BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of: MURRAY BURNS, Decedent, MARELYN BURNS, Claimant, v. WESTERN EQUIPMENT COMPANY/ WESTERN STATES EQUIPMENT COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2010-003881** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.** Filed January 4, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted hearings in Boise, Idaho, on May 6, June 9, and July 19, 2010. Max M. Sheils, Jr., of Boise represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence, and took one post-hearing deposition. The parties filed post-hearing briefs; the matter came under advisement

on October 29, 2010 and is now ready for decision.[1]. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

By stipulation of the parties subsequent to hearing, the issues to be decided are:

1. Whether Decedent (hereinafter Claimant) suffers from a compensable occupational disease;

2. Whether Claimant's last injurious exposure to asbestos pursuant to Idaho Code § 72-439(3) occurred while employed by Defendant Employer;

3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition; and

4. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that he developed a compensable occupational disease, pleural mesothelioma, as a result of working for approximately fourteen years as a mechanic for Employer. Claimant contends that there is no evidence of a pre-existing or subsequent injury or condition that caused his pleural mesothelioma, and that his last injurious exposure to asbestos occurred while working for Employer. Claimant argues that Defendants' denial of his claim was

[1] Decedent passed away from his occupational disease on October 19, 2010, after the close of proceedings, but before the case came under advisement. For purposes of clarity, Decedent is referred to as Claimant and in the present tense throughout the Recommendation.

unreasonable and urges the Commission to award attorney fees pursuant to Idaho Code § 72-804.

Defendants do not dispute that Claimant suffers from an occupational disease, but assert that they are not liable for that disease. More particularly, Defendants contend that Claimant's last injurious exposure to asbestos occurred after he had ceased working for Employer, relieving Defendants of liability pursuant to Idaho Code § 72-439(3). Because Defendants have no liability on Claimant's occupational disease claim, their denial of the claim is not unreasonable, and Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Marelyn Burns, taken at hearing on May 6, 2010;

2. The testimony of Paul Montgomery, M.D., taken at hearing on June 9, 2010;

3. The testimony of Claimant and Philip John Templin, taken at hearing on July 19, 2010;

4. Claimant's exhibits 1 through 4, admitted on May 6, 2010, and exhibits 5 and 6, admitted on July 19, 2010;

5. Defendants' exhibits A and B, admitted on May 6, 2010;

6. The post-hearing deposition of Michael Krause, taken August 31, 2010, together with Defendants' exhibit C offered without objection during the deposition and deemed admitted on August 31, 2010.

All objections made during the post-hearing deposition of Mr. Krause are overruled.

FINDINGS OF FACT

UNDISPUTED FACTS

1. Claimant was sixty-two years of age at the time of the hearing. He married Marelyn Burns in 2002, and together they had three sons, who at the outset of the hearing were aged ten, five, and nine months.

2. Claimant's work history prior to his work for Employer included brief stints working for a supermarket as a "box boy," for an auto dealership washing cars, and for a wholesale aviation company in its parts department.

3. Claimant first worked for Employer from 1970 to 1972, cleaning and painting parts and cleaning up. Employer laid Claimant off in 1972 due to a work slow-down.

4. After his layoff, Claimant worked for about six months as a janitor at the Idaho Department of Transportation before beginning his career as a forklift mechanic with a brief (six months) employment with Hanford Equipment.

5. In 1973 or 1974, Claimant returned to work for Employer as a mechanic in the forklift division, where he remained employed until 1987. Claimant typically worked forty hours per week. As part of his duties as a forklift mechanic, Claimant worked on forklift brakes and clutches. He estimated that over the course of a year he worked on one hundred thirty to one hundred forty forklifts. Claimant's work on forklift brakes and clutches involved the use of compressed air to blow out the dust produced by friction parts, and emery paper or emery cloth to abrade friction components of the brakes and clutches. Claimant used compressed air to clean debris particles off parts after using the emery paper, and to remove dust and debris from the shop area at the end of the workday.

6. During the time that Claimant worked as a forklift mechanic for Employer,

asbestos was a constituent in friction components such as drum brakes and clutches. Although the U.S. eventually stopped using asbestos in many industrial applications because of the documented health risk associated with inhaling asbestos fibers, the use of asbestos in drum brakes and equipment and vehicle clutches continued. Many, but not all, manufacturers of original and replacement parts stopped using asbestos in friction components once the health effects of asbestos were known. Nevertheless, it was possible to purchase replacement parts for drum brakes on vehicles that contained asbestos as late as 1999.

