BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOMINGO KINCHELOE, Claimant, v. GLANBIA FOODS, INC., Employer, and VALLEY FORGE INSURANCE COMPANY, Surety, Defendants.	**IC 2010-009113** **FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDATION** Filed: April 11, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on July 28, 2011. Dennis R. Petersen of Idaho Falls represented Claimant. Mark C. Peterson of Boise represented Defendants. The parties submitted oral and documentary evidence, took one post-hearing deposition, and submitted post-hearing briefs. The matter came under advisement on December 26, 2011 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the sole issue to be decided is:

1. Whether Claimant suffers from a compensable occupational disease.

Initially, additional issues of entitlement to medical and time-loss benefits were included in the Notice of Hearing, but the parties agreed that if the claim is compensable, quantifying the medical and time-loss benefits will not be difficult. Claimant had also asked that the Commission retain jurisdiction. Because the parties agreed that all issues other than compensability were reserved, there is no need to address retention of jurisdiction at this time.

CONTENTIONS OF THE PARTIES

Claimant asserts that he suffers from a compensable occupational disease, carpal tunnel syndrome (CTS), which became manifest on or about March 15, 2010.

Defendants argue that Dr. Spritzer diagnosed Claimant with work-related CTS in July 2005. Claimant's CTS pre-existed his employment with Employer, and pursuant to the decision in *Nelson v. Ponsness-Warren Idgas Enterprises,* 126 Idaho 129, 879 P.2d 592 (1994), Employer cannot be held liable for Claimant's pre-existing occupational disease absent the occurrence of an industrial accident causing permanently aggravation of the underlying condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;
2. Joint exhibits 1 through 16, admitted at hearing;
3. Defendants' supplemental exhibits 1 through 3, admitted at hearing; and
4. The post-hearing deposition of John W. Howar, M.D., taken August 25, 2011.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was thirty-seven years of age, and living in Twin

Falls with his wife and three children.

2. Claimant left school after completing tenth grade. He joined Job Corps where he received vocational training in culinary arts. After leaving Job Corps, Claimant worked for Cactus Pete's in Jackpot, Nevada, and Elmer's Pancake and Steak House in Boise.

3. When Claimant was twenty-three years of age, he obtained his commercial drivers license (CDL) and began working as a truck driver. Claimant worked for a number of different employers over the years. At first, he drove a flatbed tractor-trailer over-the-road for about four years. Thereafter, he began driving for various local agricultural producers and processors hauling potatoes, cheese byproducts, and construction materials, eventually working exclusively as a milk hauler.

JOB DUTIES OF A MILK HAULER

Giltner

4. Claimant worked briefly as a milk hauler early in his driving career, and returned to milk hauling with Giltner in early 2005. Claimant worked for Giltner until September 2006, at which time he went to work for Employer.

5. Claimant described his duties when he worked as a milk hauler for Giltner in 2005:

> That included – we would take our tanker out to the dairy, pick up milk, hook our hoses, which were 2-inch hoses, to the tank. We would load milk, do our sampling, rinse the tanks, silos out. Then we would return to the plant. We would scale in, turn our samples in and then unload our tankers.

HT, p. 37. Claimant explained that he worked a twelve-hour shift, and in that time would collect milk from three and sometimes four dairies. At that time, the equipment consisted of a tractor pulling a forty-eight foot long steel tank (tube) and a smaller thirty-foot long tube (pup).

6. With the described configuration of equipment, one end of the two-inch hoses remained attached to the pump on the truck. The main tank and the smaller pup each had hoses and a pump. When not in use, the hoses were stored coiled up under the belly of the tank. When the driver arrived at a dairy, he pulled out the hose attached to the pump in the main tube, took the protective cap off the storage tank at the dairy, and attached the hose to the tank. To make the connection, Claimant would hold the hose with his left hand, and connect and tighten the connection with his right hand, generally in the same way that one would couple two irrigation hoses. In order to obtain a good seal, Claimant tightened the connections with a wrench. At some dairies, the drivers had to use an additional piece of equipment—an adapter that required the use of a hose clamp in addition to the standard connection.

