BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN DAHLKE, Claimant, v. ASH GROVE CEMENT CO., Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2012-016998** **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** **Filed April 25, 2014**

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 Pocatello, Idaho, on October 29, 2013. James D. Ruchti, of Pocatello, represented Claimant. David P. Gardner, of Pocatello, represented Defendants. Oral and documentary evidence was admitted. The parties filed post-hearing briefs. The matter came under advisement on January 30, 2014. It is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

By agreement of the parties at hearing, the issues to be decided, listed in the order of discussion herein, are:

1. Whether Claimant suffers from a compensable occupational disease;

2. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury or condition;[1]

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

4. Whether and to what extent Claimant is entitled to the following benefits:

   a. Medical care;
   b. Permanent partial impairment (PPI);
   c. Permanent partial disability (PPD);
   d. Attorney fees; and

5. Whether the *Nelson* rule applies to bar Claimant's claim.[2]

CONTENTIONS OF THE PARTIES

While all parties recognize Claimant suffers from a partial hearing loss, they disagree on its source. Claimant argues he has diminished hearing due to working in an extremely loud work environment for the past thirty-three years while employed by Ash Grove Cement Company (Employer). Claimant seeks medical benefits for past-incurred charges, as well as future treatment and medical devices, mainly hearing aids and related upkeep expenses. Claimant also raises a claim for PPI and PPD benefits, while simultaneously acknowledging the state of the law does not support such a claim, because Claimant is not disabled from working. He included the issue for the stated purpose of pursuing it on appeal.

Defendants argue Claimant failed to prove to a reasonable degree of medical probability that his loss of hearing was caused by his employment. Instead, he merely has middle age

[1] This issue, as briefed by Defendants, is incorporated into the issue of whether Claimant suffered a compensable occupational disease. Defendants' argument is not that Claimant suffered from some other distinct event or medical condition, but that his hearing loss is simply age related, and not the result of his employment.

[2] This issue was not argued or briefed by either party, nor does it have application to the facts. It is deemed waived and will not be addressed further.

hearing loss, unassociated with his employment. Since Claimant did not suffer an occupational disease as defined by Idaho statute, he cannot claim any compensation, including medical benefits. Next, they deny Claimant timely supplied Employer with notice of his alleged occupational disease. For these reasons, Defendants properly denied Claimant's claim in its entirety. In the event these defenses are rejected, Defendants argue against the imposition of attorney fees, and claim the right to direct Claimant's future medical care.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant John Dahlke, taken at hearing;
2. Claimant's Exhibits 1-16,[3] admitted at hearing;
3. Defendants' Exhibits 1 through 6, admitted at hearing.

All objections made during Claimant's deposition are overruled, except for the objection at page 30, l. 1, which is sustained.

At hearing, Defendants objected to Claimant's Exhibit 16. Preliminarily, the Exhibit was admitted for illustrative purposes. Claimant's counsel agreed to submit those pages of the Exhibit which were offered for their substantive value post-hearing and subject to Defendants' objections to specific pages of the amended Exhibit. This procedure was acceptable to all parties. Claimant's counsel then submitted a revised Exhibit 16, with only those pages he felt were substantively relevant. Defendants did not object to this revision. Defendants then cited to pages of the original Exhibit 16, which were not included in the revised Exhibit 16. Claimant objects to Defendants' use of these pages, based on the fact the pages cited to by Defendants are

[3] Claimant's Exhibit 11 had certain language redacted as part of Defendants' objection to the Exhibit. The Exhibit was admitted with the redactions. Exhibit 16 is addressed separately.

"inadmissible hearsay" and "unauthenticated expert testimony." Claimant's objection on this point is overruled, and the pages cited by Defendants are admitted for illustrative purposes.

After having considered the evidence and briefs of the parties, the undersigned Commissioners issue the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

BACKGROUND AND CLAIMANT'S WORK HISTORY

1. Claimant was, at the time of hearing, a fifty-five-year-old married man living in Inkom, Idaho. He has a high school education with post-secondary Vo-Tech welding training.

2. Since 1979, Claimant has worked for Employer. Until 2012, Claimant worked at Employer's Inkom, Idaho cement plant. In 2012, when the Inkom plant ceased production operations, he transferred to Employer's Leamington, Utah plant, where he is still employed.

3. The Inkom plant produced cement from locally mined rock. The rock was run through a tandem of mills – one "wet" and one "dry." A mill is a large hollow metal cylinder into which rock is deposited. The mill rotates, much like a huge clothes dryer. As it turns, metal rods or steel grinding balls, free falling inside the mill as it rotates, pulverize the rock into cement product. This process is extremely noisy, and the wet mill is noisier than the dry mill.

4. At the Inkom plant, three dry mills and one wet mill, as well as a kiln which dried the slurry of crushed rock, were located in a building called the mill room. Not surprisingly, noise levels in this room were exceedingly loud. Claimant testified it was not possible to carry on a conversation in the mill room. Decibel meters inside this room often

registered in excess of 95db and Claimant recalls seeing readings as high as 105db on occasion. Signs were posted at various places around the mill room warning that hearing protection was required.