7. In 1987, Claimant became a heavy equipment salesman for Employer and no longer performed mechanical work. Claimant left Employer in 1989 to start his own business.

8. From 1989 until the summer of 2009, Claimant was the owner/operator of A1 Industrial Services (A1). A1 performed regularly-scheduled preventive maintenance (PM) on forklifts for businesses throughout the Treasure Valley. PM services involved oil changes, tune-ups, replacement of belts and hoses, and test-driving forklifts to assure proper operation. At times, Claimant would encounter forklifts that were dirty and he would wipe them down or use the air compressor on his service truck to remove debris. A1 did not do brake or clutch work on the forklifts it contracted to maintain as it lacked the proper equipment and facilities to perform such work. In the course of a year, Claimant would service about eighty forklifts.

9. Over the course of its life, A1 owned several GMC service trucks. There is no dispute that Claimant performed *one* brake job on *one* service vehicle. Claimant was unable to recall *when* he did the brake job. There was some confusion about the vehicle as well, but it seems most likely that he performed the work on a 1989 GMC.

10. Claimant closed A1 in June 2009 and applied for and began receiving social security disability for reasons unrelated to this proceeding.

11. In September 2009, Claimant began experiencing breathing problems. He sought medical care, underwent testing, and on December 21, 2009, received a terminal diagnosis of pleural mesothelioma.

12. During the course of his work with Employer, Claimant was exposed to airborne asbestos. There is a strong relationship between mesothelioma and prior exposure to airborne asbestos.

ADDITIONAL FINDINGS

13. Prior to going to work for Employer as a mechanic in about 1973, Claimant's most significant *potential* exposure to airborne asbestos was limited to his brief employment with Hanford Equipment. Claimant also worked briefly as a janitor for the Idaho Department of Transportation where a part of his job was sweeping floors in the same building where other employees performed vehicle maintenance.

14. Subsequent to his work for Employer, while performing PM for A1, Claimant did not work on forklift clutches or brakes. He did much of the work out-of-doors, he did not use compressed air to blow out brake drums or clean up his work area, and he did not work eight hours a day, five days a week.

15. Apart from his work for Employer, and his brief period at Hanford Equipment, Claimant never worked in any industry where exposure to airborne asbestos is a recognized hazard. Neither did Claimant participate in avocational or recreational pursuits where exposure to airborne asbestos is a recognized hazard.

16. Claimant has no history of tobacco use.

MEDICAL EVIDENCE

17. The only medical evidence presented at hearing is that of Dr. Montgomery—

Claimant's treating oncologist. Dr. Montgomery's unrefuted testimony included the following points:

- There is a strong relationship between mesothelioma and asbestos exposure (stronger than the link between smoking and cancer);
- There is a long latency period between asbestos exposure and the development of mesothelioma—the average latency is thirty-five years;
- Ninety-six percent of patients diagnosed with mesothelioma report a first exposure date more than twenty years in the past—only four percent identify a first exposure that occurred less than twenty years prior to their diagnosis;
- In mesothelioma patients with latency of less than twenty years, the amount of the exposure becomes more important than the period of latency—*i.e.,* a shorter latency period is associated with higher doses of asbestos—an incidental or minimal exposure to asbestos is not strongly associated with a shorter latency period;
- Nearly all of the risk for the development of Claimant's mesothelioma occurred while he worked for Employer—the risk of Claimant developing mesothelioma from incidental exposure occurring after 1990 is about one percent.

INDUSTRIAL HYGIENE

18. Both parties retained industrial hygienists as expert witnesses. Claimant retained Philip John Templin. Mr. Templin received his master of science in industrial hygiene in 1980 and has worked as an industrial hygienist since that time. Mr. Templin became a certified industrial hygienist in 1985 and a certified asbestos consultant in 1992. He specializes in asbestos and lead. In 2002, Mr. Templin went to work for MAS, LLC,[2] of Los Angeles, California where he remained as a senior consultant for the firm at the time of hearing.

19. Defendants retained Michael W. Krause. Mr. Krause obtained his master of science in public health (industrial hygiene and safety) in 1983, and has worked as an industrial hygienist since that time. Mr. Krause earned his certification in industrial hygiene in 1982. He

[2] MAS stands for Materials Analytical Services.

received a similar certification (registered occupational hygienist) in Canada in 1991. In 2002, Mr. Krause went to work for Veritox, Inc., of Redmond, Washington, where he remained as a senior industrial hygienist at the time of his post-hearing deposition.