7. Before beginning to pump the milk into the tanker, the driver would climb on top of his tank and open four roof vents to prevent the increasing pressure inside the tank from causing the tank to explode. These vents opened by turning a small apparatus with a finger.

8. When the main tank was full, the driver decoupled the hose from the main tank, and attached the hose from the pup, repeating the process (including cracking open the vents on the roof of the pup). When both tanks were full (80,000 pounds of milk or so), the driver disconnected and put away the hose, replaced the protective cap on the storage tank, and closed all of the roof vents on the tubes.

9. At the processing facility, Claimant essentially reversed the process. At the processor, the hoses used to drain the tubes were permanently installed on the receiving end. Claimant would have to remove the protective cap from the access port on the tube, hook up the hose, and crack the air vents to prevent the tubes from imploding. Generally, Claimant was able to unload both tubes at the same time. Drivers repeated this process three or four times per day.

Glanbia

10. Claimant testified that when he started at Glanbia in 2006, the process for collecting and hauling milk was pretty much the same as the work he had done at Giltner. At Glanbia, he worked twelve-hour shifts for six days, followed by three days off.

11. In about 2008, Glanbia began upgrading its equipment in order to operate more efficiently. Glanbia replaced the two tanks with a single fifty-four foot long tank. Employer also began using bigger (three-inch) hoses. The larger hoses could not remain permanently attached to the pump on the tractor/tank, nor could they be stored under the belly of the tank. Instead, the hoses were stored in tubes attached to the side of the tanks. Each hose has a cap at each end. At each stop, the driver would have to pull out the hose, remove the cap from one end of the hose, remove the cap at the pump, and connect the hose to the pump. Then the driver would remove the cap on the other end of the hose, along with the cap on the storage tank, and hook up the hose to the storage tank. Before he started pumping, the driver climbed atop the tanker and cracked open the vents. This new equipment essentially quadrupled the number of times that a driver had to use his hands (and sometimes a wrench) to connect and disconnect hoses each day.

RELEVANT PRIOR MEDICAL HISTORY

12. There is only one relevant prior chart note in the hearing record. However, it is the medical record upon which this recommendation pivots. On July 25, 2005, Claimant presented at St. Luke's Clinic in Twin Falls. David Spritzer, M.D., saw Claimant that day. Because this chart note is crucial to the resolution of this matter, the note is set out in its entirety:

> SUBJECTIVE: Patient in with persistent paresthesias of the hands and arms. Has a one year history of intermittent problems. Saw Dr. Harris last year and thought that he might have early carpal tunnel syndrome.
>
> This seemed to get a little better but now for the past few weeks has had severe pain at night. Paresthesias effecting [*sic*] all of the fingers on both sides but more

> the right than the left. The long finger of the right hand appears to be more severely effected [*sic*]. The pain goes up into the elbow area. No history of neck trauma or neck pain.
>
> OBJECTIVE: This confirms good vascular function to both hands. He has diminished grip on both sides. There is negative Tinel's. He shows no intrinsic atrophy.
>
> ASSESSMENT: Probable bilateral carpal tunnel syndrome.
>
> PLAN: A splint is applied to the right wrist. If this helps a lot he will call in and get one on the left side. Also, Aleve two tablets b.i.d. for the next couple of weeks. If not improving, he will call back in and further evaluation to possibly involve the neck would need to be considered.

JE 6, p. 1.

THE INSTANT CLAIM

Randall Slickers, M.D.

13. On February 9, 2010, Claimant presented at the St. Luke's Clinic in Twin Falls with two complaints: a draining right ear, and right wrist pain with numbness in his right hand. With regard to the wrist pain, the note states, "He has had his wrist pain checked in the past. He has splints but no anti-inflammatories. Right hand going numb." JE 7, p. 1. On exam, Dr. Slickers noted that Claimant's left hypothenar eminence appeared atrophied compared to the right, and that Tinel's was positive on the right. Dr. Slickers diagnosed Claimant's ear complaint, but made no diagnosis for the hand complaint, though in the "Plan" portion of his notes he states: "Carpal tunnel addressed with naproxen 500 twice daily unless he gets GI heartburn. Return a week if not improving, consider steroid injection." *Id.*

