

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ESTATE OF JESUS S. MADERA, MARIA IBARRA,
YESSENIA MADERA, KARINE MADERA,
BRIANNA MADERA, AND AZUSENA MADERA,

Claimants,

v.

GRANT 4-D FARMS,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,
Defendants.

IC 2013-017843

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

Filed April 4, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Twin Falls, Idaho, on August 24, 2015. Claimants were represented by Reed Larsen, of Pocatello. Paul Augustine, of Boise, represented Grant 4-D Farms (“Employer”), and State Insurance Fund (“Surety”), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on February 29, 2016.

ISSUES

The issues to be decided are:

1. Whether the notice limitations set forth in Idaho Code §§ 72-701 to 706 bar recovery for any benefits sought;

2. Whether Jesus Madera sustained an injury from an accident arising out of and in the course of employment;
3. Whether Jesus Madera incurred a compensable occupational disease;
4. Whether the condition for which Claimants seek benefits was caused by the industrial accident or occupational disease;
5. Whether and to what extent Claimants are entitled to the following benefits:
 - a. Past medical care;
 - b. Temporary disability benefits, (TPD, TTD); and
 - c. Death benefits;
6. Whether and to what extent Defendants are entitled to an offset for TTD benefits paid;
7. Whether there exists any qualified dependents of Jesus Madera, and if so, the extent to which they are entitled to death income or other benefits;
8. Whether any of dependents' claims are barred by Idaho Code § 72-440; and
9. Whether the death benefits claim related to an occupational disease is barred by Idaho Code § 72-448(2).

CONTENTIONS OF THE PARTIES

Claimants argue that Jesus Madera contracted and died of lung cancer from repeated exposure to the pesticide Temik while working for Employer. His dependents are entitled to appropriate benefits for this occupational disease. Additionally, on June 4, 2013, Mr. Madera breathed in a large amount of Temik while crushing boxes which had held the chemical. As a result of this accident, Mr. Madera suffered pulmonary irritation for which he sought medical treatment. Claimants are due appropriate benefits related to this accident.

Defendants argue Mr. Madera's cancer was not related to his employment. Claimants are entitled to no death benefits. Mr. Madera was paid his full salary from

the date he was no longer able to work until the time of his death. His medical treatment after June 4, 2013 was due solely to his cancer. No medical and/or temporary disability benefits are due.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Maria Avila (Jesus Madera's widow), Jose Madera (Jesus Madera's brother), and Duane Grant (Employer's representative), taken at hearing;
2. Claimants' Exhibits (CE) A through R, (which include the pre-hearing deposition transcripts of witnesses Alan Mohlman and Ignacio Cruze – CE L & M respectively – and a sample particulate respirator as part of CE O), admitted at hearing;
3. Defendants' Exhibits (DE) 2, 3, 5, 6, 8, 9, 10, 11 & 16, (which includes the deposition of Jesus Madera – DE 16), admitted at hearing¹;
4. The post-hearing deposition transcript of Richard Kanner, M.D., taken on October 20, 2015;
5. The post-hearing deposition transcript of Michael Freeman, M.D., PhD, taken on November 23, 2015;
6. The post-hearing deposition transcript of Bart Moulton, M.D., taken on November 23, 2015; and
7. The post-hearing deposition transcript of Donald Workman, M.D., taken on December 1, 2015.

¹ In a much-appreciated move, Defendants "conditionally withdrew" DE 1 on the ground it was over 850 pages of mostly duplicate medical records. The parties agreed that if any of the non-duplicate "conditionally withdrawn" records were discussed by any witness, or in some other manner became material to the decision, those particular pages would be supplied to the Commission. Accordingly, DE 1 was not admitted. It does not appear any pages of DE 1 were needed and none were supplied with the parties' briefing. Defendants also withdrew several other proposed exhibits which were duplicates of Claimants' exhibits.

All objections preserved during the depositions are overruled.

Having considered the evidence and briefing of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. On June 4, 2013, the deceased, Jesus Madera (Mr. Madera), a supervisor for Employer's farming operations in Minidoka County, inadvertently inhaled dust residue of a granular commercial pesticide, Temik, while in the course and scope of his employment. Both Mr. Madera and his wife, Maria Ibarra, informed Employer of the event the next day.