20. Both men offered similar descriptions of the field of industrial hygiene:

> Industrial Hygiene is that science and art devoted to the recognition, evaluation, and control of those environmental factors that may cause sickness, impaired health and well-being, or significant discomfort among workers or the general community.

Mr. Krause Depo., p. 6. Mr. Templin summed up the field "as the recognition, evaluation, and control of occupational health hazards." Tr., p. 145.

Mr. Templin

21. The bulk of Mr. Templin's testimony related to the amount of asbestos exposure that Claimant received while he worked for Employer as compared his exposure after he left to start his own business. In their briefing, Defendants conceded that, while working for Employer, Claimant encountered airborne asbestos. However, as discussed by Dr. Montgomery, the risk of developing mesothelioma from asbestos is a function of both the amount of exposure and the length of the latency period. Because the issue of Claimant's last injurious exposure is at issue, a brief discussion of this testimony is helpful in analyzing Claimant's claim.

22. Mr. Templin testified that ambient background levels of airborne asbestos range from two fibers per cubic meter of air in a rural setting to around 300 fibers per cubic meter of air in an urban setting. Mr. Templin discussed the exposure rates created by particular tasks that Claimant performed while working for Employer, including:

- 500,000 to 1 million fibers per cubic meter by using emery cloth to rough up friction parts;
- 10 million fibers per cubic meter by using compressed air to blow off work surfaces; and

- 6 million to 30 million fibers per cubic meter by using compressed air to blow out brake and clutch mechanisms.

23. Mr. Templin noted that, while working for Employer, Claimant's exposure to high levels of airborne asbestos was constant while he was at work, and he was never subject to such consistently high levels of asbestos after he left Employer. While working for A1, Claimant did not tear down equipment, or take friction components apart. When equipment needed major repair, Claimant arranged for repair shops to handle the work. Further, Claimant did most of his PM work outdoors—there was no evidence that he regularly worked in a location where others performed major mechanical work, including brakes and clutches. "So, the types of exposure that he incurred at Western States is something that he avoided, just by virtue of the nature of his practice, when he was working with his own company." Tr., p. 163.

24. Mr. Templin also opined that a potential exposure to asbestos while performing one brake job on a service truck was not likely a factor in the development of Claimant's mesothelioma. Mr. Templin explained that manufacturers did not use asbestos in disc brakes after 1985, and that Claimant testified that the service truck had front disc brakes. After 1985, manufacturers of drum brakes had moved away from using asbestos in their brake products, so if Claimant did the brake job on a 1989 vehicle in the early to mid 1990s, it is possible that neither the original equipment brakes or the replacement parts contained asbestos. As Mr. Templin stated, "although I can't unequivocally say that it's impossible that those brakes contained asbestos, I can't say on a more probable than not basis that they did." Tr., p. 164. Mr. Templin went on to note that even if the original brakes and replacement brakes contained asbestos, Claimant's exposure to airborne asbestos "would have been much much lower than the concentration generated by his use of compressed air at Western States." *Id.,* at p. 170.

Mr. Krause

25. Mr. Krause stated in his report, and reaffirmed at hearing, that Defendants retained him to:

> [E]xamine whether [Claimant] would have been exposed to asbestos under employment at A1 Industrial Services when he changed the firm's utility truck brakes or when he drove, examined, or blew lift trucks down with compressed air in the owners' facilities.

Defendants' Ex. C, p. 39.

26. Mr. Krause opined:

> 1) It is not possible to exclude [Claimant] experienced some exposure to ambient asbestos in buildings, . . . particularly when he entered industrial and commercial buildings that may have contained asbestos materials, when he drove forklifts therein, and when he blew collected dust off of those forklifts with compressed air.
>
> 2) The original equipment brakes that [Claimant] changed on his 1989 utility truck were likely asbestos containing. The replacement brakes may have contained asbestos as well.
>
> 3) When he was employed by A1 Industrial Services, [Claimant] would likely have been exposed to some asbestos fibers as a result of removing and replacing the brakes on his 1989 service truck, similar to the exposure from changing brakes on forklifts.

Id., at p. 42.