14. Claimant returned to see Dr. Slickers on March 12, 2010. On this visit, his hand complaints were Claimant's primary concern, with only passing mention made of his chronic otitis:

> SUBJECTIVE: increasing discomfort both wrists. He is using his wrists a lot in turning nozzles and nuts in his line of work. Left hurts more than the right, but he is right-handed . . .
>
> OBJECTIVE: . . . Wrists: He has wrinkles both thenar eminences with some atrophy of the left hypothenar eminence. Tinel's is positive. He has decreased motion in his wrist due to discomfort.
>
> ASSESSMENT/PLAN: Increasing carpal tunnel, despite conservative management. Arrange to have him see Dr. Howar next Monday. Continue splints and Naprosyn. . .

JE 7, p. 4. This was Claimant's first visit with Dr. Slickers in which he and Dr. Slickers discussed the nature of Claimant's work.

15. Claimant notified Employer of his occupational disease claim and filed his First Report of Injury on March 15, 2010. Claimant did not have an opportunity to see Dr. Howar, as scheduled by Dr. Slickers' office, because Employer sent Claimant to their occupational medicine provider, who happened to be Douglas Stagg, M.D., a practice partner with Dr. Slickers at the Twin Falls St. Luke's clinic.

Dr. Stagg

16. Claimant saw Dr. Stagg on March 19, 2010. Claimant provided the following history as captured in the chart note:

> [Claimant] is right-handed. He drives a milk tanker for Glanbia. He has been with them nearly 4 years. For the past 8 months he has had increasing paresthesias in both hands, a little more so on the left than the right. In the past 3 weeks, they have worsened considerably. His job entails steering his truck with both hands. He hooks and unhooks hoses. Pulls hoses. Pushes hoses into their storage areas. Turns valves mainly with his right hand. Climbs ladders and twists silo doors open at the dairies.

JE 4, p. 2. Claimant specifically denied having any prior problems with this hands or wrists. On exam, Dr. Stagg found no thenar atrophy on either hand, and normal sensory function on both hands. Tinel's test was negative bilaterally and Phalen's test was negative on the right and

mildly positive on the left. Dr. Stagg tautological diagnosis: "Painful paresthesias both hands." *Id.* Dr. Stagg gave Claimant wrist splints to wear at night, and sought approval for bilateral nerve conduction (NC) studies.

17. Claimant returned to Dr. Stagg on March 24, 2010. He was "improving but persistent painful paresthesias of both hands." JE 4, p. 6. Dr. Stagg was still awaiting approval for the NC tests.

18. Claimant underwent NC studies on April 20, 2010. The tests showed markedly prolonged distal latencies bilaterally on both the median palmars and median motors.

19. In early May, Claimant returned to see Dr. Stagg and to discuss the result of the NC studies. At that visit, Dr. Stagg diagnosed severe bilateral CTS, and asked Surety for approval of a surgical consultation.

20. Surety denied Claimant's claim on June 4, 2010. Thereafter, Claimant sought medical care using his own resources.

Dr. Howar

21. Claimant saw Dr. Howar, an orthopedic surgeon, on June 17, 2010. Claimant reported to Dr. Howar that in 2005 he saw Dr. Spritzer for "mild carpal tunnel symptoms" which had resolved completely with a brief course of anti-inflammatories, ice, and braces. JE 8, p. 2. Claimant told Dr. Howar that he believed the symptoms recurred in January 2010 because of the changeover in equipment at Glanbia. Dr. Howar diagnosed "severe bilateral carpal tunnel syndrome that is definitely related to his work, in the sense that it was a pre-existing condition that was markedly exacerbated by his work activities." *Id.* Dr. Howar recommended bilateral carpal tunnel releases to relieve Claimant's symptoms. Claimant could not afford to proceed

with the surgery at that time. For the next year, Dr. Howar prescribed Vicodin to help Claimant sleep.

22. Claimant returned to Dr. Howar on March 28, 2011. He was ready to proceed with the carpal tunnel release in early May 2011. Because he was not receiving workers' compensation benefits, Dr. Howar agreed to do both releases at the same time, rather than doing them separately with time to recover between the procedures.

