

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

The Estate of:
KURT AIKELE (Deceased),
Claimant,

v.
CITY OF BLACKFOOT,
Employer,

and
IDAHO STATE INSURANCE FUND,
Surety,
Defendants.

IC 2008-040432

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

Filed October 22, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted two hearings in Idaho Falls, the first on August 22, 2012 with Mr. Aikele present and the second after Mr. Aikele's death, on December 4, 2013. Paul Curtis and Andrew Adams represented Claimant and his estate. Steven Fuller represented Defendants. The parties presented oral and documentary evidence, took posthearing depositions, and submitted briefs. The case came under advisement on June 30, 2014 and 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

The first hearing concerned only the bifurcated issue of whether an IME constituted medical treatment for purposes of determining the applicable statute of limitation. Claimant passed before the issue could be briefed. That issue is subsumed within issue number 1 below.

All issues are now to be considered as follows:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through -706, and whether these limitations are tolled under Idaho Code § 72-604;
2. Whether the condition for which Claimant seeks benefits was caused by exposure to carcinogens at work;
3. The extent of death benefits payable, if any; and
4. Whether and to what extent Claimant is entitled to other benefits.

CONTENTIONS OF THE PARTIES

The parties agree Claimant died of lung cancer on December 8, 2012.

Claimant contended his lung cancer was caused by multiple exposures to carcinogens in smoke and diesel exhaust fumes during his career as a firefighter. Entitlement to all benefits stems from this premise. Scientific studies cannot prove Claimant's cancer was not caused by his work. Claimant gave timely notice and made a timely claim because Defendants required an independent medical examination (IME) which constituted medical treatment and activated the five-year statute of limitation for purposes of temporary disability benefits.

Defendants contend Claimant's cancer was not caused by his work. There is no link between Claimant's work and higher cancer risks; scientific studies show firefighters experience cancer at the same rates as the general public. The IME did not constitute medical treatment; the one-year statute applies.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony of Claimant, his wife Denise, and fire chief Kevin Grey;
2. Joint Exhibits A1 through A8 admitted at the first hearing;
3. Joint Exhibits 1 through 6 and 8 through 29 admitted at the second hearing; and

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

4. Posthearing depositions of oncologists Norman Zuckerman, M.D., (2012 and 2014) and Dane Dickson, M.D. (2014).

Objections raised in depositions are OVERRULED.

FINDINGS OF FACT

1. Claimant worked for Employer as a firefighter. Through the years he has assisted at a multitude of fires at various locations and of various causes.

2. At various times, medical records show Claimant reported a family history of prostate cancer involving his father and/or one or both of his grandfathers.

3. A January 7, 2005 visit to Bret J. Rodgers, M.D., involved removal of basal cell carcinoma from the left side of his face. Physicians have not opined that this impacts any analysis of causation about his lung cancer.

4. In December 2008, Claimant was seen for possible pneumonia. Subsequent testing and a biopsy revealed lung cancer.

5. On December 29, 2008, Dane Dickson, M.D., examined Claimant. He opined that since Claimant worked as a firefighter he had been exposed to smoke during clean-up operations and to diesel fuel fumes; therefore, these were “most likely the reason” for having developed non-small-cell lung cancer. He noted an absence of conditions likely to expose Claimant to radon gas and that Claimant never smoked.

6. Thereafter, Dr. Dickson provided significant treatment of Claimant’s condition.

7. On June 8, 2009, Dr. Dickson wrote to rebut Dr. Pfortner’s opinion and an article describing scientific studies involving firefighter (see below). He provided other more recent studies including one relied upon by Dr. Girardi (see below). Dr. Dickson opined, “I feel the review I have done, which is limited and I recognize this, is enough to say there can be a

presumptive risk of cancer although it may not be enough to establish a definitive relationship.” He suggested a possible relationship to lung cancer where a study linked laryngeal cancer to firefighters.