5. During Claimant's first six years working as a laborer for Employer, he was often stationed in the mill room for his entire eight hour shift.[4] His duties routinely included taking slurry samples from the sump located adjacent to the wet mill. Claimant testified that when he was taking samples, the noise from the wet mill was so intense it made his body hurt. Claimant did not work inside the mill room or draw samples every day. However, during these years, his duties required him to work inside the mill room, on average, about three days per week.

6. Eventually, Claimant moved up from laborer to a position as a fill-in worker for the laboratory. In this capacity he often took slurry samples, but by then a new wet mill had been installed, and he did not have to get as close to it as previously in order to collect the sample. It was still noisy work, but he no longer spent entire eight hour shifts in the mill room. Claimant did this work assignment for approximately three years.

7. Claimant next obtained a job in the maintenance shop, where he worked for over twenty-five years, until transferring to the Utah plant. His duties took him all over the plant, from the rock quarry to the mail room. Two or three days per week, on average, Claimant spent at least part of his shift in the mill room, often working on non-operational mills. On those occasions, the other mills in the room would typically be operating. Claimant's shift ran at least eight, but at times up to ten or even twelve, hours per day.

[4] When working in the mill, Claimant wore various levels of hearing protection, which is discussed in greater detail herein.

8. In 2009, Employer shut down the wet mill at the Inkom plant, but continued to run the three dry mills until the plant ceased milling operations in 2012. About this time, Claimant transferred to Employer's Leamington, Utah plant. There is no wet mill at the Utah plant, and Claimant testified the noise levels where he works now are significantly less than what he experienced while working in Inkom.

9. From 1979, when Claimant first began working for Employer, until 2003, workers stationed in, or entering the mill room were required to wear "single" hearing protection, typically in the form of earplugs. In 2003, Employer decided "double" hearing protection, meaning earplugs *and* noise-blocking ear muffs, had to be worn in the mill room. Finally, in 2010, Employer determined workers could not be in the mill room for more than four hours at a time, even with double hearing protection.[5] These changes were not the result of increasing noise levels, but rather increased understanding of the damage the noise levels could cause, and increasing government regulations.

10. From 1979 until 2009, the noise level in the mill room was fairly constant. When the wet mill was taken offline in 2009, the noise level decreased. In spite of this noise reduction, Employer determined in 2010 it was still unsafe for workers to be exposed to the then-current noise levels of the mill room for more than four consecutive hours.[6]

CLAIMANT'S HEARING LOSS

[5] Claimant testified he was required on occasion to work more than four hours per shift in the mill room after the 2010 regulation was implemented.

[6] In addition to limiting the time workers could be exposed to the noise levels of the mill room, Employer in or around 2010 also hung "noise absorbing" mats between the mills to try to lessen the noise levels. Apparently the mats had no beneficial effect.

11. Employer annually tested the workers' hearing levels. Claimant had normal hearing levels when he began working for Employer in 1979. Over the years, his hearing degraded. Claimant knew his hearing was worsening, both by experience and review of his annual test results. As far back as ten to fifteen years before filing his workers' compensation complaint, Claimant knew his hearing was getting worse and believed[7] it was related to work. However, he chose not to see a doctor for his hearing loss until April, 2012. He was never told by Employer or any of its agents that he had a work-related hearing loss. In fact, to this day, Employer denies Claimant's hearing loss is related to his employment.

12. Claimant testified he did not seek medical attention or file a workers' compensation claim earlier than 2012 because he did not want to jeopardize his employment. Dahlke depo. p. 29, ll. 5-23; Defendants' Exhibit 6, p. 94; *see also* Defendants' Exhibit 4, pp. 72-73. When he learned the Inkom plant was closing, he decided it was time to seek a medical opinion regarding the nature and cause of his hearing issues.

13. On April 26, 2012, Claimant saw Kraig McGee, M.D., a board-certified Otolaryngologist practicing in Pocatello, Idaho. Dr. McGee took a history from Claimant, performed a physical examination, reviewed Claimant's past hearing test records, and conducted a hearing test. Claimant testified that at the conclusion of the visit, Dr. McGee said he would evaluate the test results and send Claimant a letter containing the doctor's

[7] In a recorded statement to Surety, he claimed he "knew" his hearing loss was work related long before he saw a medical doctor and filed a claim. Defendants' Exhibit 4, p. 72.

opinions and conclusions. Dr. McGee allegedly gave Claimant no further information at the time.[8]

14. In a letter dated May 3, 2012, Dr. McGee set forth his opinions and conclusions. Therein he diagnosed Claimant with noise-induced hearing loss and opined on a more-probable-than-not basis that the cause of the loss was "attributable to noise exposure while working at the Ashgrove [sic] Cement Company Plant." He also gave Claimant a 7% whole person permanent impairment. Dr. McGee noted Claimant was a candidate for hearing aids. Claimant's Exhibit 8, p. 30.

15. Claimant testified the first time he learned definitively that his hearing loss was work-related was when he read the letter from Dr. McGee in early May, 2012. On June 26, 2012, Claimant reported his claimed occupational disease to Employer who filled out a First Report of Illness form that same day. Claimant's Exhibit 1, p. 1.

16. After the claim was filed, Surety hired Ryan Van De Graaff, M.D., presumably an Otolaryngologist[9] practicing in Nampa, Idaho, to review Claimant's past audiograms and opine on causation of his hearing loss. Dr. Van De Graaf, who did not personally examine Claimant, opined in a letter, discussed in further detail below, that Claimant's hearing loss was not caused by noise exposure due to his employment. Defendants' Exhibit 5, p. 82.