Dr. Krafft

23. On April 22, 2011, Claimant saw Kevin R. Krafft, M.D., a physiatrist, for an independent medical evaluation (IME) at Surety's request. Dr. Krafft reviewed medical records, took a patient history, administered some disability and depression diagnostic exams, and performed a physical exam.

24. Dr. Krafft identified the medical records he reviewed in preparing his report. He had the records that are part of the adjudicatory record, but in addition he also had some records predating Claimant's 2005 visit with Dr. Spritzer that are not part of the record in this proceeding. Those records included an emergency room visit at St. Benedict's Family Medical Center on April 11, 2001 and records from a Dr. Harris from February 2001 through February 2005. Dr. Krafft specifically notes that the records of Dr. Harris contain no evidence of upper extremity complaints. However, he discusses Dr. Spritzer's July 25, 2005 note which mentions that Claimant saw Dr. Harris in 2004 "and was thought to have possible early carpal tunnel syndrome." JE 9, p. 3.

25. Dr. Krafft, in his discussion of Claimant's patient history, repeatedly references a 1995 date when Claimant began experiencing tingling in his fingers. Dr. Krafft associates this same 1995 date with Claimant's 2005 visit to Dr. Spritzer. There is no suggestion elsewhere in

the record that Claimant's carpal tunnel symptoms predate 2004 or 2005. In fact, in 1995, Claimant was twenty-two years of age and had not yet obtained his CDL. The Referee presumes that Dr. Krafft's references to 1995 are to 2005.

26. Dr. Krafft administered psychological diagnostic tests, including a pain drawing, pain disability index, Oswestry function test, short form McGill pain questionnaire, and the CES-D (Center for Epidemiologic Studies Depressed Mood Scale). Claimant showed no evidence of symptom magnification, and viewed himself as only slightly disabled. The CES-D results were consistent with a depressed mood.

27. Dr. Krafft diagnosed:

- Moderate to severe bilateral sensory motor carpal tunnel syndrome;
- Mild left cubital tunnel syndrome;
- Perception of minimal disability;
- Pre-existing history of previous bilateral carpal tunnel syndrome; and
- Depressed mood.

Dr. Krafft noted that Claimant's complaints were consistent with the objective findings. He concluded:

> This is a 37-year-old, right handed gentleman who has a history of carpal tunnel syndrome dating back to 2005, as noted by Dr. Spritzer and previously noted by Dr. Harris. He has increasing symptoms with awakening at night and burning in his hands. He has documented bilateral carpal tunnel involvement. These findings, on a more probable than not basis represent an aggravation of a preexisting condition. He does not point to a specific injury, but rather his work activities in general are likely the causative factor for his current complaints.
>
> * * *
>
> Based upon the available information, to a reasonable degree of medical certainty, there is a causal relationship between the examinee's current complaints and his work activities.

Id., at p. 7.

Dr. Howar

28. Dr. Howar performed bilateral carpal tunnel releases on May 9, 2011. Claimant made an excellent recovery. He was off work from May 9 through June 7, 2011, and returned to work without restrictions. In his post-hearing deposition, Dr. Howar opined that it was too early to assess Claimant for permanent impairment, but he doubted that Claimant would have any permanent impairment as a result of the carpal tunnel release.

DISCUSSION AND FURTHER FINDINGS

OCCUPATIONAL DISEASE

29. Idaho Code § 72-102(22)(a) defines "occupational disease" in pertinent part as: ". . . a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment . . ." In this proceeding, there is really no dispute that Claimant has an occupational disease. All of the relevant medical evidence supports Claimant's CTS diagnosis, that the nature of his work as a milk hauler put him at risk for developing CTS, that his CTS was causally related to his work, and that surgical intervention was necessary. The dispute in this case does not concern the "how," but rather the "when" of Claimant's occupational disease.

ACTUALLY INCURRED/MANIFEST

30. 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 therefore.

It is undisputed that Claimant's work at Glanbia exposed him for more than sixty days to the hazards that caused his CTS. Thus, this dispute focuses on subsections (1) and (3) of the statutory provision.