2. Subsequent to this exposure, Mr. Madera developed headache, abdominal discomfort, and nausea. He sought care with Brian Muir, D.O., at the Minidoka Medical Center on June 5, 2013. After examination, Dr. Muir suggested increasing fluid intake and released Mr. Madera.

3. Thereafter, Mr. Madera developed additional symptoms. About a week after his initial medical visit, Mr. Madera was hospitalized with recurring pneumonia and bilateral pulmonary emboli. He subsequently developed deep vein thrombosis in his left leg.

4. During the course of his treatment, it was discovered Mr. Madera had lung cancer. He was under medical care with several treaters for a number of serious complaints and complications from his cancer until the date of his death on November 20, 2013. He was 39 years old. He left behind a wife and four children – Claimants in this matter.

DISCUSSION AND FURTHER FINDINGS

5. The parties agree the main issue for resolution is whether Claimants have proven a causal link between Mr. Madera's exposure to Temik and his lung cancer. Without this threshold link, many of Claimants' other claims need not be considered.

6. Claimants have the burden of proving, by a preponderance of the evidence, all facts essential to recovery on their claims. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). Claimants must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). To prove that a causal relationship is medically probable requires Claimants to demonstrate that there is more medical evidence for the proposition than against it. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). In determining causation, it is the role of the Commission to determine the weight and credibility of testimony.

7. Claimant was afflicted with the rare EML4-ALK mutation cancer. It forms from a different biological gene mutation mechanism than the much-more common K-RAS single amino acid mutation cancer most often seen in smokers. Mr. Madera was not, and had never been, a smoker.

8. Claimants argue Mr. Madera's repeated exposures to Temik² over his long career with Employer caused the EML4-ALK genetic mutation to occur, which in turn led to his lung cancer. His accident of June 4, 2013 aggravated his condition.

9. The parties spend considerable time sparring over a number of details and propositions, such as the years when Temik was used on the Minidoka farm ground and in what amounts, the nature and number of times when Mr. Madera was exposed to the chemical, and the nature and sufficiency of protective garments/apparatuses he used when working with or around the chemical. None of these contested claims are pivotal to the decision and therefore they will not be addressed further, other than to note that, based upon the totality of the evidence, it is more likely that Mr. Madera's exposure over his years of employment was quite limited, notwithstanding the event of June 4, 2013. Be that as it may, the causation issue in this matter rests upon expert testimony and the state of science on this issue, not on Mr. Madera's level of exposure.

Occupational Disease

State of the Science

10. The following facts are instrumental when evaluating the claim that Temik was responsible for or caused Mr. Madera's lung cancer;

- Mr. Madera's lung cancer was caused by the EML4-ALK gene mutation;
- This particular mutation is a translocation and inversion mutation;

² In briefing, Claimants argue Mr. Madera's exposure was to "toxic chemicals", but since Temik was the only allegedly toxic chemical on which there is any expert medical testimony, it is assumed Claimants argue Temik was the "toxic chemical" to which Mr. Madera was exposed. Any expansion of the claim to other unnamed chemicals would fail, in part due to the absence of any medical testimony on the issue of causation as to those chemicals.

- There are no scientific studies showing a correlation between any toxin exposure and any of the translocation or inversion genetic mutation cancers, including the EML4-ALK mutation;
- No one knows what causes this particular genetic mutation to occur.

11. None of Claimants' witnesses were able to produce any scientific evidence that Temik was, on a more-likely-than-not basis, the cause (or even a cause) of Mr. Madera's cancer; nevertheless Claimants' expert witnesses went on record testifying that Temik caused Mr. Madera's cancer. The fact that such opinions are not supported by any scientific study, report, or findings is sufficient to discount such testimony under the facts of this case. However, the expert testimony will be presented and analyzed to give such opinions a hearing.

Expert Witness Testimony

12. Claimants primarily utilize the reports and opinions of two medical doctors, Dr. Kanner and Dr. Freeman, in support of their proposition. They also rely to a lesser degree on a treating surgeon, Dr. Workman. The opinions of all three are explored below.