17. In his recommendation, the Referee found Claimant to be a credible witness. The undersigned Commissioners see no reason to disturb this finding.

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[8] As discussed below, Defendants contest the claim that Dr. McGee said nothing to Claimant about the causal connection between his hearing loss and his work on April 26, 2012.

[9] Dr. Van De Graaf's CV was not produced; it is presumed he is an Otolaryngologist, as he is associated with a medical group which holds itself out as "ear, nose, and throat" doctors.

DISCUSSION AND FURTHER FINDINGS

18. The provisions of the Idaho workers' compensation law are to be liberally construed in favor of the employee. *Haldiman v. American Find Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes that it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

CLAIMANT'S OCCUPATIONAL DISEASE CLAIM

19. "Occupational disease" is defined by Idaho statute as "a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process or employment…." Idaho Code § 72-102(22)(a). Under Idaho Code § 72-437, a claimant suffering from an occupational disease is entitled to "compensation" only upon becoming disabled from performing his work in the last occupation in which he was injuriously exposed. However, *Mulder v. Liberty Northwest Insurance Co.*, 135 Idaho 52, 14 P. 3d 372 (2000), makes it clear that pursuant to Idaho Code § 72-432(1), a claimant suffering from an occupational disease is entitled to related medical benefits even if not disabled. Hearing loss can be an occupational disease. *Miller v. Amalgamated Sugar Co.,* 105 Idaho 725, 672 P.2d 1055 (1983).

20. All parties agree Claimant's occupation created a very real potential for occupational hearing loss, peculiar to, and characteristic of, his employment, and that Claimant suffers from a partial loss of hearing. Of course, it is not enough for Claimant to show he worked in a trade where a peculiar, actual hazard of hearing loss existed as a characteristic of his line of work, and that he has a hearing loss. He must come forward

with medical testimony to a reasonable degree of medical probability to prove a causal connection between his hearing loss and the occupational exposure which allegedly caused it. *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as having more evidence for than against. *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974).

21. Claimant relies upon Dr. Kraig McGee's written report of May 3, 2012 to provide the causal connection between his hearing loss and his work-related noise exposure. Therein, Dr. McGee states in relevant part:

> An audiogram was obtained in my office. It reveals a bilateral, notched high frequency sensorineural hearing loss, which is a bit worse in the left ear. Word recognition is normal. The pattern is completely consistent with a noise induced hearing loss. I reviewed his audiograms over time. He had normal hearing in 1979, which has deteriorated over the years in the classic pattern for noise induced hearing loss. It appears that the thresholds have been quite reliable through the years.
>
> My diagnosis is noise induced hearing loss. According to the Guides to the Evaluation of Permanent Impairment, AMA, Fifth Edition, Mr. John Dahlke has a 19.4% binaural hearing impairment, which correlates to a 7% impairment of the whole person. In my opinion, it is more probable than not that Mr. Dahlke's current hearing loss is attributable to noise exposure while working at the Ashgrove [sic] (Ash Grove) Cement Company Plant. He is a candidate for hearing aids.

Claimant's Exhibit 8, p. 30. Dr. McGee's opinion was rendered after a physical examination and review of the history and records provided by Claimant.

22. Among their arguments, Defendants claim the opinions contained in Dr. McGee's May 3, 2012 letter are insufficient to constitute *prima facie* proof, to a reasonable degree of medical probability, of a causal connection between Claimant's hearing loss and his work environment. Defendants are critical of the fact the doctor does not explain in detail *how* he determined the loss was noise-induced, as compared to age-

related or genetic hearing loss. While Defendants recognize Dr. McGee noted the hearing loss pattern was completely consistent with noise-induced hearing loss, he did not identify the pattern and then compare Claimant's tests results to it.

23. Dr. McGee provided a copy of Claimant's hearing test graph (Claimant's Exhibit 8, p. 27) with his report. He referenced Claimant's hearing loss as "bilateral, notched high frequency sensorineural hearing loss, which is a bit worse in the left ear." He likewise observed Claimant's hearing loss pattern over the years is consistent with a noise-induced loss. He went on to point out that Claimant's word recognition was normal. In Dr. McGee's opinion, these findings constituted a pattern "completely consistent with a noise induced hearing loss." This opinion was based upon examination and diagnostic testing, and came from a qualified expert on the subject of hearing loss. Dr. McGee's credentials have not been questioned. He set forth the information he used to reach his conclusion. Such information is the type used by doctors in his field to reach conclusions regarding the extent and cause of hearing loss. In fact, it is the same type of information used, in part, by Defendants' expert to reach his conclusion.[10] Claimant has made a *prima facie* showing of causation to a reasonable medical probability between his hearing loss and his work environment.

24. Defendants hired Ryan Van De Graaf, M.D., to interpret Claimant's past audiologic tests. His findings and opinions are set out below:

> I have reviewed his audiograms and it demonstrates that he [Claimant] began with normal hearing in both of his ears in 1979. Over the course of the years his hearing loss progressed. At his most recent audiogram in March 2012, he had normal low frequency hearing which sloped to a severe hearing loss in the right

[10] Actually, Dr. McGee did a more thorough evaluation, as he met with and physically examined Claimant, in addition to reviewing audiograms and related records.