DISCUSSION AND FURTHER FINDINGS

DISABLEMENT

27. Commencing at Page 9 of their brief, Defendants argue that because of a non-industrial knee condition, Claimant was no longer able to perform his work tasks at Western, and voluntarily left his employment at Western for that reason. From this, Defendants argue that Claimant cannot satisfy the disablement requirement of Idaho Code § 72-437 because he was

already disabled from his employment at Western by his knee condition at the time his mesothelioma first manifested in 2009. Idaho Code § 72-437 provides:

> When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or, in case of his death, his dependents shall be entitled to compensation.

As used in connection with occupational disease cases other than cases involving silicosis, Idaho Code § 72-102(22)(c) defines disablement as follows:

> "Disablement," except in the case of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Although it is clear that Claimant's non-industrial knee condition made it impossible for him to perform his work at Western, it is also clear that following the manifestation of his occupational disease, that disease left Claimant "actually and totally incapacitated from performing his work" at Western. That Claimant may have been previously incapacitated from performing his work at Western for a non-industrial reason is entirely fortuitous and is not relevant to the evaluation of his current occupational disease claim. It is clear that following his 2009 date of manifestation, Claimant did become actually and totally incapacitated from performing his work at Western. There is nothing in the statute which suggests that it was the legislature's intention to relieve an Employer of responsibility for an occupational disease simply because Claimant was compelled to leave his job at Western some years prior to the time of his occupationally induced disability.

28. Idaho Code § 72-439 limits the liability of an employer for payment of compensation for an occupational disease to cases where: (1) "such disease is actually incurred

in the employer's employment," and (2) where "the employee was exposed to the hazard of such disease for a period of 60 days for the same employer" [not at issue here]. Finally, Idaho Code § 72-439(3) states:

> [w]here compensation is payable for an occupational disease, the employer, or the surety on the risk for employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor [sic].

29. Thus, in order to prevail on his claim, this Claimant must prove:

- That he was afflicted by a disease;
- That the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged;
- That the disease was incurred in, or arose out of and in the course of his employment;
- That his last injurious exposure to asbestos fibers occurred while he was employed by Employer; and
- That his death was a consequence of such disease.

As with industrial accident claims, an occupational disease claimant also has the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation is claimed and occupational exposure to the substance or conditions which caused the alleged condition. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990). *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).

30. It is undisputed that Claimant was afflicted by a disease—pleural mesothelioma—that has a strong association with exposure to airborne asbestos. Defendants conceded that Claimant was exposed to asbestos in Employer's workplace. Both industrial hygienists agreed that exposure to airborne asbestos existed in, was characteristic of, and peculiar to locations

where workers handled asbestos-containing friction parts in the 1970s and 1980s. There is unrefuted medical testimony of a causal connection between Claimant's work for Employer and his mesothelioma. There is unrefuted medical testimony that Claimant's mesothelioma was terminal. The only element remaining in Claimant's occupational disease claim is whether his last injurious exposure occurred while in the employ of Employer.

LAST INJURIOUS EXPOSURE

31. Next, Defendants argue that even if it be assumed that Claimant's mesothelioma was caused by exposures at Western, Idaho Code § 72-439(3), commonly known as the last injurious exposure rule, insulates Western from liability, and places responsibility for Claimant's occupational disease with his self-employment. Defendants posit that the last injurious exposure rule is not necessarily intended to, though it frequently does, assign responsibility between two or more entities responsible for contributing to the development of an injured workers' occupational disease. Rather, the rule is intended to mechanically govern the assignment of responsibility and depends only on identifying the last employer in whose employ an injured worker was exposed to an occupational hazard that could have contributed to the development of the disease, quite apart from the question of whether that exposure actually contributed to the development of the disease in question. *See,* Defendant's Brief at P. 15. In other words, according to Defendants, it is not necessary to show that the last exposure actually caused, or contributed to Claimant's disease in order to hold that employer liable; it is enough to show that the exposure was potentially injurious.

32. Proper evaluation of Claimant's argument requires closer examination of the provisions of Idaho Code § 72-439 and the last injurious exposure rule contained therein. Idaho Code §72-439 provides:

> (1) An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.
>
> (2) An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.
>
> (3) Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.