Dr. Workman

13. As noted above, Donald Workman, M.D., a Twin Falls general surgeon, treated Mr. Madera during his cancer battle. Dr. Workman correctly noted that Mr. Madera was not a typical cancer patient; he was young, a non-smoker, no family history of cancer, and no exposure to asbestos. Dr. Workman felt Mr. Madera had no radon exposure.³

14. Dr. Workman felt possibly a work exposure to chemicals could have been the culprit for Mr. Madera's cancer. He did internet research by posing the question

³ In reality, a radon test of his house showed some radon, but at a level less than the government believes to be harmful. One of Claimant's experts testified that any radon is unsafe. However, since exposure to radon, or in what amounts, is not critical to the outcome of this decision, that information is noted, but not relied on in this analysis.

“can farm chemicals cause cancer?” and found the answer was “yes.” In particular, Dr. Workman found an article entitled *Pesticides and Lung Cancer Risk in the Agricultural Health Study Cohort*, an epidemiologic study of thousands of applicators and agricultural workers. An increased risk from four named chemicals, (two herbicides and two pesticides), not including Temik, appeared to exist from the study. (Of note in the study was the finding that “[a]lmost all the lung cancer cases that occurred in the Agricultural Health Study cohort were observed in current or former smokers.” CE H7.)

15. Dr. Workman informed Mr. Madera that chemicals probably caused his cancer, but it would be difficult to prove it. He also authored a “to-whom-it-may-concern” letter wherein he expressed his opinion that pesticides caused Mr. Madera’s cancer. He based his opinion on the fact that Mr. Madera was young, and the only risk factor the doctor was aware of was pesticide exposure. At deposition he modified his opinion to state that “there could very well be a causal” relationship between the cancer and chemical exposure, but he acknowledged he was not an epidemiologist and could not say if the relationship existed. He testified he simply wanted to give Mr. Madera the information “just to get things started.” Workman depo. p. 13.

16. Dr. Workman acknowledged he was not an oncologist. He did not know Mr. Madera had EML4-ALK cancer, nor did he know much about that cancer.

Dr. Kanner

17. Claimants hired Richard Kanner, M.D., a professor of medicine at the University of Utah for forty-five (45) years, and board-certified in pulmonary diseases. He was asked to review Mr. Madera’s case and opine on whether Mr. Madera’s purported “long term exposure” to Temik was responsible for his cancer.

18. Dr. Kanner noted the Material Safety Data Sheet put out by Temik's manufacturer warned that Temik could cause chronic health effects, and further that it contained ingredients which were considered to be probable or suspected human carcinogens. Using this information, coupled with the facts that Mr. Madera was not a smoker and was a young man, Dr. Kanner felt it was at least 51% probable that Temik was responsible for Mr. Madera's lung cancer.

19. Dr. Kanner was deposed post-hearing. By then he had the opportunity to review Defendants' expert's opinions. Defense counsel objected to any testimony responding to other physician testimony, as it was developed in violation of J.R.P. Rule 10. The objection is well taken. However, such testimony does not alter the outcome of this case. The Referee will consider Dr. Kanner's deposition in its entirety.

20. Dr. Kanner admitted his opinion was based on assumptions which may or may not be accurate. He assumed Mr. Madera was exposed to Temik for approximately twenty (20) years. He acknowledged he had no idea how much exposure Mr. Madera actually had, what protection he took around Temik, or how often Employer used the chemical. He admitted he had no evidence that Mr. Madera was ever exposed to Temik other than on one occasion in June 2013. He had no idea what Mr. Madera's work responsibilities were. He had no idea if the protective equipment recommended by Temik's manufacturer was utilized by Mr. Madera, or if such equipment was adequate protection from the chemical.

21. Dr. Kanner's original opinion did not consider the type of cancer which afflicted Mr. Madera. Once alerted to the fact Mr. Madera suffered from EML4-ALK mutation cancer, Dr. Kanner researched the issue. He learned that no one knows

what causes the mutation to occur. He reiterated that point several times in his deposition. In spite of this acknowledgement, Dr. Kanner still opined that Temik caused the mutation which led to Mr. Madera's cancer. Dr. Kanner could think of no other cause for the cancer.

Dr. Freeman

22. Claimants also hired Michael Freeman, D.C., M.D., Ph.D, a chiropractor and doctor of medicine graduate from Umea University in Sweden. Dr. Freeman also has a public health Ph.D with a focus on epidemiology from Oregon State University.