8. On August 31, 2011, Dr. Dickson reiterated his opinions while noting the impossibility of determining a cause. He compared Claimant’s situation to veterans who had been exposed to Agent Orange who were eventually grouped into a presumptive category by the Veterans’ Administration to obtain compensable medical care. Dr. Dickson went on to state, “I readily admit that I am not an expert in this field, but feel strongly.”

9. Kirt McKinlay, M.D., treated Claimant. He recorded that initially, Claimant’s lung cancer was “nodular in nature.” After chemotherapy and a remission, it returned, but this time as an infiltrate.

10. On July 4, 2010, Christopher Shields, M.D., described Claimant’s condition as “non-tobacco related adenocarcinoma of the lung.”

11. In December 2011, Claimant underwent a lung cancer mutation screening. The equivocal legibility of this report precludes Commission evaluation of it, except to say that it does not appear to demonstrate a significant genetic predisposition toward cancer.

12. On November 30, 2012, urologist Timothy Taylor, M.D., diagnosed cancer, adenocarcinoma of the prostate. It is unclear whether this was an error and Dr. Taylor meant to say “lung.” Regardless, prostate cancer did not kill Claimant; lung cancer did.

13. Except as described above, the significant volume of medical records does not significantly contribute to establishing a cause for Claimant’s cancer.

Non-Treating Medical Opinions

14. On March 13, 2009, George Pfoertner, M.D., evaluated Claimant’s records

and reviewed scientific literature at Surety's request. He opined: "Thus, on a more probable than not basis, I do not feel that Mr. Aikele's diagnosis of Adenocarcinoma of the Lung is related to his employment as a Firefighter/EMT, in the city of Blackfoot, Idaho."

15. On December 8, 2009, oncologist Norman Zuckerman, M.D., evaluated Claimant at Surety's request for an independent medical evaluation ("IME"). He reviewed records and examined Claimant. He noted that Claimant had never smoked. He recommended additional treatment. He did not provide this treatment.

16. On January 21, 2010, Dr. Zuckerman reported to Surety and opined Claimant's adenocarcinoma of the lung was "unlikely to be related to his occupation as a firefighter." Dr. Zuckerman provided a copy of a meta-analysis of scientific studies which Dr. Zuckerman opined was the "best and most thorough" available. He noted this meta-analysis concluded that firefighters have been shown to face an increased risk of non-Hodgkin's lymphoma, multiple myeloma, and malignant myeloma but no statistically significant increased risk of lung cancer.

17. On December 24, 2009, Richard Oehlschlager, M.D. wrote Claimant's prior attorney Richard Owen. Dr. Oehlschlager opined about the likelihood of prevailing on a claim before a jury rather than about whether Claimant's work likely caused his cancer. Inadequate foundation fails to establish the documentation which Dr. Oehlschlager reviewed. This opinion does not significantly contribute to our analysis here.

18. On February 26, 2010, Alyce Girardi, M.D., on letterhead identifying the International Association of Fire Fighters, described and criticized scientific literature relating to cancer risk among firefighters. She further relied upon an attached article summarizing and criticizing studies which indicate firefighters experience lung cancer at an equal rate as the general population, but smoke at a lower rate. The article's author proposes some

presumptions and performs an “indirect . . . mathematical derivation” which suggests to that author and Dr. Girardi that non-smoking firefighters experience cancer more than the general population. The major opinion of that author was that workers’ compensation jurisdictions should enact a legislative or regulatory presumption of a causal link between lung cancer and work for non-smoking firefighters. The article concludes:

Such assessments for medicolegal and adjudicatory purposes are not intended to replace the standards of scientific certainty that are the foundation of etiologic investigation. They are social constructs required to resolve disputes in the absence of scientific certainty.

Despite the fact that most studies indicate firefighters have an increased risk for certain types of cancer—but not lung cancer—Dr. Girardi opined “work-related exposures are likely contributors to lung cancer in non-smoking fire fighters.” The record does not show whether Dr. Girardi reviewed medical records specifically related to Claimant.