It is first worth noting that the only Employers who can be held responsible for an occupational disease are those in whose employment the injured worker "actually incurred" the occupational disease. *See,* Idaho Code § 72-439(1). In this context, incurred is the equivalent of "arising out of and in the course of" employment. *See,* Idaho Code § 72-102(21)(b); *Sunquist v. Precision Steel and Gypsum, Inc.,* 141 Idaho 450, 111 P.3d 135 (2005). It is axiomatic that an injury is deemed to arise out of employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. (*See, Kiger v. Idaho Corporation,* 85 Idaho 424, 380 P.2d 208 (1963). Therefore, as with accident/injury claims, the injured worker who pursues an occupational disease claim against his employer must demonstrate that the disease is causally related to the hazards to which the injured worker was exposed in the course of that employment. *See, Sunquist v. Precision Steel and Gypsum, Inc., supra.*

33. As is the case in many jurisdictions, Idaho has adopted a last injurious exposure rule for the purpose of assigning responsibility between two or more employers in whose employ an injured worker was "injuriously exposed" to the hazards of the occupational disease in question. It seems clear that, at the very least, in order for an employer to be held liable under the last injurious exposure rule, it must be demonstrated that the injured worker had <u>some</u> exposure to the occupational hazard thought to be responsible for the disease. For example, let it

be assumed that an individual worked for three successive employers over a thirty year period. For the first two such employers, Claimant worked as an underground miner, and was exposed to hazardous quantities of rock dust. Claimant left underground mining, and thereafter worked for ten years as a car salesman before being diagnosed with silicosis. Clearly, even though Claimant's employment as a car salesman was his last employment, no one would argue that this employment was implicated in exposing Claimant to the hazard of developing silicosis. Therefore, absent some threshold showing that the employment in question exposed the injured worker to the hazard of contracting the occupational disease, the last injurious exposure rule is not implicated for that particular employer. The narrow question that is presented by the facts of the instant case is not whether there is some evidence that Claimant was exposed to the hazards of his occupational disease during his period of self-employment, but rather, whether the evidence is sufficient to establish that those exposures were "injurious" for the purposes of the application of the rule. In connection with their defensive use of the last injurious exposure rule, what is the quantum of proof which Defendants must adduce in order to satisfy the requirement of demonstrating that Claimant suffered an injurious exposure to asbestos containing products/materials in the course of his self-employment?

34. The Commission's review of Supreme Court and Commission decisions does not reveal any past treatment of this particular issue. Decisions from other jurisdictions run the gamut. At one end of the spectrum are jurisdictions which have determined that as long as there is some exposure of a kind that could have caused the disease in question, the last employer on the risk is liable for all disability from that disease. In such jurisdictions, the inquiry is not whether the conditions of the last employment actually caused the disease, but whether the conditions of the last employment would have been sufficient to cause the disease had Claimant

undergone a long term exposure of those hazards. *See,* Larsen's Workers' Compensation Law, § 153.02; *Liberty Northwest Ins. Corp. v. Montana State Fund*, 353 MT 299, 219 P. 3d 1267 (2009). This leads to the not infrequent outcome, in jurisdictions that have adopted this or a similar rule which does not depend on proof of actual causation, of an employer being held responsible for an occupational disease after having employed the injured worker for only a very brief period of time.

35. At the other end of the spectrum are those jurisdictions which have determined that in order for an exposure to be deemed "injurious," there must be some proof that the hazardous exposure in question contributed to the development of the disease in question. Representative of these jurisdictions are those which have adopted the so-called "substantial contributing factor" test. *See, Busse v. Quality Insulation,* 322 N.W.2d 206 (Minnesota 1982). For example, in *Halverson v. Larrivy Plumbing and Heating Company*, 322 N.W.2d 203 (Minnesota 1982), Claimant had worked as a plumber for over thirty years. In the course of his various employments, he had been exposed to asbestos containing products/materials. He eventually developed asbestosis, and was disabled. His last employer was not held liable for Claimant's occupational disease because medical testimony indicated that his recent exposures in that employment would not result in any measurable injury for another five years or more. Accordingly, the exposures could not be considered to be a substantial contributing factor to the development of Claimant's current disability.

36. In between these two extremes are a few jurisdictions who have adopted an approach that favors a lower degree of causation. In *Rutledge v. Tultex Corporation,* 308 N.C. 85, 301 S.E.2d 359 (1983), Claimant, a textile worker, was employed for many years by a number of successive employers. She developed respiratory problems, eventually diagnosed in

1976 as chronic obstructive pulmonary disease with elements of pulmonary emphysema and chronic bronchitis. At the time, North Carolina had a last injurious exposure rule similar to the current provisions of Idaho Code § 72-439:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the [*89] risk when the employee was so last exposed under such employer, shall be liable.