23. Dr. Freeman explained that epidemiology is the study of populations or groups of people who are exposed to things, or groups who are sick, and then trying to figure out correlations between the condition and various exposures. Dr. Freeman works in the field of forensic epidemiology, often for civil and criminal litigants. He was asked by Claimants to do an epidemiological evaluation. He was given certain assumptions, notably that Mr. Madera was a nonsmoker in his late thirty's, who was exposed to Temik from the age of twenty (20) onward on an annual basis, and that Mr. Madera was not exposed to any other harmful substances.

24. Dr. Freeman prepared an elaborate seventeen (17) page report. While much of it appears to be "cut-and-paste," (at one point it references the "two plaintiffs" that are the subject of the report, and notes they are smokers), it is full of scientific-looking, copiously-footnoted statistics. Dr. Freeman concluded his analysis by stating that since Mr. Madera had no other known risk factors outside of exposure to Temik, and Temik has "the capacity to cause lung cancer⁴," it followed that Mr. Madera's

⁴ The study Dr. Freeman relied on in part for the proposition that Temik had the capacity to cause lung cancer- the Alavanja report - actually showed an association between the chemical Aldicarb, found in Temik, and increased incidence of *colon* cancer. Individuals with increased lung cancer were exposed to other chemicals, not found in Temik. See, Freeman depo. pp. 47, 48.

“prolonged exposure” to inhaled Temik was a substantial factor in causing his lung cancer.
CE I 17.

25. Dr. Freeman was also deposed. He explained his methodology for reaching his conclusions. He noted that it is rare for an individual in Mr. Madera’s age group (thirty to thirty-nine (30-39)) to get lung cancer – one per one hundred thousand (1/100,000) per year, or one in ten thousand (1/10,000) over that ten (10) year period. He testified that cancer is typically triggered by an environmental agent. Cigarette smoke is the most common, but would not apply in this case. Dr. Freeman stated that the ingredients in Temik cause inflammation and reduce lung function if inhaled. Chronic inflammation leads to an environment in the lungs which Dr. Freeman calls “pro-cancerous,” or more susceptible to cancer formation. He acknowledged Mr. Madera may well have had a genetic predisposition to getting cancer, since not everyone who is exposed to Temik gets cancer. Combining Mr. Madera’s genetic predisposition with the assumed “pro-cancerous” environment created by long-term non-trivial exposure to Temik, and the further assumed lack of exposure to other “pro-carcinogenic substances,” and the fact that most men in Mr. Madera’s age group do not get lung cancer, Dr. Freeman felt there was almost no competing risk of Mr. Madera getting lung cancer absent his exposure to Temik.

26. On cross examination, Dr. Freeman admitted he had no information on the level of exposure a person would require to get lung cancer from Temik. (Dr. Freeman defined “exposure” as being in proximity to a noxious element with the capacity to cause disease or injury such that the potential for the element to influence the disease or injury outcome is present.) Dr. Freeman had no idea how many times Mr. Madera would have been exposed

to Temik, but assumed it was repetitively. Dr. Freeman further assumed if Mr. Madera properly used the protective equipment recommended by Temik's manufacturer, he would not have been exposed to Temik. Dr. Freeman had no idea if Mr. Madera used such equipment.

27. Dr. Freeman could not testify as to the differences between a K-RAS mutation and an ALK mutation. He admitted no research exists which would tie the chemicals in Temik to the specific type of lung cancer which afflicted Mr. Madera. He did point out there was no research which established that Temik could not cause such a cancer.

Dr. Moulton

28. Defendants hired Bart Moulton, M.D., a pulmonologist specializing in lung cancer diagnosis at Oregon Health & Science University in Portland. He was asked to review Mr. Madera's medical chart and opine on whether exposure to Temik could be causally related to his lung cancer. Dr. Moulton authored a report dated February 12, 2014, and was subsequently deposed.

29. Dr. Moulton opined that Mr. Madera's cancer was more probably not related to Temik exposure, although his exposure on June 4, 2013 could have caused pulmonary irritation for which he sought medical care the next day. However, by the time of his June 2013 exposure, Mr. Madera already had widespread metastatic cancer. Dr. Moulton testified Mr. Madera's pneumonia was due to his cancer.