DISCUSSION AND FURTHER FINDINGS OF FACT

19. The provisions of the Idaho Workers’ Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

A. The science

20. The physicians who testified agree that a meta-analysis of multiple studies is particularly useful scientific evidence to address the question of a causal link between non-small cell lung cancer and firefighters generally. The meta-analysis concluded that although firefighters have a statistically significant incidence of certain cancers compared to the general population, studies and data show no statistically significant incidence of lung cancer in firefighters. Physicians who opined Claimant’s lung cancer was caused by his work quibbled

and questioned the source data and methodology of the meta-analysis, but did not show that Claimant's work differed from the firefighters studied in any material way.

21. All physicians of record who testified acknowledge that long-term exposure to tobacco smoke causes lung cancer of the type Claimant developed. No physician of record suggested that the few cigarettes Claimant admitted to having smoked as a teen could be a cause of Claimant's lung cancer; we concur. He is deemed by these physicians and by the Commission to be acknowledged as a lifetime non-smoker.

22. The physicians who testified agreed that the causal link between lung cancer and tobacco smoke was scientifically established by meta-analysis of many individual studies involving many patients.

23. Dr. Zuckerman testified that "the poison is in the dose" to explain the importance of determining whether any exposure, incidental or cumulative, might be carcinogenic.

B. Dr. Zuckerman's opinion

24. Dr. Zuckerman described the strengths and weaknesses applicable to meta-analysis. He opined about the impossibility of establishing a likely causal link between Claimant's cancer and his work without significant information about the extent to which he was exposed to potential carcinogens. The meta-analysis concluded a causal link was unlikely, generally; the absence of data showing Claimant's coworkers contracted lung cancer indicates no link exists, specifically. About 15% of lung cancers occur in non-smokers with no occupational risk. Largely upon these factors, Dr. Zuckerman opined Claimant's lung cancer was unlikely to have been caused by his work. Dr. Zuckerman testified that upon meeting Claimant, Dr. Zuckerman assumed Claimant's work caused his lung cancer, but that further analysis failed

to support that assumption. Dr. Zuckerman admitted he could not unequivocally state that Claimant's cancer was not caused by his work.

25. Dr. Zuckerman's testimony well explained the bases for his opinion. His opinion is entitled to great weight.

C. Dr. Dickson's opinion

26. Dr. Dickson challenged the applicability of the groups of firefighters studied to Claimant's actual work. Dr. Dickson repeatedly testified that without specifics about each of the studied firefighter's exposures to compare to specifics of Claimant's exposures, the meta-analysis was less than conclusive. However, Dr. Dickson did not possess knowledge of specifics of Claimant's exposures either. First, although the record logs fires that Claimant worked, it is silent about specific dates and times, and about specific carcinogenic compounds and levels, of exposure to potentially causative compounds. We are forced to make assumptions favorable to Claimant if we are to fill these gaps and find for compensability. Second, Claimant's general testimony about ventilation and the presence of diesel fumes in the living quarters at the firehouse was contradicted by Chief Gray. Claimant initially reported to physicians that he "always" used personal protective equipment. After this claim began, he recalled that he did not always use PPE during the mop-up phase of fires. This change in recollection did not impair the Referee's assessment of Claimant's credibility. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility. However, it does impair the basis upon which Dr. Dickson's opinion is based. He simply does not have a factual basis about whether, when, or how much Claimant was exposed to unknown—potentially carcinogenic—compounds to support his opinion. Dr. Dickson's own reasoning in criticizing the meta-analysis undercuts his reasoning as applied to Claimant

individually. Upon cross-examination in posthearing deposition, Dr. Dickson acknowledged he did not have sufficient historical data to determine the cause of Claimant's lung cancer.

27. Dr. Dickson is a qualified oncologist whose opinion has been given serious attention. However, in the end, his criticism of the meta-analysis is unpersuasive; it evinces Dr. Dickson's willingness to abandon science in favor of his emotional wish on Claimant's behalf.