37. North Carolina interprets the term "last injuriously exposed" to mean an exposure which proximately augmented the disease to any extent, however slight. *See, also, Haynes v. Feldspar Producing Company,* 222 N.C. 163, 22 S.E.2d 275 (1942). Under such test, in order for an employer to be held responsible under the last injurious exposure rule, Claimant only need demonstrate that the hazards to which the injured worker was exposed contributed to the development of his or her disease, even though the amount of contribution was slight.

38. Again, there are no reported decisions from Idaho which treat the question of type and amount of proof necessary to establish that an exposure is indeed "injurious." However, the Commission believes that a plain reading of the statute demonstrates that it is clearly intended only to apply to assign responsibility for an occupational disease as between the two or more employers whose employment of the injured worker actually contributed to the development of the disease in question. Support for this proposition is most clearly seen in the language of Idaho Code § 72-439(1), discussed above, which makes it clear that only those employments which contribute to the development of an injured workers' occupational disease can be held responsible for the payment of benefits. It follows that in order to hold an employer responsible under the last injurious exposure rule, it must be demonstrated that there is some causal connection between the hazards of the employment, and the development of the occupational disease. Otherwise, the last injurious exposure rule contained at Idaho Code § 72-439(3) runs

headlong into the overarching requirement of Idaho Code § 72-439(1). This interpretation finds further support in *Sunquist v. Precision Steel and Gypsum, Supra.* In *Sunquist,* Claimant was employed as a drywall taper by a number of successive employers. A drywall taper smoothes "mud" over sheetrock seams. The work involves using trowels to spread the mud evenly. The pressure that must be applied by the employee in performing this work constitutes a hazard of developing several upper extremity maladies. Sunquist worked as a taper for a number of employers before he first came to be employed by Precision in 2002. While employed by one of these earlier employers, Sunquist began to experience mild pain and discomfort in his wrists and forearms. After he began work for Precision in 2002, the demands of his work increased, and he developed increasing pain/discomfort in his upper extremities, finally diagnosed as cubital tunnel syndrome. In defending Sunquist's claim for worker's compensation benefits, Precision argued that although the manifestation of Sunquist's occupational disease took place during the period of his employment by Precision, the occupational disease was first "incurred" when Claimant was employed by the earlier employer, in whose employ Claimant first developed symptomatology. Precision contended that an occupational disease is "incurred" at the point in time that Claimant first suffers symptoms of the disease. Therefore, Claimant's occupational disease was incurred while he was working for an earlier employer, and that employer, rather than Precision, should be held liable. The Supreme Court rejected Precision's argument that "incurred," as used in Idaho Code § 72-439(1) refers to an identifiable point in time when an occupational disease comes into existence. Rather, the Court concluded that the term as used in that section simply means that the occupational disease arose out of and in the course of employment, *i.e.* that the occupational disease was causally related to the employment. The Court then stated:

> As an occupational disease develops over time, it is possible for the disease to be "incurred" by a Claimant under a series of different employers before it becomes manifest. In such a situation, Idaho Code Section § 72-439(3) provides that it is the last such employer, or its surety, who is liable to the Claimant.

The quoted language makes it apparent that the Court recognizes that an occupational disease may be causally related to more than one employment. In such cases, the last such employer, *i.e.* the last employer in whose employ Claimant was exposed to an occupational hazard which contributed to the development of the occupational disease, is the one who is held responsible under the last injurious exposure rule.

39. Although the Commission finds that a proper application of the last injurious exposure rule requires some showing that the hazard to which an injured worker was exposed in the course of his last employment actually contributed to the cause of the occupational disease, the Commission finds no support for the proposition that the statute requires that an employer can only be held liable under the last injurious exposure rule if it is demonstrated that the hazard to which the Claimant was exposed in that employment were a "substantial contributing factor" to the development of the disease. The Commission concludes that in order for the last injurious exposure rule to apply, it must first be demonstrated that the employment in question did in fact expose the injured worker to the hazard of contracting the occupational disease at issue. Next, in order for that employer to be held liable under the last injurious exposure rule, it must be demonstrated that the hazard to which the injured worker was exposed actually did contribute, however slightly, to the development of the disease, and Claimant's eventual disability.[3]

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[3] Defendants assert, and Claimant does not contest, that whatever the extent of Claimant's exposure to asbestos during his self-employment, that exposure took place over a period exceeding 60 days. Since the minimum exposure requirement for this non-acute occupational disease has been met, (s*ee,* Bint v. Creative Forest Products, 108 Idaho 116, 697 P.2d 818 (1985)) we do not reach the question of whether application of the last injurious exposure rule would be mooted by proof that Claimant was not exposed to the hazards of his disease in his self-employment for at least 60 days. *See*, Idaho Code § 72-439 (2).