31. Idaho Code § 72-102(21)(b) defines the terms "contracted" and "incurred" when referring to an occupational disease as "the equivalent of the term 'arising out of and in the course of' employment."

> Because in Idaho's worker's [*sic*] compensation law the word "incurred" means "'arising out of and in the course of' employment," it is as much a reference to cause *as to a particular point in time*. 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, I.C. § 72-439(3) provides that it is the last such employer, or its surety, who is liable to the claimant.

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 456, 111 P.3d 135, 141 (2005) (Internal citations omitted, emphasis added). An occupational disease becomes manifest when:

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

Idaho Code § 72-102(19). As Defendants point out in their post-hearing brief: "For all intents and purposes, this case boils down to what Claimant knew regarding his CTS, and when he knew it." Defendants' Post-hearing Brief, p. 11.

32. Claimant asserts that his occupational disease became manifest in March 2010 when two critical events occurred: First, Dr. Slickers diagnosed Claimant's bilateral CTS; and, second, Dr. Slickers engaged Claimant in a discussion as to the nature of his work, in particular the use of his hands to loosen and tighten various caps, connections, vents, and valves. Essentially, Claimant's position is akin to *Sundquist*, in that his occupational disease may have been "incurred" with several employers, but did not become manifest until Dr. Slickers provided

both a diagnosis and connected the diagnosis to Claimant's work. If Claimant's argument prevails, his occupational disease became manifest during the period of his employ by Employer, and Employer is liable on the occupational disease claim.

33. Defendants assert Claimant's CTS became manifest in 2005, when Dr. Spritzer diagnosed Claimant with bilateral carpal tunnel syndrome. At the time of Dr. Spritzer's diagnosis, Claimant worked as a milk hauler for Giltner. If Defendants prevail in their view that Claimant's occupationally-related CTS was manifest prior to his employment with Employer, they have no liability in this case. Idaho case law holds that an employer owes no compensation for the aggravation of a pre-existing condition unless an industrial accident causes the aggravation. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). Claimant denies the occurrence of an industrial accident.

34. For the reasons set out below, the Referee finds that there is substantial persuasive evidence to support a finding that Claimant's CTS became manifest in the spring of 2010 when he had been working for Employer for more than three years.

Medical Evidence

35. Defendants assert that Dr. Spritzer's chart note is definitive on the question of manifestation, stating: "There is no question that Dr. Spritzer diagnosed Claimant with CTS on July 25, 2005." Defendants' Post-hearing Brief, p. 11. Dr. Spitzer's chart note does not support a diagnosis of CTS or that CTS constituted an occupational disease.

36. Diagnosis. First, the Referee notes that Dr. Spitzer did not diagnose CTS. He diagnosed "probable" CTS. Having symptoms consistent with CTS is not tantamount to a diagnosis of CTS.

37. Patient History. Dr. Spritzer based his diagnosis of probable CTS primarily on

Claimant's subjective reporting. The note makes reference to Claimant having seen a Dr. Harris with a similar complaint in the past. One could assume that the information about Dr. Harris came from Claimant. One could just as easily assume that Dr. Harris was part of the same practice and Dr. Spitzer saw the note while reviewing Claimant's medical file prior to seeing Claimant. The point is that either conclusion is speculative.[1]

38. Testing. Apart from Claimant's subjective reporting of symptoms, Dr. Spritzer performed limited objective testing in making his diagnosis of probable CTS. He performed a grip test, looked for a Tinel's sign, and looked for muscle atrophy. In his deposition, Dr. Howar dismissed the value of a grip test:

> Q. If you look under "Objective," it says – the second sentence says, "He has diminished grip on both sides."
>
> Is that consistent with carpal tunnel syndrome?
>
> A. No.
>
> Q. Is that a test that you would typically do for carpal tunnel syndrome?
>
> A. No.
>
> Q. Okay. Does that finding have any relevance to this?
>
> A. No, it doesn't.

Dr. Howar Dep., p. 19.

