BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL FEDERKO, Claimant, v. SUN VALLEY COMPANY, Employer / Self-Insured, Defendant.	)	**IC 2008-017353** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED: January 28, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on May 11, 2010. Claimant, Michael Federko, was present in person and represented by Daniel Luker, of Boise. Defendant Employer, Sun Valley Company (Sun Valley), is self-insured and was represented by R. Daniel Bowen, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on October 4, 2010.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code §§ 72-701 through 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604.
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.

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

   a. Medical care;

   b. Temporary Partial and/or Temporary Total Disability benefits (TPD/TTD);

   c. Attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts he suffered an industrial accident on August 21, 2007, which caused pulmonary emboli (discovered in November 2007) and recurrent pulmonary emboli (discovered in February 2009). He maintains that Defendant's initial acceptance and payment of his medical expenses from November 2007 through approximately December 2008 constitutes a waiver of statutory notice and claim requirements, that Defendant had knowledge of the accident and was not prejudiced by any untimely notice, and that Defendant's present denial is unreasonable.

Defendant acknowledges Claimant's August 21, 2007 industrial accident, but asserts that Claimant failed to provide notice within 60 days thereof as required by Idaho Code § 72-701 and that Defendant has been prejudiced by such failure. Defendant also maintains that Claimant's pulmonary emboli arise from causes other than his industrial accident and that Defendant's decision to contest the claim is reasonable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant, taken February 5, 2010;
3. The testimony of Claimant, Claimant's wife, Amy Federko, Matthew Parkes, and Michael Haxby, taken at the May 11, 2010 hearing;
4. Claimant's Exhibits A through H and Defendant's Exhibits 1 through 20, admitted at the hearing;

5. The post-hearing deposition testimony of George Rodgers, M.D., Ph.D., taken June 17, 2010;

6. The post-hearing deposition testimony of Wayne Samuelson, M.D., taken June 29, 2010; and

7. The post-hearing deposition testimony of Robert Friedman, M.D., taken July 21, 2010.

The objection posed during Dr. Friedman's deposition is sustained. After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 60 years old and had resided in Ketchum for 20 years at the time of the hearing. He was raised and graduated from high school in New York state. He spent two years ski racing competitively and then served in the U.S. Army during the Viet Nam conflict. Thereafter, Claimant worked at Lake Tahoe as a member of the ski patrol.

2. In 1978, Claimant began working for Sun Valley. Over time he received additional and increasing responsibility. By September 1999, Claimant was Sun Valley's director of mountain operations and managed all mountain operations at Sun Valley except food services and ski school. He regularly skied and hiked around the mountain in the performance of his work duties. Claimant directly supervised 15 managers and, through them, directed approximately 300 employees. Sun Valley provided Claimant health insurance benefits as part of his compensation.

3. In mid-2001, Claimant was thrown from a horse and fractured two ribs on his left side. In August 2001, Claimant began feeling weak and low in energy. He was treated by Donald Levin, D.O., his primary physician in Hailey, and was diagnosed with atrial fibrillation. In October 2001, Claimant lapsed into atrial fibrillation and was placed on an anticoagulant

regime. He was also treated with Amiodarone in 2000 and 2001. This caused severe shortness of breath. Diagnostic testing in 2002 disclosed an interatrial septal bulge toward the right atrium consistent with an interatrial septal aneurysm and pulmonary hypertension. In October 2002, Claimant underwent an ablation procedure that resolved his atrial fibrillation episodes. Further diagnostic testing in November 2002 revealed no evidence of any left atrial thrombus.

4. In March 2003, Claimant fell from a horse. He sustained a concussion and fractured his left clavicle and his left second and possibly third ribs.

5. In October 2005, he fell again from a horse and fractured five ribs on his right side, including his third, seventh, eighth, ninth, and tenth ribs. Some of the rib fractures were displaced. The fracture of the right eighth rib apparently went on to nonunion. Claimant experienced shortness of breath and was placed on oxygen at home. He developed a pneumothorax, and 1.2 liters of bloody fluid was drained from his chest. His right lung was noted to be elevated. He recuperated sufficiently to return to skiing by the first week of December 2005 and worked and skied during the 2005-2006 season.