D. The weight of medical opinion

28. Claimant was a non-smoker. Thus, having eliminated the cause of the overwhelming majority of lung cancer cases—tobacco smoke—we are left to compare the likelihood of various minority causes. The physicians agree that the most significant among the potential remaining causes are occupational exposure and bad luck; there are potentially a multitude of other minor causes, a few of which have been ruled out by testifying physicians.

29. Drs. Pfoertner and Zuckerman opined occupational exposure remained an unlikely cause; Dr. Dickson opined otherwise. Dr. Girardi's opinion was of insufficient foundation to carry much weight. Drs. Zuckerman and Dickson well explained their rationale and bases for their opinions in posthearing deposition testimony.

E. The law

30. An occupational disease is one that is "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 for employment ...". *See* Idaho Code § 72-102(22)(a). The terms "contracted" and "incurred," when referring to an occupational disease, are deemed to be the equivalent of "arising out of and in the course of employment". *See* Idaho Code §

72-102(22)(b). Under Idaho Code § 72-439, an employer cannot be held liable for an occupational disease unless such disease is actually “incurred” in that employment. Therefore, as in an accident/injury case, one who claims benefits for an occupational disease must show that he developed a disease while performing the work he was employed to perform, and that there is a causal connection between the conditions under which the work was performed and the resulting disease. *Langley v. State Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995); *Hagler v. Micron Tech., Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

31. Idaho Code § 72-438 enumerates a number of specific occupational diseases including respiratory diseases incurred by firefighters:

Compensation shall be payable for disability or death of an employee resulting from the following occupational diseases:

...

Cardiovascular or pulmonary or respiratory diseases of a paid fireman, employed by a municipality, village or fire district as a regular member of a lawfully established fire department, caused by overexertion in times of stress or danger or by proximate exposure or by cumulative exposure over a period of four (4) years or more to heat, smoke, chemical fumes or other toxic gases arising directly out of, and in the course of, his employment.

Therefore, the respiratory disease of a fireman which is caused by cumulative exposure to injurious substances over a period of at least four years is a compensable occupational disease. Pursuant to the general and specific tenets of occupational disease law referenced above, Claimant bears the burden of proving that the lung cancer from which he suffered was causally related to the claimed occupational exposure. To prove causation Claimant must put on medical proof establishing that it is more probable than not that his condition is work related. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

32. Based on the evidence of record, we cannot say that Claimant has met his burden of proving that it is more probable than not that his lung cancer is occupationally related. In this regard, we find the meta-analysis, as explained by Dr. Zuckerman and Dr. Pfortner to be persuasive.

33. We want to believe that because it is generally accepted that tobacco smoke causes lung cancer, other smoke should also; because firefighters spend their work lives in a smoky environment, that environment should have caused any individual firefighter's lung cancer. But the evidence discussed above says our intuition is incorrect.

34. The record does not show whether or how much exposure Claimant experienced. It does not indicate that any other Blackfoot firefighter has contracted lung cancer. These two factors cut against Dr. Dickson's opinion and favor those of Drs. Pfoertner and Zuckerman.

35. The preponderance of evidence is persuasive in favor of the opinions of Drs. Pfoertner and Zuckerman. Dr. Zuckerman particularly identified both general and specific factors which support his opinion. Regardless of how much we would like to help Claimant provide an extra measure of financial relief to his widow, we will not arbitrarily put our thumb on the scales; persuasive medical opinions of record address Claimant's case individually; they show it likely that Claimant's lung cancer was not likely caused by his work. Claimant failed to meet the requirements of Idaho Workers' Compensation Law; a preponderance of the evidence shows Claimant failed to establish, more likely than not, that his lung cancer was caused by his work environment.

36. Because we have found that Claimant has failed to prove that his disease was causally related to his employment, all other issues are moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant failed to show his lung cancer was likely related to his work;
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this ___ 22nd ___ day of ___ October ____, 2014.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

RECUSED

R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2014, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was served by regular United States Mail upon each of the following:

ANDREW A. ADAMS
598 NORTH CAPITAL AVENUE
IDAHO FALLS, ID 83402

STEVEN R. FULLER
P.O. BOX 191
PRESTON, ID 83263

/s/ _____