> ear and a mild hearing loss which sloped to a severe loss from low to high frequencies in the left. His hearing at 4,00 [sic] Hz is similar to his hearing at 6,000 and 8,000Hz in both ears (80, 80, 80 in the left and 85, 80, 80dB in the right at these frequencies).
>
> I must state that I have never seen nor interviewed this patient prior to providing my interpretation. That notwithstanding, it is impossible to fully separate age-related or genetic hearing loss from noise-induced hearing loss. Typically one will see more hearing loss at 4,00 [sic] Hz in instances of pure noise related hearing loss, however. Thus, based on the pattern of hearing loss that he demonstrates and based on the amount of noise exposure he has had on the job, I feel that the majority of his hearing loss is related to age related changes or presbycusis and is not significantly related to noise exposure. Thus, I do NOT feel there is reasonable medical probability that his hearing loss is caused by noise exposure due to his employment.

Defendants' Exhibit 5, p. 82. Defendants suggest Dr. Van De Graaf's conclusion is more credible than Dr. McGee's, in large part because Dr. Van De Graaf's explanation of "typical" noise-induced hearing loss findings at 4,000Hz is more analytical than Dr. McGee's opinion contained in his May 3, 2012 letter.

25. Neither Dr. McGee nor Dr. Van De Graaf was deposed or called at hearing. As such, there is no way to have them clarify their statements, or explore their opinions in greater detail. This fact is particularly troubling when reviewing Dr. Van De Graaf's letter. He never said Claimant's hearing loss could not be caused, or at least contributed to, by his employment. In fact, he seems to imply there are both noise-related and other factors contributing to Claimant's current hearing loss. Also, he mentions the pattern of hearing loss he found when reviewing Claimant's records is not "typical" of a "pure" noise-related hearing loss, but he did not mention whether it was typical of a "blended" hearing loss, which has as elements a genetic or age factor *coupled with* a noise-related factor. Most importantly, he never defined "typical." Did he mean "typical" as "nearly always" or simply as "more often than not?" If it is the latter, who is to say Claimant does not have

noise-induced hearing loss which exhibits a pattern which shows up "less often than not?" While Dr. Van De Graaf ultimately opines that Claimant's hearing loss was not primarily caused by noise exposure, the substance of his opinion does not rebut Claimant's causation proof. Furthermore, the opinion of Dr. McGee, who met with Claimant and examined him in person, was based on more complete information than that of Dr. Van De Graaf, who merely reviewed Claimant's records. For these reasons, we find Dr. McGee's opinion more persuasive than Dr. Van De Graaf's.

26. Claimant has proven that he suffers from an occupational disease, as defined by Idaho Code § 72-102(22)(a), with competent medical evidence to a reasonable degree of medical probability. The evidence in the record does not support a finding that Claimant's hearing loss was caused in whole or in part by a preexisting or subsequent injury or condition.

27. Defendants also argue Claimant cannot have an occupational disease because, admittedly, he is not disabled. In doing so, they muddle the definition of occupational disease with the circumstances under which *compensation* is available to the worker afflicted with an occupational disease. As discussed above, the definition of occupational disease does not include disablement. However, in order for an employee to receive *compensation* for such occupational disease, the worker must be disabled.

28. The Idaho Supreme Court has determined the term *compensation*, when used in Idaho Code § 72-437, does not include medical benefits, which remain available under Idaho Code § 72-432(1) to non-disabled workers who contract an occupational disease. *Mulder v. Liberty Northwest Insurance Co.*, *supra.* Defendants argue the *Mulder* holding is erroneous, but unless and until it is overruled, it is the law. Claimant suffers from an

occupational disease, as defined by Idaho Code § 72-102(22)(a), in spite of the fact that he is not actually and totally incapacitated from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease. *See* Idaho Code § 72-102(22)(c), (definition of "disablement").

NOTICE

29. The record establishes that Employer was put on notice of Claimant's occupational disease when Claimant filed his First Report of Illness with Employer on June 26, 2012. Idaho Code § 72-448 requires Claimant to give notice to employer within 60 days following the date of first manifestation. Therefore, if the date of manifestation here occurred prior to April 28, 2012, notice is untimely under the provisions of Idaho Code § 72-448. To ascertain whether notice is timely, it is necessary to identify the date of manifestation.

30. Since 1997, the term "manifestation" has been defined at Idaho Code § 72-102(19) as follows:

> "Manifestation" means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

The definition is stated in the disjunctive: Manifestation means *either* the date on which Claimant "knows" that he suffers an occupational disease, *or* the date on which a qualified physician informs Claimant that he has an occupational disease. *Sundquist v. Precision Steel & Gypsum, Inc.,* 141 Idaho 450, 111 P.3d 135 (2005). It is important to evaluate manifestation under both prongs of the statutory definition.

Informed by a physician

31. Claimant saw Dr. McGee on April 26, 2012, and received a letter from Dr. McGee on May 3, 2012, informing Claimant that his hearing loss was, in Dr. McGee's opinion, caused by Claimant's occupational exposure. Defendants allege that Dr. McGee *must* have verbally informed Claimant of the work-related nature of his hearing loss at the time of the April 26, 2012 visit. If so, then notice would be untimely. However, Claimant denies being so informed on April 26, and there is no other evidence of record which supports Defendants' speculation in this regard. We conclude that under this prong of the definition of manifestation, Claimant's notice is timely since notice was given within 60 days following May 3, 2012, the date on which Claimant read Dr. McGee's letter.