30. Dr. Moulton indicated that Mr. Madera's lung cancer was due to a gene fusion translocation mutation (EML4-ALK), for which he tested positive in August 2013. This mutation was first discovered in 2007. Approximately 7% of all non-small cell lung cancer is due to this mutation, and in non-smokers under age forty (40), the mutation accounts for about 50% of all lung cancer. Young, healthy, non-smokers are most likely

to get this cancer. Dr. Moulton diagnoses one or two such patients each year. Dr. Moulton also noted that to date no studies have shown a connection between chemical exposure of any kind and the EML4-ALK mutation.

31. At his deposition, Dr. Moulton reiterated that there had been no showing to date that the EML4-ALK mutation is toxin induced. He testified further that no translocation mutation cancers, including the very common CML leukemia, have been shown to be caused by toxin exposure. Instead, these types of mutations occur during cell division for reasons yet unknown.

Analysis of Claimants' Position

32. Claimants raise a number of arguments in favor of finding a causative connection between Mr. Madera's exposure to Temik and his subsequent lung cancer diagnosis. They will be addressed in turn, with the exception of arguments debating the times/levels of exposure to Temik over Mr. Madera's employment tenure. This decision does not rely on the nature of Mr. Madera's exposures, but rather the state of science on the matter. However, it should be noted the totality of the evidence established that Mr. Madera was not exposed to Temik significantly more than other agricultural workers who apply the chemical on a regular basis. He had no extraordinary levels of exposure beyond that of any and all other such workers.

33. Claimants point out that Dr. Moulton produced no medical literature proving chemical exposure can not cause the EML4-ALK gene mutation. They note that Dr. Freeman stated that absence of evidence of a relationship is not equivalent to evidence that is there is no relationship. Dr. Freeman's statement is correct. However, the Defendants do not bear the burden of proof on this issue. Because the mutation

was just recently discovered, and because the cancer is relatively rare, the state of the science has not shown the mutation to be toxin induced. Perhaps with time this question will be definitively answered, but at the present, no one knows why the mutation occurs. Claimants bear the burden of proving the connection between Temik and EML4-ALK mutation lung cancer at a time when science can not answer, or even shed light on, this question.

34. Claimants' experts opine without evidence that such a connection is more probable than not. As discussed below, their opinions are nothing more than pure speculation, founded upon faulty reasoning and incomplete information.

35. Claimants' road to blaming Temik for Mr. Madera's cancer began early on, when Dr. Workman informed them that agricultural chemicals might have caused the cancer. As Dr. Workman testified, he was simply giving these bewildered and distressed people something tangible to "get things started." Workman depo. p. 13. Dr. Workman had no answers for why such a healthy young man would have this devastating disease, so he threw out an idea. Coincidentally, Mr. Madera had most recently been exposed to Temik, so it is not difficult to understand how the Claimants, when told a chemical might be responsible for the cancer, could latch on to the notion that Temik was the culprit. From that point on, Temik became the focus of investigation. This is true even though the June 2013 exposure could not have contributed to Mr. Madera's cancer. So, after learning that the June 2013 exposure could not have caused the cancer, the Claimants modified their claim to include multiple, non-specific instances of exposure over a period of years, in spite of no direct evidence to support that claim.

36. Both Drs. Kanner and Freeman were told Mr. Madera had been exposed to Temik over a period of years, *and had no other significant exposures*. As such, the doctors were asked

to focus only on Temik, and to ignore all else. Radon levels in Mr. Madera's home were not included in the information provided. A list of other chemicals used at Employer's farms was not included. No history into Mr. Madera's background and living conditions in Mexico or the United States was fleshed out. Temik was placed center stage and all other considerations were shoved into the background. The experts did not even know the type of lung cancer afflicting Mr. Madera until after they prepared their reports.

37. Dr Kanner's opinion is simply speculation based on the faulty logic of confusing association with causation. As he argued, Mr. Madera was exposed to Temik and thereafter got cancer at an age not often associated with the disease, and without the major influence of cigarette smoking – therefore Temik caused his cancer. Claimants urge the argument that because Dr. Kanner is a well-qualified expert, his speculation should be given weight. Letters behind a name, or accomplishments in the field, do not morph speculation into legitimate opinion. That false argument is known as “argument from authority” and is not a legitimate reason to overlook the glaring defects in Dr. Kanner's testimony. He acknowledged at deposition no one knows why the EML4-ALK mutation occurs, and then in his next breath stated it was more likely Temik caused the mutation than any other cause relevant to Mr. Madera. In reality, Dr. Kanner was correct the first time; no one knows why the mutation occurs. Since no one knows, the doctor's unsupported testimony that Temik caused the mutation is speculation. It is afforded no weight.