39. Dr. Spritzer performed a Tinel's test, with a negative result. Dr. Howar discussed this test during his deposition:

> Q. And what does that [Tinel's test] tell us?
>
> A. In this case it was negative.

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[1] The relevance of this point will become more clear during the discussion of Claimant's credibility.

> Q. So what does that tell us?
>
> A. Not very much, really. It's not – it's not a definitive test. It's one test of many we do.

Id., p. 25.

40. Finally, Dr. Spritzer observed "no intrinsic atrophy." The note does not state where Dr. Spritzer was looking for atrophy, so it is difficult to discern the relevance of the observation to the ultimate diagnosis.

41. In his deposition, Dr. Howar testified that he considered Dr. Spritzer's diagnosis weak without more testing, including sensibility testing, Phalen's test, thenar muscle strength testing, and wrist motion testing. He specifically opined that, "You can't diagnose it [CTS] just with symptoms." *Id.*, p. 9. According to Dr. Spritzer's record, he diagnosed Claimant with probable CTS based on one irrelevant test, two negative tests, and Claimant's description of his symptoms.

42. <u>EMG/NC Testing.</u> There is no evidence that Dr. Spritzer ordered any kind of EMG or NC testing for Claimant in 2005. Claimant argues that EMG/NC testing is necessary for a definitive diagnosis of CTS; however, Dr. Howar testified that an EMG/NC test was not always necessary to definitively diagnose CTS, stating:

> Well, the physical examination will make the diagnosis. If you have typical symptoms and your physical examination shows objective physical findings, then you can make the diagnosis with about 90 percent certainty. . . .Without nerve conduction test.

Id. The Commission has certainly seen cases where a CTS diagnosis remains in question even with comprehensive testing and an EMG (See, *Ibarra v. Potato Products of Idaho, LLC*, 2011 IIC 0060 (08/16/2011)) and *Couture v. Christopher & Banks*, 2010 IIC 0366 (09/13/2010)). In short, while sometimes an EMG/NC test can tilt the balance to a diagnosis of CTS, it is also the

case that a worker can have all the signs and symptoms of CTS and still have a negative EMG/NC test. Sometimes, the only confirmatory diagnostic for CTS is to actually perform a carpal tunnel release and see if the patient improves.

43. Related to Work. It is also important to note that Dr. Spritzer makes no mention in his chart note regarding Claimant's work or whether the probable CTS bears any relation to Claimant's work. There is no discussion regarding what Claimant does for a living, what his job entails, or if he was even working at the time he saw Dr. Spritzer. Dr. Spritzer's care plan did not take Claimant off work, place him on modified duty, or indicate whether the splint that he recommended be worn at night, at work, at home, or all of the time. As Dr. Howar noted in his deposition, Dr. Spritzer did exactly what any physician should do when he suspects CTS—put the patient in a splint and prescribe some anti-inflammatories and see if the patient improves.

44. Follow-up Care. On the facts of this case, Claimant did improve, and made no complaint and sought no treatment for painful paresthesias in his hands for five years. There is nothing in the medical record that suggests that Claimant continued to experience the paresthesias he complained of in 2005 intermittently or even occasionally in the following years, until he reported the symptoms to Dr. Slickers in 2010, some three years after going to work for Employer.

Claimant's Credibility

45. As noted by Defendants in their briefing, the outcome of this disputed claim hinges in large part on Claimant's credibility—both on the witness stand (observational credibility) and as compared to the hearing record (substantive credibility). See, *Painter v. Potlatch Corp.*, 138 Idaho 309, 313, 63 P.3d 435, 439 (2003).

> Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in

> order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission's findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence.

Id. (internal citations omitted).

46. Observational Credibility. The Referee finds that Claimant was a credible witness at the hearing. He admitted that he was not very good with dates related to his employment history, and that was evident from his testimony. Claimant did have a number of jobs over a short span of years when he was young. He sometimes worked two or more jobs at the same time, so it is not surprising that he could not provide precise employment dates for his various employers. Conversely, the Referee found Claimant had a remarkable ability to describe in detail the various duties of his job hauling milk—how the work at Giltner and Glanbia was similar, and how it changed over time. Claimant answered questions directly, without evasion, circumlocution, or *non sequitur*. He made clear distinctions between what he knew, what appeared in contemporary records, and what he did not recall. With only a few exceptions, he did not speculate about what he did not know.