Claimant's knowledge

32. Even though Claimant may have given notice within 60 days following the date on which he learned from Dr. McGee that his hearing loss was work-related, his claim may yet be barred if, quite apart from what a qualified physician may have told him, he nevertheless "knew" that his condition was related to the demands of his employment prior to April 28, 2012. At hearing Claimant testified as follows concerning the extent of his knowledge about the cause of his hearing loss prior to his receipt of Dr. McGee's letter:

> Q. Prior to receiving Dr. McGee's medical opinions regarding your hearing loss, did you know that your hearing loss was caused by your work-related activities?
>
> A. No.
>
> Q. But you suspected it?
>
> A. Yeah, I suspected it some, yes.
>
> …

Q. By Mr. Gardner: Isn't it true that you actually thought your hearing loss was work-related 10 years prior to when you reported it?

A. Suspected.

Q. Could you return to your deposition, Page 27, the one we were just on?

A. (Witness complies.) Okay.

Q. And I'm just going to read starting on Line 7. Do you see that question?

A. Yeah.

Q. "So was there a time when you thought that your hearing lost could be related to work?

"Answer: Yes.

"And when did that thought occur?

"Answer: Ten years ago probably."

Did I read that correctly?

A. You did.

HT, p. 82/9-15; pp. 105/25-106/16.

33. Nothing in Claimant's hearing or deposition testimony would establish that Claimant "knew" his condition was work-related prior to April 28, 2012. However, the same cannot be said for the statement Claimant gave to Surety's representative, Lisa McClure, as part of her investigation of the claim:

Q. How long has that [hearing loss] been going on?

A. It's gradually got worse but the last 10 years probably it's got. . .

Q. So what makes you think, or when did you think or maybe you don't. I don't know exactly. Tell me exactly what generated this claim to be generated at this time versus lets [sic] say 10 years ago. Did you know 10 years ago that it was related to work?

A. Yeah, but I transferred to another plant. I left that plant and transferred to another plant.

Q. You left the Inkom location?

A. Yeah. I'm still employed by Ash Grove but I went to another plant in Utah.

Q. When was that?

A. Actually my first day down there was Monday. That's why we've had such a hard time, 'cause I don't have any cell phone service.

Q. Just recently then?

A. Right.

Q. Transferred to Utah plant and you started 7-9?

A. Right.

Q. So just recently you moved down there. What about before you transferred?

A. What about it?

Q. I mean as far as, did you think your hearing loss was. . .

A. I knew it was. I knew it was but you don't, a worker don't want to stir the waves.

…

Q. So what you're saying, if this would have happened maybe 10 years ago, you would have filed it maybe then too because you felt it was related?

A. Yeah, maybe.

Defendants' Exhibit. 4, pp. 6-7 (emphasis added).

34. The questions posed by Ms. McClure are not well-phrased. However, notwithstanding this shortcoming, from Claimant's answers it might well be argued that he did "know" that his hearing loss was related to occupational exposure well before April 28, 2012. He

explained that the reason he waited so long before making his claim was because of concerns that doing so might jeopardize his employment. The announcement of the Inkom plant closure upset Claimant, and it was that announcement that made him decide that Employer should be held accountable for causing Claimant's hearing loss. Defendants Exhibit 4, pp. 7, 13.

35. In *Gardner v. Magic Valley Business Systems, Inc.*, 2013 IIC 0030 (2013), the Commission struggled with a factual scenario similar to that at bar. In that case, the claimant testified that he "believed" his knee condition was related to the demands of his employment long before he eventually notified employer of his claim for benefits. In considering whether "believing" was synonymous with "knowing", the Commission stated:

> The question that is presented by the quality of Claimant's belief in 2007 is whether his belief satisfies the demands of the statute, which requires a demonstration that he "know" that his condition is related to the demands of his employment before his condition can be said to be manifest. Thus, the distinction between believing and knowing is important, but it is not a distinction that is particularly subtle. To "know" is to perceive or understand as fact or truth; to apprehend clearly and with certainty. *Dictionary.com, Based on the Collins English Dictionary Complete & Unabridged 10th Edition.* http://dictionary.reference.com (HarperCollins Publishers, Accessed April 2013). To "believe" is to accept something as true, genuine or real. *Id*. Believing is holding an opinion. Knowing is to have direct experience of a fact.

36. The discussion in *Gardner*, *supra*, makes it clear that "believing" is not the same as "knowing," and the question of whether manifestation occurred in that case was resolved by recognizing that Claimant only believed his condition was work-related. In *Gardner*, the Commission did not consider in any greater detail what it actually means to "know" something. This case affords an opportunity to elaborate on what is necessary to prove manifestation by this route.