38. Upon a casual reading, Dr. Freeman's report certainly has the veneer of plausibility. It is long, abundantly footnoted, and full of discussion of various studies – seventy (70) to be exact. Upon further scrutiny, it too falls apart. Aside from the obvious flaw that Dr. Freeman failed to distinguish between the various forms of lung cancer and simply

focused on whether Temik can cause (generic) “lung cancer”, he also provided no evidence that in this case Temik more-likely-than-not did cause Mr. Madera’s specific cancer. Dr. Freeman’s basic conclusion, that Temik was a substantial factor in causing Mr. Madera’s lung cancer, was not reached on any direct evidence, but rather a series of unconnected statements which Dr. Freeman then attempted to weave together without any basis in science.

39. Dr. Freeman acknowledged that the criteria for determining cause and effect encompasses nine factors, or viewpoints, known as the Hill Criteria. The first and most important viewpoint is strength of association, that is the higher the frequency of harm from an exposure among the group exposed, compared to the population as a whole, the greater the strength of association. Under this viewpoint, one would expect to see a greater number of agricultural workers exposed to Temik contracting EML4-ALK mutation cancer than the general population. Dr. Freeman did not show any such relationship. He simply ignored this most useful analysis. Instead, he supplied all kinds of interesting but immaterial statistics on lung cancer, its prevalence, and risk factors. He then discussed how the ingredients in Temik can reduce lung function, which, with sufficient prolonged exposure, can lead to chronic bronchitis or COPD. He then noted chronic inflammation of the lungs can increase risk of DNA damage and lung cancer. Stacking this information, Dr. Freeman concluded Temik was a substantial factor in Mr. Madera’s cancer formation.

40. Dr. Freeman could not show how any ingredient in Temik could cause the ML4-ALK gene mutation, because no such study exists. He therefore had to deduce from general statements concerning broad risks in Temik a very specific opinion about the specific harm occasioned by Mr. Madera. This leap of logic was completely unsupported.

To begin with, assuming Temik can cause chronic bronchitis or COPD, which in turn can cause chronic lung irritation, which in turn might increase risk of lung cancer, the fact remains Mr. Madera did not have chronic bronchitis or COPD. Furthermore, Dr. Moulton testified Temik does not lead to chronic lung irritation, but irritation which is typically resolved within few days. Also, Dr. Moulton argued it was a stretch to assume chronic lung irritation causes an increased risk of lung cancer in all circumstances. As the doctor pointed out, asthma is a form of chronic lung irritation which does not lead to increased risk of lung cancer. Assuming bronchitis and COPD are risk factors, such information is not relevant to the discussion, since Mr. Madera had neither.

41. Some of Dr. Freeman's supporting "facts" were shown during deposition to be misplaced. For example, as noted previously, his study showing Aldicarb-exposed workers had an increased risk of lung cancer said no such thing. His statement that half of non-smokers who contract lung cancer did so due to occupational exposure was also not supported by his reference materials.

42. In short, Dr. Freeman failed to show the one thing which would have borne weight – a strong association between agricultural workers exposed to Temik and EML4-ALK or any other translocation mutation cancer. Since epidemiology is the study of cause-and-effect, this omission is glaring.

43. Claimants argue that they need not make a scientific breakthrough in order to prevail. They do not need to scientifically prove (with a confidence level in excess of 90%) the connection between Temik and Mr. Madera's lung cancer. They simply need to prove the connection is more probable than not. That argument is accurate.

44. Claimants cite to *Longmore v. Merrell Dow Pharmaceuticals Inc.*, 737 F.Supp. 1117 (D. Idaho 1990), wherein the court noted that legal proof is not as stringent as scientific proof. They point out the *Longmore* Court found that under the Idaho case of *Earl v. Cryovac*, 772 P.2d 725, 727-728 (1989), courts cannot find a causal connection is improbable merely because it has not been documented in a body of research literature where a high degree of certainty is demanded. However, that same opinion made it clear that one cannot assume a causal relationship is probable merely because a physician [no matter how impressive his or her resume may be] deems it so.