6. On July 24, 2006, Claimant presented to a local hospital with abdominal pain and was ultimately diagnosed with ileus and a right diaphragmatic hernia. On July 28, 2006, Claimant underwent arthroscopy at a Ketchum hospital. However, complications arose when portions of his bowel were found to be gangrenous, protruding through the right diaphragmatic hernia and displacing the lower lobe of his right lung. The surgery was converted to an open right hemicolectomy lasting three hours and 20 minutes. Claimant developed a hemothorax and on July 31, 2006, his chest and pleural cavity were drained. On August 5, 2006, an abdominal and pelvic CT scan documented a non-occluding thrombus within the superior mesenteric vein. Claimant's bowel obstruction persisted after surgery and on August 7, 2006, he was taken via emergency helicopter to the University of Utah Medical Center in Salt Lake City. During

transport, he hiccupped and eviscerated from his right upper quadrant incision. He underwent emergency ileocolic resection at the University of Utah Medical Center. The July and August surgeries removed approximately 30% of his colon and 40% of his small intestines. Claimant was hospitalized for approximately three weeks and in bed approximately five weeks. His doctors expected a full recovery and he later returned to work.

7. In the fall of 2006, Claimant contracted bronchitis and was treated with antibiotics. He developed chronic sinusitis, and sinus surgery was recommended. He continued working.

8. In February 2007, Claimant followed up for his right hemicolectomy, right diaphragmatic hernia repair, and subsequent ileocolic resection. He reported continued abdominal pain, mainly around the incisional site. However, no abscess was identified.

9. On June 5, 2007, Claimant presented to Thomas Acomb, M.D., reporting coughing, occasionally severe. Dr. Acomb recorded his impressions of cough, etiology uncertain, and possible restrictive airway disease. He recommended pulmonary evaluation. On June 29, 2007, Claimant presented to Ronald Fullmer, M.D., in consultation to rule out lung problems. Claimant denied shortness of breath with light activity around home; however he reported coughing, wheezing, fatigue, shortness of breath, and dyspnea on exertion. Dr. Fullmer suspected asthma, prescribed Prednisone, and scheduled Claimant for a complete pulmonary function study in four weeks.

10. On July 3, 2007, Claimant reported to Dr. Acomb that his shortness of breath was worsening after finishing his Prednisone prescription the prior week. Dr. Acomb renewed the Prednisone prescription.

11. On July 20, 2007, Claimant twisted and sprained his right ankle at work. He completed and submitted a notice of this work-related injury. He wore an ankle brace for several weeks, but was mobile and active. Claimant continued to note shortness of breath.

12. On August 3, 2007, Claimant underwent pulmonary function testing and returned to Dr. Fullmer reporting that his cough and right lower chest pain had improved. Claimant's pulmonary function testing showed moderately reduced diffusion capacity and mild obstructive airway disease. Dr. Fullmer's impression was chronic obstructive pulmonary disease. He suspected possible Amiodarone hypersensitivity or mild to moderate emphysema. He prescribed Combivent for Claimant's wheezing and shortness of breath and planned to follow-up in six months with another pulmonary function study.

13. By mid-August 2007, a wildfire threatened Sun Valley property. Claimant worked ten or more hours daily, seven days per week supporting U.S. Forest Service fire suppression crews. On or about August 21, 2007, Claimant was holding a high pressure water hose under his right arm while filling 16,000 gallon containers when the water pressure unexpectedly surged. Claimant hung onto the hose as it thrashed about and was thrown repeatedly to the ground. The surging water pressure in the hose was later estimated at 275 psi. When the hose was shut off, Claimant found himself face down in the mud. He was sore on his right side from his shoulder to his waist. Upon arising he thought he might have sustained fractures, but after slowly walking around he concluded that no bones were fractured. Claimant made no report of the incident at that time. He continued his demanding work schedule for several weeks until the threatening fire abated.

14. By October 2007, Claimant noted that he was often fatigued, out of breath, and lacked his usual physical stamina. On October 12, 2007, he presented to Mary O'Rourke, PA-C, for continued sinusitis. Claimant reported shortness of breath, which was ongoing since July 2007.