37. As noted above, the definition of manifestation was inserted into the statutory scheme in 1997. In an initial draft of Senate Bill 1099, manifestation was defined as the "time

when an injured worker knows that he *probably* has an occupational disease, or whenever a qualified physician shall inform the injured worker that he probably has an occupational disease." *See* Idaho Sen. 1099, 54th Leg. Reg. Sess. 1 (1997) (emphasis added). Attachments to the Committee minutes reflect that another draft of the bill also included the words "or should reasonably have known" in the definition of manifestation. *See* Idaho Sen. Commerce and Human Resources Committee Minutes, 54th Leg., Reg. Sess. 1 (March 4, 1997). This language proved contentious, and after compromise negotiations between various interested parties, including the Idaho Association of Commerce and Industry and the Idaho Trial Lawyers Association, the words "probably" and "or should reasonably have known" were deleted from the definition of manifestation. *Id.* The bill as amended was passed by the Legislature, with manifestation ultimately being defined as the "time when an employee *knows* that he has an occupational disease, *or* whenever a qualified physician shall inform the injured worker that he has an occupational disease." Idaho Code § 72-102(19) (emphasis added). Thus, the legislative history makes it clear that the word "know" was not included in the statute cavalierly, but rather after much consideration, discussion, and debate. The Legislature had the opportunity to adopt a less stringent standard than "know," but chose not to do so.

38. Under the current statute, then, in order for an occupational disease to be manifest, the claimant "must know that he has an occupational disease or have been so informed by a qualified physician." *Sundquist*, 141 Idaho at 454, 111 P.3d. at 139. "Where the language of a statute is plain and unambiguous," the Commission "must give effect to the statute as written, without engaging in statutory construction." *See State v. Cottrell*, 152 Idaho 387, 396, 271 P.3d 1243, 1252 (2012). "The language of the statute is to be given its plain, obvious, and rational meaning." *Id.* If the language is clear and unambiguous, the Commission need not "resort to

legislative history or rules of statutory interpretation." *Id*. However, if interpretation is necessary because "an ambiguity exists," then the Commission "has the duty to ascertain the legislative intent and give effect to that intent." *Id*. "To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history." *Id*. The Commission should not "give an ambiguous statute an interpretation that will render it a nullity." *Id*. at 396-397, 1252-1253. "Constructions of an ambiguous statue that would lead to an absurd result are disfavored." *Id*. at 397, 1253.

39. Knowledge is defined as "justified true belief." *In Re Cacciatori*, 465 B.R. 545, 551 (2012). In order for a person to know something, "three conditions must be satisfied: 1) the person must believe it to be true, 2) the person must have justifying reasons for believing it to be true, and 3) it must in fact be true." *Id*. at 551-552.

40. Therefore, before a claimant can be said to "know" something, it must first be demonstrated that the thing the claimant believes to be true is *actually* true; one cannot be said to "know" something that proves to be false. However, as *Cacciatori*, *supra*, makes clear, the fact that the claimant's belief actually proves to be true is not, in itself, sufficient to prove that the claimant had genuine knowledge. Knowledge is belief of a true fact that has been "given account of," meaning that the belief in the true fact is explained or justified in some way. *See e.g.* Plato, *Theaetetus* 187a-201c; G. Dawson, *Justified True Belief is Knowledge*, 31 The Philosophical Quarterly 125, 315-29 (October 1981); Matthias Stetup, The Analysis of Knowledge, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Fall 2008). In order to know that a given proposition is true, one must not only believe the relevant true proposition, but one must also have a good reason for doing so. A clear consequence of the rule announced in *Cacciatori* is that no one can be said to gain knowledge solely by believing something that subsequently turns

out to be true. For example, an ill person with no medical training might "know" that his condition is work-related because of a peculiar superstition he happens to have. Nevertheless, even if this belief turns out to be true, the patient could not be said to have "known" that his condition was work-related, since his belief lacked a satisfactory justification.

41. As one considers what it means to "know" a fact within the meaning of the statute, it becomes clear that it will be the rare, but by no means vanishingly rare, case in which an injured worker independently comes to "know" that he suffers from an occupational disease. Consider the following example: Claimant works in a lead smelter where he is exposed on a daily basis to contact with lead. Over the years, a number of Claimant's co-workers have received medical diagnoses of lead poisoning. They all developed characteristic signs and symptoms of lead poisoning, and these signs and symptoms were well-known to Claimant. Eventually, he too develops what he knows to be the signs and symptoms of lead poisoning. He also knows that his workplace is the only place where he has been exposed to lead. He concludes that he has developed occupationally-related lead poisoning. His knowledge is based on other cases of lead poisoning among his co-workers, an understanding of the signs and symptoms of lead poisoning, and the fact that he was not exposed to lead anyplace else. Claimant's knowledge that he has lead poisoning is appropriately justified and therefore he can be said to "know" within the meaning of the statute that he has a work-related disease. That Claimant "knows" that he has a work-related occupational disease is premised on the hypothetical's assumption that Claimant's signs and symptoms really are related to his occupational exposure to lead. Suppose, however, that subsequent blood testing demonstrates that Claimant does not have lead poisoning, and that his symptoms have a non-work-related explanation. In this scenario, because Claimant's

knowledge turned out not to be true, manifestation could never occur by the route of Claimant's "knowledge," since one cannot be said to "know" something that is not true.