47. Substantive Credibility. Defendants focused their arguments on Claimant's substantive credibility, and found it lacking. Defendants point to several examples of Claimant's inconsistencies in support of their argument. Primary among them were:

- Claimant's failure to recall his visit with Dr. Spritzer in 2005; and
- Claimant's conflicting statements to Drs. Slickers, Stagg, and Howar regarding his history of upper-extremity paresthesias.

48. Defendants assert that Claimant's failure to recall the visit with Dr. Spritzer, together with his admitted poor memory, requires the Referee to view Claimant's testimony substantively incredible as a whole. In this case, Claimant repeatedly stated that he had no

independent recollection of his 2005 visit with Dr. Spritzer. He did not dispute that he saw Dr. Spritzer, or the information contained in the chart note. As to Claimant's admitted memory failings, he made those comments in the course of discussing his employment history. Claimant's admitted difficulty in recalling employment dates is not indicative of Claimant having a poor memory in general or of being a poor historian in other respects. It is not uncommon for individuals to fail to recall visits to particular physicians, even when the purpose for the visit appears to be of an unforgettable nature.

49. As discussed previously, Dr. Spritzer's chart note makes reference to prior complaints of upper extremity paresthesias. Similar references appear in Dr. Slickers' initial chart note dated March 10, 2010. Dr. Stagg's chart note, written after Dr. Slickers' note, states that Claimant *denied* prior upper extremity problems, and Dr. Howar's note indicates that Claimant reported the 2005 symptoms. In his deposition, Dr. Howar confirmed that Claimant volunteered the information; Dr. Howar did not get it from prior chart notes. The Referee does not know whether Claimant reported the information about prior treatment in Dr. Slickers' note, or whether Dr. Slickers obtained the information from Claimant's medical file. If the latter was the case, then it is entirely consistent for Claimant to have reported no prior problems with his hands when he first saw Dr. Stagg. By the time Claimant saw Dr. Howar, Surety had denied his claim on the basis that his upper extremity complaints pre-existed his employment with Glanbia. The medical record from Dr. Spritzer came to light with the denial of the claim. Claimant was quite clear in his testimony that after the denial he was aware of the existence of Dr. Spritzer's chart note. However, Claimant testified that he did not actually see the chart note until the day prior to the hearing. Most patients are completely unaware of what physicians write in their

chart notes, so the Referee finds Claimant's testimony is neither surprising, nor indicative of a lack of credibility.

50. The Referee finds that Claimant was not only observationally credible, but substantively credible as well.

Manifestation of Claimant's Occupational Disease

51. Knowledge. Idaho Code § 72-102(19) sets out two different means for determining a manifestation date of an occupational disease. The first of these tests is when: "an employee knows that he has an occupational disease." Defendants argue that Claimant's lack of recollection of the 2005 visit with Dr. Spritzer makes it impossible for Claimant to carry his burden of proving that he did not know that his CTS symptoms in 2005 were work-related. The Referee suggests that Defendants have flipped the burden-of-proof issue on its head. No claimant can prove what he did not know. However, upon a careful consideration of all the relevant facts in a particular case, including medical records, witness statements, a claimant's activities and behavior, it is generally possible to establish on a more-likely-than-not basis whether a claimant possessed certain knowledge.

52. The Commission's decision in *Voglewede v. Fair Dinkum Genuine Co.,* 2011 IIC 0026 (05/13/2011) is instructive on the knowledge requirement. The Claimant in *Voglewede* asserted that her bilateral CTS was not manifest until 2007, at which time she was working for defendant employer. Defendants asserted that Claimant's condition was pre-existing and had been going on since about 2000, thus *Nelson* barred her claim. As the facts developed in *Voglewede*, it became apparent that Claimant had CTS symptoms as far back as 2000. Claimant was aware of the existence of CTS, and was even aware that the work she was doing at the time seemed to aggravate her recurring hand symptoms. Further, Claimant worked for fifteen years as

a secretary/receptionist in a physician's office. In rejecting Defendants' argument that Voglewede knew she had CTS prior to 2007, the Commission cited to *Sundquist*, where the Court stated:

> This definition [Idaho Code § 72-102(19)] is subjective. The employee must know that he has an occupational disease or have been so informed by a qualified physician. In addition, the knowledge required is that he has an occupational disease, not that he has symptoms that are later diagnosed as being an occupational disease. Knowledge of symptoms is not synonymous with knowledge the symptoms are caused by an occupational disease.