15. On November 14, 2007, Claimant presented to Marshall Smith, M.D., at the University of Utah, for treatment of his chronic cough and hoarseness. He continued to report shortness of breath ongoing since July 2007. Claimant underwent a CT scan on November 15,

2007, that revealed pulmonary emboli in all lobes of both lungs. He was hospitalized for four days and treated with anticoagulants. Holly Carveth, M.D., assisted with Claimant's care and inquired whether he had sustained any recent traumatic injuries. Dr. Carveth recorded Claimant's report of a nine or ten-hour airplane flight in May and of being thrown to the ground on his right shoulder several times by a fire hose in late August. Dr. Carveth's progress note of November 16, 2007, recorded: "Symptoms of dyspnea began 4 months ago and have been steadily progressive until he could walk only about 10 feet without stopping due to dyspnea. About two months ago, his chest was injured by recoil from a fire hose, and he was exposed to smoke from forest fires." Defendant's Exhibit 17, p. 584. Dr. Carveth then assessed: "Given the history of gradual increased shortness of breath and no acute changes, likely the patient has chronic pulmonary emboli, and the patient has no obvious causes, a recent long travel, and no symptoms of deep venous thrombosis present." Defendant's Exhibit 11, p. 456. At hearing, Claimant testified that he understood Dr. Carveth thought the fire hose incident might have been the cause of his pulmonary emboli.

16. After his release from the hospital, Claimant returned to work, and no earlier than November 21, 2007, told Sun Valley human resources manager Matt Parke about the fire hose incident in August and his subsequent pulmonary emboli and hospitalization. Claimant requested that Parke handle this as a work-related injury. Claimant's wife testified that this conversation occurred before Christmas 2007. Parke testified that the conversation and request occurred no sooner than January 1, 2008. Parke later told Claimant that the issue had been transferred for handling under Sun Valley's workers' compensation coverage.

17. In February 2008, Claimant underwent sinus surgery. He continued on prescription anticoagulants until May 2008. He reported dyspnea to Dr. Samuelson in September, October, and December 2008 and January 2009.

18. In February 2009, Claimant developed increased shortness of breath and left calf pain that was worse with movement. On February 9, 2009, he presented to Dr. Levin, who suspected deep vein thrombosis. A Sun Valley corporate jet flew Claimant to Salt Lake City for treatment. An ultrasound revealed left lower extremity thrombi and bilateral pulmonary emboli. Claimant came under the care of Wayne Samuelson, M.D, head of the pulmonary department of the University of Utah Medical Center. Claimant commenced anticoagulant therapy and was hospitalized for approximately four days.

19. In March 2009, Sun Valley denied Claimant further workers' compensation benefits. Claimant continued on prescription anticoagulants and did not go up on the mountain for fear that a fall could have devastating effects. He was short of breath even after his pulmonary emboli dissolved.

20. On June 1, 2009, Sun Valley terminated Claimant's employment because his physical abilities had been greatly diminished by his pulmonary emboli episodes and he could no longer perform his duties.

21. At the time of the hearing, Claimant continued taking prescription anticoagulants and will likely do so for the rest of his life. He uses oxygen at home, but does not use portable oxygen.

22. Having observed Claimant at hearing and compared his testimony to the other evidence of record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

23. 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). 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).

24. **Notice.** The first issue is whether Claimant provided notice of his accident as required by Idaho Code § 72-701. Defendant maintains that Claimant's claim is barred due to lack of timely notice. Idaho Code § 72-701 provides in pertinent part:

> NOTICE OF INJURY AND CLAIM FOR COMPENSATION FOR INJURY – LIMITATIONS. No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident or, in the case of death, then within one (1) year after such death, whether or not a claim for compensation has been made by the employee. Such notice and such claim may be made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required.

The notice must be sufficient to apprise the employer of any accident arising out of and in the course of employment causing the personal injury. Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995).

25. The record establishes, and Claimant acknowledges, that he did not give written notice of his work injury until well beyond 60 days after it occurred. However, Claimant asserts that Defendant voluntarily paid compensation benefits, had actual knowledge of the industrial accident, and was not prejudiced by the late notice.

26. Voluntary payment. Claimant argues that Defendant voluntarily paid compensation, thus waiving the notice requirements of Idaho Code § 72-701. It is undisputed that Defendant paid substantial medical costs arising from this claim. Sun Valley does not, and represents that it will not, seek repayment of any of these costs. Sun Valley readily acknowledges that voluntary payments replace the need for making a claim within one year, but asserts that voluntary payments do not eliminate the statutory notice requirement.