42. As applied to the instant matter, we have found that the medical evidence establishes that it is more probable than not that Claimant's hearing loss is related to his occupational exposure. This finding admits that Claimant could be said to know a fact which was subsequently proven true. However, there is insufficient proof to persuade us that Claimant's conviction was adequately explained or justified at the time he is said to have formed his conviction. Although Ms. McClure did extract from Claimant his statement that, possibly as long as ten years ago, he "knew" that his condition was work-related, she failed to ask him how it is he came to this conclusion; Claimant has not explained the facts and circumstances which justified his belief that his condition was related to the demands of his employment. His reasoning is opaque to us.

43. Based on the foregoing, we conclude that the evidence fails to reveal a date of manifestation by the route of Claimant's knowledge. The evidence establishes that the date of first manifestation was May 3, 2012, the date on which Claimant received Dr. McGee's letter informing Claimant that his hearing loss, in Dr. McGee's opinion, was related to the demands of his employment.

BENEFITS AVAILABLE TO CLAIMANT

44. Because Claimant is admittedly not disabled, under the workings of Idaho Code § 72-437 and *Mulder v. Liberty Northwest Insurance Co.*, *supra,* he can only recover "such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, [such as hearing aids and related expenses], as may be reasonably required by the employee's physician or needed immediately after an injury or

manifestation of an occupational disease, and for a reasonable time thereafter." Idaho Code § 72-432(1). Claimant is entitled to those past and future medical benefits allowed under Idaho Code § 72-432(1); he is not entitled to PPI and/or PPD benefits.

45. At hearing, Claimant presented a lump sum calculation for a projected lifetime supply of hearing aids and related supplies. There is no provision for such an award calculation in Idaho Code § 72-432(1). Employer's obligation is adequately set forth in the preceding paragraph, and no sum certain award is available to Claimant under this hearing proceeding.

ATTORNEY FEES

46. Attorney fees pursuant to Idaho Code § 72-804 are not warranted. Defendants were not unreasonable in contesting the claim in light of Dr. Van De Graaf's opinion; hearing loss is a condition with many possible causes. Also, Defendants made a rational, if not ultimately successful, argument regarding notice. Claimant is therefore not entitled to attorney fees.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant suffers from an occupational disease as defined by Idaho Code § 72-102(22)(a).

2. Claimant's condition is not due in whole or in part to a preexisting and/or subsequent injury or condition.

3. Claimant is not entitled to compensation under Idaho Code § 72-437 for his occupational disease.

4. Claimant complied with the notice requirements of Idaho Code § 72-448.

5. Claimant is entitled to medical care benefits as allowed under Idaho Code § 72-432(1).

6. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.

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

DATED this _25th__ day of April, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

ATTEST:

_/s/_____
Assistant Commission Secretary

Dissenting Opinion of Commissioner Thomas E. Limbaugh

After reviewing the record in this case, I respectfully dissent from the majority decision finding Claimant did not know he had an occupational disease, and was only informed that his hearing loss was related to the demands of his employment by Dr. McGee's letter on May 3, 2012. In my opinion, Claimant knew that his hearing loss was related to his work at the cement plant well before April 28, 2012.

As stated in the majority, Employer was first put on notice of Claimant's occupational disease when Claimant filed his first report of illness with Employer on June 26, 2012. Idaho

Code § 72-448 requires a claimant to give notice to an employer within 60 days following the date of first manifestation, making April 28, 2012 the key date. Therefore, if the date of manifestation occurred any time before April 28, 2012, notice is untimely.

The term manifestation, for use in workers' compensation, is defined by Idaho Code §72-102(19).

> "Manifestation" means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

As discussed in the majority, the above definition allows two avenues for proving manifestation, but the focus of this case is whether Claimant knew he had an occupational disease prior to April 28, 2012. There is no doubt that the facts of this case allow for a dispute, but, when taken as a whole, the record supports a finding that Claimant knew his hearing loss was related to his employment long before April 28, 2012.

Claimant testified that he had no significant involvement in any noise producing activities outside of his employment, and the Commission agrees. The non-work related potential causes of hearing loss which Claimant reported consisted of firing a weapon three or four times a year, using an ATV to push snow for three years while wearing ear protection, mowing his lawn, and riding a snow machine a couple of times. It is not a very impressive list of loud events, especially considering that list covers a span of time from the late 1970s until 2012. Claimant's work environment was the obvious culprit for his hearing problems.

Claimant is exceedingly aware that he worked in an extremely noisy environment. Claimant began working for Employer when he was 21. He worked at Employer's Inkom site, which mined rock out of the hill and turned it into cement, from 1979 to 2012. Noise levels and hearing protection were topics regularly discussed by Employer during company meetings and

trainings. In 2003 the safety director required double-hearing protection, both earmuffs and ear plugs, when working in the mill room. Before that employees wore single-hearing protection, either earmuff or earplugs. Claimant testified that in 2010 another safety worker performed hearing tests and determined that the employees should only be working in the mill room for four (4) hours at a time with double-hearing protection.

Additionally, Employer provided Claimant with yearly hearing tests and Claimant received results showing a hearing loss beginning 10 to 15 years ago.

> Q. Now, isn't it true that you realized you were experiencing hearing loss as far as 10 to 15 years prior?
> A. I knew that my hearing wasn't as good as it was, yes.
> Q. And isn't it true that you also experienced ringing in your ears frequently and have done so for the past 10 years or so?
> A. Yes.

HT, p. 100/3-11.