40. Applying this rule to the facts of the instant matter requires examination of the medical testimony of Paul Montgomery, M.D., and industrial hygienists Templin and Krause. From the testimony of Claimant, and that of Mr. Templin and Mr. Krause, it seems that there is no consensus on the question of whether, during his years of self-employment, Claimant may have been exposed to the hazards of developing asbestos related lung disease. There was some testimony supporting the conclusion that Claimant was exposed to asbestos containing materials at some point in time in the early 1990's as the result of servicing the brakes on his 1989 service truck. As well, there was some testimony that in the course of the service work he performed for area forklift owners, he was exposed to some amount of asbestos dust or fibers. However, even if it be assumed that Claimant was exposed to the hazard of developing mesothelioma during his self-employment, it is clear that Defendant's have failed to demonstrate that these exposures were of a type that more probably than not contributed to the development of Claimant's disease.

41. The only medical testimony on this question came from Dr. Montgomery. His testimony establishes that when airborne particles of asbestos are inhaled, they eventually lodge in the small air sacs of the lungs. Because they are foreign particles, they provoke an immune response from the body's immune system. The immune system attempts to degrade, break down, or destroy the offending particles using a variety of tactics. This smoldering skirmish goes on for many years, without destroying the asbestos particles. However, the attack does generate chemicals and compounds which, ironically, damage other healthy tissue, and set up a chronic inflammatory process. Damage to the pleural mesothelium cells by these compounds and chemicals eventually leads to the development of malignant mesothelioma. Dr. Montgomery's testimony makes it clear, however, that there is typically a long period of latency between an individual's exposure to asbestos, and the manifestation of asbestos related disease.

Because of this phenomenon, Dr. Montgomery testified that only one to five percent of mesotheliomas arise from exposures occurring less than twenty years before the date of manifestation. He testified that there is a one to five percent chance that exposure occurring twenty to fifteen years prior to the date of manifestation would be a causative factor in the development of Claimant's disease. However, he stated that in order for this rule to apply, the exposure would have to be heavy. According to Dr. Montgomery, for more recent exposures, there is a dose response to asbestos exposure. Therefore, in this case, after approximately 1989, only heavy exposure to asbestos containing products/materials would be relevant to the development of Claimant's condition.

42. Even so, after being apprised of the evidence on Claimant's asbestos exposure during his period of self-employment, Dr. Montgomery remained unequivocal in his overall opinion that the odds are "overwhelming" that Claimant's diagnosis of mesothelioma is only related to exposures which pre-date 1990. (*See,* Montgomery dep. 112/19-113/5; 137/4-17).

43. In all the time since Claimant left his employment with Western, he performed one brake job on his own 1989 service vehicle. Even granting Defendant's argument that this brake job did involve asbestos-containing materials, that exposure pales in comparison to the many brake and clutch jobs performed by Claimant in the course of his employment by Western. Tr., pp. 169/18 – 170/21. Defendant's evidence on the extent of Claimant's other exposures during the course of his self-employment is even less persuasive. Mr. Krause supposed that because Claimant did his forklift servicing work at various industrial sites and businesses, it is quite possible to imagine that asbestos-containing products might have been used in the construction of those buildings and that dust or fibers from those materials might find their way onto the surface of a forklift that Claimant was examining or servicing, only to be disturbed and

made available for inhalation by Claimant when Claimant might have used an air hose to blow off a forklift. Mr. Krause's supposition piles possibilities upon possibilities and lends no support to the proposition that Claimant's asbestos-related lung disease is in any wise, causally related to these exposures. It is also worth noting that Mr. Krause was charged by Defendant's only with the task of ascertaining whether Claimant was exposed to asbestos-containing products/materials in the course of his self-employment, not whether any of these exposures were significant enough to contribute to the development of Claimant's disease. Further doubt is cast on Mr. Krause's testimony by the answer he gave to one of the last questions posed to him on cross examination. Even though Mr. Krause had a good understanding of Claimant's asbestos exposure during the course of his employment by Western, he stated that he could provide no response to the question of whether Claimant's exposure to asbestos was greater during his period of employment by Western, as opposed to his period of self-employment. His reluctance to admit a fact which appears to be unambiguously established by the evidence calls his other conclusions into doubt.