27. The plain language of Idaho Code § 72-701 clearly provides that "If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required." (Emphasis supplied.) However, the statute contains no similar provision obviating the requirement of notice within the prescribed period. Claimant herein failed to give timely notice of his August 21, 2007 accident and his claim is barred by Idaho Code § 72-701, unless he satisfies the provisions of Idaho Code § 72-704.

28. Idaho Code § 72-704 provides in pertinent part:

> A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

29. Knowledge. Claimant asserts that Defendant had actual knowledge of Claimant's industrial accident within the 60-day period because Claimant was himself a member of upper management and thus an agent of Defendant, and that Claimant's knowledge, although not communicated to any other supervisor within the 60-day period, is imputed to Defendant by virtue of Claimant's position as a Sun Valley manager.

30. In Dick v. Amalgamated Sugar Co., 100 Idaho 742, 605 P.2d 506 (1979), Dick was a warehouse foreman charged with administering the employer's workers' compensation policy of timely reporting industrial accidents. Dick alleged an industrial accident, but did not provide his employer notice thereof until four months after its occurrence. The Supreme Court affirmed a finding that Dick's claim was barred for lack of timely notice. However, the imputed knowledge argument was apparently not raised.

31. "The requirement that notice of an accident be given to an employer 'is to give the employer or someone on his behalf timely opportunity to make an investigation of the accident and surrounding circumstances to avoid payment of an unjust claim.'" Page v. McCain Foods, Inc., 141 Idaho 342, 345, 109 P.3d 1084, 1087 (2005), citing Taylor v. Soran Rest., Inc., 131 Idaho 525, 528, 960 P.2d 1254, 1258 (1998). The notice requirement also provides the employer and its surety the "opportunity to … afford claimant … such reasonable medical, surgical and attendant treatment, hospitalization and kindred services as required, or requested by him immediately after the injury and for a reasonable time thereafter, which right is specifically accorded to an employer." Findley v. Flanigan, 84 Idaho 473, 483, 373 P.2d 551, 557-558 (1962). Thus the purpose of the statutory notice requirement is to position the employer to make further inquiry, investigation, and fulfill its statutory obligation to provide medical care and other relevant benefits for the injured employee. Imputing notice to the employer based on knowledge to which only the injured worker is privy would not further the legislative objectives behind the statute. As a practical matter, endorsing such a course would entirely eviscerate the notice requirement as to every managerial level employee and supervisor. It would invite abuse and frustrate the legislative goal of providing prompt care for industrial injuries.

32. Claimant herein was aware of the usual accident reporting procedures at Sun Valley because he had handled numerous notices of industrial injuries by employees he supervised. He had filed previous notices himself—the most recent when he twisted his ankle at work scarcely two months before the fire hose incident. Claimant did not complete an incident report for his August 21, 2007 accident until May 2008. The Referee is not persuaded that Claimant's knowledge of his accident within the 60-day statutory period should be imputed to Defendant.

33. Prejudice. Defendant argues that Claimant has failed to prove that it has not been prejudiced by the delay in giving notice. Defendant maintains that had Claimant's accident been

timely reported, Defendant would have had an opportunity to discuss the accident with a fire crew eyewitness and send Claimant for prompt medical evaluation and treatment that would have assisted in mitigating any potentially injurious effects and in determining the etiology of his pulmonary emboli.

34. The Court in Jackson v. JST Manufacturing, 142 Idaho 836, 136 P.3d 307 (2006), observed that Idaho Code § 72-704 gives the employer a favorable presumption and it is a claimant's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. A worker's assertions that there would have been no change in the surety's investigation of the claim or in the worker's medical treatment if notice had been timely do not discharge a claimant's burden to prove lack of prejudice. Kennedy v. Evergreen Logging Co., 97 Idaho 270, 543 P.2d 495 (1975).