45. Claimants also cite to *Wilson v. Preco, Inc. et al*, IC 03-009D276 (April 22, 2005), as support for their position. Therein the Referee found a causal connection between Claimant's cancer and his work exposure to sulfuric acid mists, even though there were no studies demonstrating an increased risk of cancer from such exposure. The facts of *Wilson* are unique to that case, and present a different situation than the one presented herein. In *Wilson*, the Claimant's job required him to breathe in sulfuric acid mist on a regular, nearly daily basis for extended time periods. He was basically immersed in the mist. He was given no protective equipment. Sulfuric acid mist was a known carcinogen. Claimant's cancer was so rare that at least one testifying physician had never seen or even heard of such a thing. Claimant's cancer was in his respiratory system (nasal cavity). Sulfuric acid mist was known to cause lung cancer. Since Claimant's cancer was unique, no study could be made to correlate it to any environmental factor. The Referee specifically noted that his finding applied only to this particular Claimant under the unique and specific circumstances of his case.

46. In the present case, Mr. Madera, even under Claimants' best argument, was not immersed without protective gear in breathing Temik on a daily basis. Mr. Madera's

work environment was not unique among agricultural workers. His cancer was not so rare as to be unprecedented. Dr. Moulton sees patients every year with the same cancer as afflicted Mr. Madera. Studies have been done, but to date no one has linked chemical exposure to the translocation mutation cancers. The evidence in *Wilson* was much more compelling than in the present case, and the decision based on far greater evidence than presented herein. *Wilson* is distinguishable, and by the author's own thinking, its holding was limited to the unique situation presented therein.

47. Claimants next argue they met the six (6) criteria for proving an occupational disease under *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). The first requirement, that Mr. Madera was afflicted by a disease, is beyond debate. However, the second criterion, that the hazard of contracting EML4-ALK gene mutation cancer actually existed at Employer's farms, has not been proven. Furthermore, Claimants did not establish that Mr. Madera's cancer arose out of and in the course of his employment with Employer. There was not more evidence for that proposition than against it. In reality, there was no true evidence in favor of the proposition, only speculation and invalid assumptions.

48. The evidence, testimony, and opinions of Dr. Moulton are given more weight than those of Dr. Workman, Dr. Kanner, and Dr. Freeman, for reasons explained above.

49. All evidence and testimony presented herein clearly establishes that Mr. Madera was an outstanding worker, husband, and father. If there was an exception to the burden of proof rule for exemplary individuals, he would certainly qualify. Unfortunately, the sterling character of the deceased cannot be weighed against the lack of proof on causation.

50. When considering the record as a whole, Claimants have failed to prove their claim that Mr. Madera incurred a compensable occupational disease.

51. The following noticed issues are rendered moot by the finding that Claimants failed to prove a compensable occupational disease resulting in Mr. Madera's death;

- Claimants' right to death benefits;
- Who qualifies as a dependent of Mr. Madera for death benefits, including the application of Idaho Code § 72-440; and
- The application of Idaho Code § 72-448(2).

Remaining Issues

52. Issues of notice, whether a compensable accident occurred, past medical care, temporary disability benefits, and Defendants' right to an offset for total temporary disability payments paid, are not extinguished by the finding on Mr. Madera's occupational disease and corresponding death benefits claims. These remaining issues are discussed in turn.

Notice

53. Defendants did not argue against Claimants on a notice issue, and the evidence established that proper notice of a work-related accident for Mr. Madera's chemical exposure on June 4, 2013 was provided to Employer. Claimants have established that proper notice of such accident was given.

Accident

54. There was no debate that on June 4, 2013, Mr. Madera inhaled Temik fumes and/or dust which caused him a headache and nausea for which he sought medical treatment.

55. Claimants have proven that Mr. Madera suffered a compensable industrial accident on June 4, 2013.

Medical Care

56. Mr. Madera sought medical care the day after his industrial accident. He complained of symptoms compatible with Temik inhalation, namely a headache and nausea. He was seen by Dr. Muir and sent home with instructions to drink lots of liquids.

57. Defendants claim all of Mr. Madera's medical treatment was related to his non-industrial cancer and therefore not compensable. However, the above-referenced trip to Dr. Muir was clearly due to the effects of Temik inhalation, and was different than Mr. Madera's subsequent treatment for pneumonia, DVT, and ultimately his cancer.