Sundquist, 141 Idaho 453-454, 111 P.3d 138-139.

53. In support of their assertion that Claimant had to have known in 2005 that he had an occupation disease, Defendants note the following points:

- When Claimant was hauling milk for Giltner, he was performing work similar to the work he performed some years later for Glanbia, and Claimant knew the work required a lot of work with his hands;
- Claimant saw Dr. Spitzer because of several weeks of severe pain and paresthesias in all of the fingers of both hands;
- Dr. Spritzer diagnosed Claimant with CTS, and offered treatment with a splint for his right hand and OTC anti-inflammatories; and
- Claimant did not have any hobbies or engage in other activities outside of work that would be taxing on his upper extremities.

None of these points persuade the Referee that Claimant knew he had an occupational disease in 2005. At best, they establish that Claimant should have known he had symptoms suggestive of CTS. At the time he saw Dr. Spritzer about his upper extremity pain and paresthesias, Claimant could not compare his work for Giltner with his work for Glanbia. The knowledge requirement is not retroactive, *i.e.*, the information Claimant learned about his condition in 2010 does not relate back just because Claimant may have been doing the same activities in 2005. More importantly, there is nothing in Dr. Spritzer's chart note that provides the slightest inkling that Claimant's CTS symptoms were work-related. Dr. Spritzer did not record any facts about Claimant's work. A comparison of the facts in *Voglewede* and the instant matter provide some

perspective on the knowledge issue. The Commission found the Claimant in *Voglewede* lacked the required knowledge to make her CTS manifest in 2000. The facts of the instant case provide even less reason to think that that Claimant knew he had an occupational disease in 2005.

54. Information. The second test for determining when an occupational disease becomes manifest is when a "qualified physician shall inform the injured worker that he has an occupational disease." The medical records, upon which Defendants urge the Referee to rely, do not support a finding that Dr. Spritzer (or any other qualified physician) informed Claimant in 2005 that he had an occupational disease. The first time that any medical record includes both a discussion of Claimant's work and his symptoms is in March 2010 when Dr. Slickers engaged Claimant in a discussion about the nature of his work. Although the chart note does not state that Claimant's symptoms were related to his work, that information was nevertheless conveyed to Claimant, since he filed his FROI just days later.

CONCLUSION

55. There is no dispute that Claimant has CTS and that it is an occupational disease. The medical records alone are sufficient to support the finding that Claimant's occupational disease did not become manifest until March 2010. However, the Referee found Claimant to be a credible witness, both observationally and substantively, and his testimony is largely consistent with the other factual elements of the case. There is substantial credible evidence in the record to establish that Claimant suffers from a compensable occupational disease that became manifest in March 2010. This case is controlled by *Sundquist v. Precision Steel & Gypsum, Inc., supra*. There was no manifestation of Claimant's occupational disease prior to the commencement of his employment by Glanbia such that the rule of *Nelson* would afford a defense to the instant claim.

CONCLUSION OF LAW

1. Claimant suffers from a compensable occupational disease that became manifest in March 2010.

RECOMMENDATION

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

DATED this 6 day of April, 2012.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOMINGO KINCHELOE, Claimant, v. GLANBIA FOODS, INC., Employer, and VALLEY FORGE INSURANCE COMPANY, Surety, Defendants.	**IC 2010-009113** **ORDER** Filed: April 11, 2012

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

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

1. Claimant suffers from a compensable occupational disease that became manifest in March 2010.

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

DATED this 11 day of April, 2012.

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 11 day of April, 2012, 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:

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djb /s/_____