Claimant recalled that his hearing has been tested yearly at the worksite by Employer. For at least the last 20 years, a subcontractor has done the testing. Claimant explained the process of testing and receiving the results.

> Q. Did they ever – anybody ever explain what your results meant?
> A. The guy giving the test would say basically that the high numbers, you was losing your hearing, bad hearing. Low numbers was good, good numbers.
> Q. Okay. During your time at Ash Grove, did you ever notice you were experiencing hearing loss?
> A. Yeah, I noticed it.
> Q. About how, how –
> A. Ten, fifteen years ago.

HT, p. 73/16- 25; p. 74/1.

In 2009, Employer downsized from 85 employees to 20, then in 2010 down to 6 employees. It was only when Employer was severely downsizing and Claimant feared he would

be out of work that he took steps to file a claim. Claimant testified that he was not sure if he was going to have a job or not. HT, p. 54.

> Q. When did you become aware that the Inkom plant was going to downsize to six employees?
> A. I suppose the official word was in the spring of 2012.
> Q. Was that right about the same time that you decided to go see the doctor?
> A. Probably before.
> Q. So you knew about the downsizing, and did that have anything to do with your decision to do see the doctor about your hearing loss?
> A. Could have.
> Q. And can you explain that?
> A. Well, I thought perhaps I wouldn't have a job, and I wanted a professional opinion to tell me about my hearing.
>
> C. Exh. 13, p. 29.

Claimant stated he went to get his hearing checked by Dr. McGee because Claimant wanted to see if he had any hearing loss. HT, p. 110. That statement is surprising because he has been subject to an annual hearing test provided by Employer for the past 34 years. Further, Claimant stated that his results have shown a hearing loss for the past 10 to 15 years. Specifically, Claimant presented for a hearing exam with Dr. McGee on April 26, 20012, even though Claimant had just received an Employer sponsored hearing test on March 19, 2012 which showed high numbers, indicating hearing loss. C. Exh. 7, p. 16.

I find it difficult to believe that Claimant presented to Dr. McGee in April 2012 to see if he had any hearing loss. The more logical answer, supported by Claimant's first recorded discussion with Surety's adjuster, is that he was finally motivated to act on his prior knowledge by the fact that he might be losing his job.

> Q. How long has that been going on?
> A. It's gradually got worse but the last 10 years probably it's got…
> Q. So what makes you think, or when did you think or maybe you don't. I don't know exactly. Tell me exactly what generated this claim to be generated at

this time versus lets say 10 years ago. Did you know 10 years ago that it was related to work?
A. Yeah, but I transferred to another plant. I left that plant and transferred to another plant.

…

Q. Transferred to Utah plant and you started 7-9?
A. Right.
Q. So just recently you moved down there. What about before you transferred?
A. What about it?
Q. I mean as far as, did you think your hearing loss was…
A. I knew it was. I knew it was but you don't, a worker don't want to stir the waves.

…

Q. So what you're saying, if this would have happened maybe 10 years ago, you would have filed it maybe then too because you felt it was related?
A. Yeah, maybe.

D. Exh. 4, p.6; p.7.

The transcript above is clearly a more casual conversation than most depositions but it plainly reads that Claimant knew he had work related hearing loss 10 years ago. While conflicting testimony exists, the record as a whole supports a finding that Claimant knew his hearing loss was related to his employment years before he notified Employer of his claim. He simply chose not to make a claim because he did not want to disturb the status quo or endanger his job. Regardless of whether that was a wise decision, it was a decision that was in Claimant's purview to make. Only years later, upon learning that he was probably losing his job, did Claimant decide to make a claim for hearing loss. The evidence supports a conclusion that Claimant knew he suffered from hearing loss related to his employment.

Additionally, the majority's new breakdown of three factors required to prove that a claimant knew he or she had an occupational disease is unnecessary and arguably nullifies the

provision is it attempting to refine. The majority states that for an employee to "know," three conditions must be satisfied: 1) the person must believe it to be true, 2) the person must have justifying reasons for believing it to be true, and 3) it must in fact be true. The most troubling factor is the requirement of reasons justifying the belief. The present requirement for a claimant to know or to be informed by a physician is a high hurdle for employers to scale. Requiring an employer to adduce a claimant's justification to their knowledge of manifestation is onerous and uncalled for by the statute. Clearly the best justification that the majority speaks of would be that of an opinion by a physician, which is covered by the statute's second alterative for proving manifestation. The current notice requirement at issue is not overly burdensome. It simply requires workers to pursue their claims diligently, which is beneficial for the workers' compensation system as a whole.

In this particular case, the majority admits that Surety's adjuster elicited a statement from Claimant that he knew his hearing loss was related to his work about 10 years before he reported it to Employer. But the majority faults the adjuster in not further asking Claimant to justify his belief with facts and circumstances. The majority is handing out an additional requirement which is going to be very challenging to prove. Most claimants will have a hard time verbally justifying their knowledge in a way which will satisfy the majority's requirement, and defendants will be left with another burdensome requirement.

For the foregoing reasons, it is my opinion that Claimant knew his condition was related to the demands of his employment many years prior to April 28, 2012. As such, notice is untimely pursuant to Idaho Code §72-448. I respectfully dissent from the majority decision.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25th__ day of __April_____, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

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