58. Claimant Estate of Jesus Madera has proven the right to past medical care benefits in the amount of Dr. Muir's treatment on June 5, 2013. All subsequent treatment was related to Mr. Madera's cancer, and not compensable.

TPD Payments and Credits

59. Claimant Estate of Jesus Madera argues that from the date of his industrial accident until his death, Mr. Madera did not work, and therefore was entitled to total temporary disability benefits. Given the rulings herein, the Estate would be entitled to time missed from work due to Mr. Madera's headache and nausea symptoms and time to visit with Dr. Muir regarding the same. However, Employer testified that Mr. Madera was paid at his regular wage rate from the date he stopped working until the date of his death. As such, the Estate of Jesus Madera is not entitled to further payment for temporary disability benefits, which are provided to offset the reduction or elimination of a worker's wages during a period of recovery. Without such reduction or elimination of wages, temporary disability payments are not mandated.

60. Defendants claim, but did not argue for, a credit for temporary disability payments paid, or to be paid. Since no such benefits were paid, and none are ordered herein, Defendants are not entitled to such credit.

CONCLUSIONS OF LAW

1. Claimants have failed to prove their claim that Jesus Madera incurred a compensable occupational disease while working for Employer.

2. The following noticed issues are rendered moot by the finding that Claimants failed to prove a compensable occupational disease resulting in Jesus Madera's death;

- Claimants' right to death benefits;
- Which listed claimants qualify as dependents of Jesus Madera for death benefits;
- Whether the application of Idaho Code § 72-440 bars any listed claimants' right to death benefits; and
- Whether the provisions of Idaho Code § 72-448(2) bar Claimants' death benefits claims.

3. Claimants have proven that Jesus Madera suffered a compensable industrial accident on June 4, 2013.

4. Claimant Estate of Jesus Madera has proven the right to past medical care benefits for medical treatment with Dr. Muir on June 5, 2013.

5. Claimant Estate of Jesus Madera has failed to prove the right to past medical care benefits beyond his treatment on June 5, 2013.

6. Claimant Estate of Jesus Madera has failed to prove it is entitled to temporary disability benefits beyond the wages paid to Mr. Madera by Employer from the date of his accident until the time of his death.

7. Defendants are not entitled to a credit for temporary disability payments since they paid no such benefits.

RECOMMENDATION

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

DATED this 8th day of March, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2016, 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:

REED LARSEN
PO BOX 4229
POCATELLO ID 83205

PAUL AUGUSTINE
PO BOX 1521
BOISE ID 83701

jsk

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ESTATE OF JESUS S. MADERA, MARIA IBARRA,
YESSSENIA MADERA, KARINE MADERA,
BRIANNA MADERA, AND AZUSENA MADERA,

Claimants,

v.

GRANT 4-D FARMS,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2013-017843

ORDER

Filed April 4, 2016

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. 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. Claimants have failed to prove their claim that Jesus Madera incurred a compensable occupational disease while working for Employer.
2. The following noticed issues are rendered moot by the finding that Claimants failed to prove a compensable occupational disease resulting in Jesus Madera's death;

ORDER - 1

- Claimants' right to death benefits;
- Which listed claimants qualify as dependents of Jesus Madera for death benefits;
- Whether the application of Idaho Code § 72-440 bars any listed claimants' right to death benefits; and
- Whether the provisions of Idaho Code § 72-448(2) bar Claimants' death benefits claims.

3. Claimants have proven that Jesus Madera suffered a compensable industrial accident on June 4, 2013.

4. Claimant Estate of Jesus Madera has proven the right to past medical care benefits for medical treatment with Dr. Muir on June 5, 2013.

5. Claimant Estate of Jesus Madera has failed to prove the right to past medical care benefits beyond his treatment on June 5, 2013.

6. Claimant Estate of Jesus Madera has failed to prove it is entitled to temporary disability benefits beyond the wages paid to Mr. Madera by Employer from the date of his accident until the time of his death.

7. Defendants are not entitled to a credit for temporary disability payments since they paid no such benefits.

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

DATED this 4th day of April, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
R.D. Maynard, Chairman

_____/s/_____
Thomas E. Limbaugh, Commissioner

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

REED LARSEN
PO BOX 4229
POCATELLO ID 83205

PAUL AUGUSTINE
PO BOX 1521
BOISE ID 83701

jsk

_____/s/_____