35. In Findley v. Flanigan, 84 Idaho 473, 483, 373 P.2d 551, 557-558 (1962), the Court declared:

> The record affirmatively shows, by reason of lack of timely notice and knowledge of the accident on the part of respondent Company or any partner, that neither the Company nor its surety was afforded opportunity to investigate the alleged accident and injury, nor to afford claimant, if an injured employee, such reasonable medical, surgical and attendant treatment, hospitalization and kindred services as required, or requested by him immediately after the injury and for a reasonable time thereafter, which right is specifically accorded to an employer by the provisions of I.C. § 72-307.
>
> The Industrial Accident Board, after finding that claimant failed to give any written notice to respondent company until 85 days after the accident and that the Company had no knowledge of any industrial accident involving claimant until not earlier than a week preceding February 25, 1961, then found and ruled:
>
> > It is affirmatively shown in the record that the defendants were prejudiced by such delay, particularly with respect to their right to designate claimant's attending physician or physicians. Prior to February 18, 1961, claimant had been confined in hospitals in Lewiston, Idaho, and Spokane, Washington, from December 6, 1960, to January 15, 1961, and undergone surgical treatment while in the Spokane hospital, and subsequently had been under

> continuous after-care by the Lewiston physician. All of such medical, surgical, hospital and kindred treatment was obtained by claimant on his own initiative without notice to, demand upon, knowledge or authorization of the defendants or any of them.

36. In the present case, Claimant's pulmonary emboli, which he alleges were caused by his industrial accident, were discovered during a routine examination on November 16, 2007. Defendant had no opportunity to designate Claimant's attending physicians or even to consider, authorize, or evaluate Claimant's medical care until well after the fact. No imaging studies were done of Claimant's legs or abdomen when he was treated for pulmonary emboli in November 2007. Such studies would have helped locate the origin and etiology of his pulmonary emboli. Rodgers' Deposition, p. 31. By the time Claimant notified Defendant of his condition and alleged that such was due to an accident in August 2007, Claimant had been on anticoagulant therapy for weeks and his emboli had dissolved, precluding a full evaluation of their etiology. As in Findley, delayed notice herein prejudiced Employer. Claimant has failed to rebut the presumption of prejudice arising from untimely notice.

37. Claimant has not proven that the bar to his claim arising from Idaho Code §72-701 is averted by satisfaction of the provisions of Idaho Code § 72-704.

38. Having failed to prove timely notice, timely actual knowledge, or lack of prejudice, Claimant's claim is barred and further analysis is unnecessary. However, even if his claim were not time-barred, medical causation has not been established.

39. **Causation.** An employer is obligated to provide medical treatment necessitated by an industrial accident. Idaho Code § 72-432. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of

employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

40. In the present case, several physicians have opined regarding the causation of Claimant's pulmonary emboli. Their opinions are examined below.

41. Dr. Levin. Dr. Levin treated Claimant in Ketchum and opined that Claimant's pulmonary emboli were caused by his August 2007 industrial accident because Dr. Levine could identify no other precipitating events or factors contributing to development of the emboli. He did not address or indicate any awareness of Claimant's prior mesenteric vein thrombus.

42. Dr. Carveth. Dr. Carveth treated Claimant at the University of Utah Medical Center in November 2007, when his pulmonary emboli were initially discovered. Dr. Carveth specifically asked if Claimant had sustained any recent traumatic injuries and recorded Claimant's report of being thrown to the ground on his right shoulder several times by a fire hose in late August. Dr. Carveth's note of November 16, 2007, recorded: "Symptoms of dyspnea began 4 months ago and have been steadily progressive until he could walk only about 10 feet without stopping due to dyspnea. About two months ago, his chest was injured by recoil from a fire hose, and he was exposed to smoke from forest fires." Defendant's Exhibit 17, p. 584. Dr. Carveth

assessed: "Given the history of gradual increased shortness of breath and no acute changes, likely the patient has chronic pulmonary emboli, and the patient has no obvious causes, a recent long travel, and no symptoms of deep venous thrombosis present." Defendant's Exhibit 11, p. 456.

43. Dr. Rodgers. George Rodgers, M.D., Ph.D., medical professor at the University of Utah Medical Center, testified for Claimant. Dr. Rodgers practices in the specialty of hematology, with a subspecialty in bleeding and clotting disorders. He examined Claimant on March 24, 2009. Dr. Rodgers testified that emboli originate from deep vein thrombi, specifically in the leg, arm, pelvis, or abdomen, and then break off and are carried by the bloodstream to the heart and lungs. He testified that approximately 90% of pulmonary emboli can be traced to deep vein thrombosis. He acknowledged that the cause of approximately 10% of emboli cannot be determined. Dr. Rodgers testified that the presence of chronic pulmonary emboli may increase the risk of developing subsequent acute pulmonary emboli and may actually cause subsequent acute pulmonary emboli.