44. On the other hand, Claimant's expert, Mr. Templin, testified convincingly that Claimant had no significant exposure to airborne asbestos particles while performing forklift work during his period of self-employment. He based his opinion on the evidence of record, not on faulty assumptions or conjecture. Mr. Templin's opinion on Claimant's exposure to airborne asbestos while performing forklift maintenance work during his period of self-employment is supported by the record and is persuasive. As well, on the question of Claimant's asbestos exposure from changing one set of brake pads at some point in time following 1989, Mr. Templin explained that even if the brake pads did contain asbestos, Claimant's exposure from this one-time event was not significant as compared to his exposures while employed at Western.

45. In view of the foregoing, the Commission concludes that the Defendants have failed to adduce substantial and competent evidence which would support a conclusion that Claimant's asbestos related disease, is in some part, causally related to his exposure to asbestos containing products/materials during the period of self-employment. Since the Commission finds that the exposures suffered by Claimant during his period of self-employment are not implicated in the genesis of his condition, there is no basis in Idaho law to assign responsibility for Claimant's occupational disease to his period of self-employment under the last injurious exposure rule.

PRE-EXISTING OR SUBSEQUENT CONDITION

46. The issue of a pre-existing or subsequent condition or injury is included within the parties' stipulation as an issue to be decided. How this issue is pertinent in this proceeding is unclear. If it is directed to whether Claimant was exposed to airborne asbestos before or after his employment with Employer, that discussion is subsumed by the analysis required to establish liability for a compensable occupational disease. In any event, Defendants did not pursue this line of defense in their brief, and the Commission considers it waived.

ATTORNEY FEES

47. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which *requires* the Commission to award attorney fees when:

- An employer or surety contests a claim for compensation made by an injured employee without reasonable ground; or

- An employer or surety neglects or refuses to pay to the injured employee or his dependents the compensation provided by law within a reasonable time after receipt of a written claim for compensation; or

- An employer or surety stops paying compensation provided by law and justly due without reasonable grounds.

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

48. Claimant asserts that he is entitled to an award of attorney fees because Defendants were unreasonable in denying and refusing to pay his claim. Claimant notes, as does the Commission, that this matter received expedited handling throughout the adjudication process. The matter was brought to hearing within four months after the claim and complaint were filed—a time-line that could not have happened without the cooperation of Defendants.

49. However, Claimant asserts that by the date of the first hearing on May 6, Defendants had an opportunity to thoroughly investigate this simple claim and provide a reasonable basis for their denial and Defendants did not do so. The Commission disagrees. Although Defendants certainly had time to conduct an investigation into the factual underpinnings of this case prior to the May 6 hearing, that factual investigation would not avail Defendants in resolving the issue of first impression upon which their defense is based. Although the Defendant's interpretation of the last injurious exposure rule ultimately proved unpersuasive, the Commission cannot say that the defense was unreasonably interposed for the purpose of denying or delaying the payment of benefits. As noted, other jurisdictions with a statutory scheme similar to that of Idaho, have interpreted the last injurious exposure rule as urged by Defendants. We find no evidence that the defense was interposed for the purpose of unreasonably denying or delaying the payment of benefits, and therefore decline to award attorney's fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant suffers from a compensable occupational disease.

2. Claimant's last injurious exposure to airborne asbestos occurred while employed by Defendant Employer.

3. There is no evidence that Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition.

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

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ORDER

1. Claimant suffers from a compensable occupational disease.

2. Claimant's last injurious exposure to airborne asbestos occurred while employed by Defendant Employer.

3. There is no evidence that Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition.

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

IT IS SO ORDERED.

DATED this _4th_____ day of _January_____, 2011__.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _4th__ day of __January_____, 2011__, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

MAX M SHEILS JR
PO BOX 388
BOISE ID 83701-0388

SCOTT HARMON
PO BOX 6358
BOISE ID 83707-6358

_/s/_____