44. Dr. Rodgers opined that Claimant's November 2007, pulmonary emboli were caused by trauma due to the temporal relationship between Claimant's chest trauma from the fire hose in August 2007, the discovery of his pulmonary emboli a few months later, and the absence of any other precipitating factor. Rodgers' Deposition, p. 16. Dr. Rodgers opined that Claimant's recurrence of thromboembolism in February 2009 was the result of damaged left leg vein valves resulting from his injuries that precipitated his pulmonary emboli in November 2007.

45. Dr. Rodgers reasoned that Claimant had sustained numerous prior traumatic episodes in falls from horses and various abdominal surgeries, and the fact that Claimant had not previously developed any thromboembolism until the fire hose incident persuaded him that the hose incident was likely the precipitating factor for Claimant's emboli in November 2007. Referring to Claimant, Dr. Rodgers testified:

> I mean he went through so many episodes of trauma and injuries and broken bones and general surgical procedures, if he had any other reason for a clot, it should have been manifest much earlier in his life, and the fact that nothing happened until his most severe traumatic event, apparently, occurred in August of 2007, only that apparently was associated with appearance of a clot.

Rodgers' Deposition, p. 24, ll. 17-24.

46. Dr. Rodgers acknowledged that if Claimant had sought treatment earlier, that earlier anticoagulation therapy might have preserved more of his pulmonary function.

47. Dr. Rodgers' conclusions rest upon some tenuous assumptions. Dr. Rodgers surmised that Claimant's accident in August 2007 must have resulted in deep vein thrombosis in his left leg because his February 2009 thromboembolic recurrence originated in his left leg. However, there is no evidence that Claimant reported or suffered left leg pain at any time between his industrial accident and the discovery of his pulmonary emboli in November 2007. Dr. Rodgers also acknowledged that trauma to Claimant's right side from the fire hose incident would have been less likely to produce deep vein thrombosis in his left leg in 2007. Perhaps most significantly, Dr. Rodgers' testimony indicates he did not identify any other precipitating factor. Specifically, nowhere in his testimony does Dr. Rodgers mention or address Claimant's mesenteric vein thrombosis as revealed by his August 2006 abdominal CT scan.

48. Dr. Rodgers testified that deep vein thrombosis can be asymptomatic for months. However, he testified that the extensive bowel resection Claimant underwent in 2006, followed by an extended sedentary convalescence period, would not have produced the deep vein thrombosis that ultimately caused Claimant's pulmonary emboli in 2007. "Not a year or two earlier, no. That just wouldn't fit the time line of clots." Rodgers' Deposition, p. 25, ll. 5-6. Dr. Rodgers' report recites Claimant's shortness of breath subsequent to his August 21, 2007 industrial accident, but is silent as to his complaints of shortness of breath commencing prior to his industrial accident. Dr. Rodgers acknowledged that his report did not consider the records of Idaho physicians Dr. Fullmer

and Dr. Acomb, who initially attempted to treat Claimant's shortness of breath as asthma in June and July 2007 with only partial success. The medical records clearly document that Claimant began reporting shortness of breath more than two months before his industrial accident. This was almost exactly ten months after his abdominal CT scan in August 2006 documented mesenteric vein thrombosis. This ten-month period is very similar to the nine-month period between Claimant's cessation of anticoagulate therapy for his first pulmonary emboli episode and the discovery of his second pulmonary emboli episode in February 2009.

49. Dr. Rodgers acknowledged that a CT scan of Claimant's heart on February 19, 2008, revealed an interatrial septal aneurysm. However, Dr. Rodgers was not able to define an interatrial septal aneurysm and testified that he did not know whether interatrial septal aneurysms increase the risk of blood clots. The testimony of Robert Friedman, M.D., and other medical evidence in the record indicate that interatrial septal aneurysms increase the risk of clots. Lastly, Dr. Rodgers reported that Claimant had no family history of deep vein thrombosis. However, the initial clinical history and evaluation taken on September 4, 2008, by Darin Ryujin, M.D., at the University of Utah Medical Center, recorded that Claimant "has one brother who has had a DVT …" Defendant's Exhibit 9, p. 421. The record also reveals that Claimant's father had deep vein thrombi during his final year.

50. Dr. Samuelson. Pulmonologist Wayne Samuelson, M.D., testified for Claimant. Dr. Samuelson commenced treating Claimant in September 2008 for a cough, presumed asthma, and shortness of breath. Dr. Samuelson agreed with Dr. Rodgers' opinion that the fire hose incident caused Claimant's pulmonary emboli in November 2007 and recurrent emboli in February 2009. Dr. Samuelson testified that the chronology of Claimant's fire hose incident, followed by the development of pulmonary emboli, was the most persuasive factor leading him to conclude that Claimant's pulmonary emboli were caused by the industrial accident.

51. Nowhere in his testimony does Dr. Samuelson address or even mention Claimant's prior mesenteric vein thrombus documented by his August 2006 abdominal CT scan. Dr. Samuelson testified that: "once you've had blood clots anyplace, your chances of having them again increases quite a bit." Samuelson Deposition, p. 10, l. 24 – p. 11, l. 1. He also testified that damage to bone increases the risk of pulmonary emboli considerably. Significantly, Claimant alleges no fractures as a result of his industrial accident. However, he suffered five fractured ribs and a herniated diaphragm in the nine months prior to discovery of his mesenteric vein thrombus.

52. Dr. Friedman. Robert Friedman, M.D., testified for Defendant. Dr. Friedman opined that Claimant's fire hose incident did not cause his pulmonary emboli in November 2007. He noted that the abdominal and pelvic CT scan taken of Claimant on August 5, 2006, clearly revealed a non-occluding thrombus within the superior mesenteric vein. Thus Claimant had documented deep vein thrombosis prior to his industrial accident. Dr. Friedman noted that Claimant sustained significant trauma during his 2006 bowel resection surgeries and also during his October 2005 rib fractures and hemothorax that could have caused the mesenteric vein thrombus. He noted Claimant's shortness of breath commencing prior to his industrial accident. Dr. Friedman concluded that Claimant's 2007 pulmonary emboli were caused by his mesenteric vein thrombosis.

53. Claimant alleges that his mesenteric vein thrombus could not have caused his pulmonary emboli because the mesenteric vein feeds into the hepatic portal vein which terminates in a bed of capillaries in the liver. Dr. Friedman acknowledged that in traditional anatomy, the mesenteric vein goes to the liver and theoretically passes through a bed of capillaries there before being reconstituted into the vena cava. However, Dr. Friedman held to his causation opinion and testified both that recognized variations exist in which the complete

venous blood flow from the gut does not pass through the liver and that further variations exist in which not all of the venous blood flow passing through the liver is filtered through a capillary bed before entering the inferior vena cava.

54. Of the medical experts who opined regarding the causation of Claimant's pulmonary emboli, only Dr. Friedman was aware of and addressed Claimant's prior mesenteric vein thrombus. The failure of Dr. Levine, Dr. Rodgers, and Dr. Samuelson to consider this in their opinions of the etiology of Claimant's pulmonary emboli renders their opinions unpersuasive in the face of Dr. Friedman's opinion. Claimant has not proven that his industrial accident caused his pulmonary emboli.

55. **Medical care, temporary disability benefits and attorney fees.** Claimant has failed to prove timely notice of his accident as required by statute and has also failed to prove that his pulmonary emboli were caused by his industrial accident. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of the provisions of Idaho Code § 72-704.

3. Claimant has failed to prove that his pulmonary emboli were caused by his industrial accident.

4. All other issues are moot.

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RECOMMENDATION

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

DATED this 21st day of January, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DANIEL LUKER
PO BOX 190929
BOISE ID 83719-0929

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL FEDERKO, Claimant, v. SUN VALLEY COMPANY, Employer / Self-Insured, Defendant.	)	**IC 2008-017353** **ORDER** FILED: January 28, 2011

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.
2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of the provisions of Idaho Code § 72-704.
3. Claimant has failed to prove that his pulmonary emboli were caused by his industrial accident.
4. All other issues are moot.

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

DATED this 28th 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 28th day of January, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

LYNN M LUKER
PO BOX 190929
BOISE ID 83719-0929

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

sc _/s/_____