BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIM MCPHERSON, Claimant, v. DRYWALL SPECIALTIES, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-018298** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed February 3, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing via video conferencing between Boise and Coeur d'Alene on July 28, 2011. Claimant was present in Coeur d'Alene and represented himself. Bradley J. Stoddard of Coeur d'Alene represented Employer/Surety. Oral and documentary evidence was presented. Claimant did not file an opening brief but filed a reply to Defendants' brief. This matter came under advisement on October 20, 2010. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The following matters are at issue per the Notice of Hearing:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled

pursuant to Idaho Code § 72-604;

2. Whether Claimant suffered a personal injury arising out of and in the course of employment;

3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

4. Whether Claimant suffers from a compensable occupational disease;

5. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-448;

6. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

7. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

8. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof; and,

9. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof.

CONTENTIONS OF THE PARTIES

Claimant contends that he developed inguinal and umbilical hernias as a result of his hard work for Employer over time. He asserts that he gave notice to his employer as soon as he was told by a physician that he was suffering from that condition, and he should be reimbursed for the costs associated with the surgical repair of the hernias.

Defendants contend that Claimant failed to provide Employer notice within 60 days of the manifestation of his alleged occupational disease, thus barring his claim. Further,

Defendants contend that even if notice is timely, Claimant has failed to establish that his inguinal/umbilical hernias are casually related to the demands of his employment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's part owner, Jeff Miller, taken at the hearing; and

2. Defendants' Exhibits 1-3, admitted at the hearing.

FINDINGS OF FACT

1. Claimant worked for Employer, whose business is installing drywall, metal stud framing, and stucco, as a framer from 2006 through April 10, 2009. Claimant testified that he first noted the presence of an abdominal bulge, later diagnosed as an umbilical hernia, sometime toward the end of 2008, or the beginning of 2009. (Hr. Tr., 8/25 – 9/11). He evidently consulted with Dr. Sturges, who informed him that he suffered from an umbilical hernia, and that if it wasn't bothering Claimant, it probably required no treatment. Claimant testified that because work with his Employer was slowing down, he did not want to do or say anything that might alert Employer to the fact that he was injured. Notably, there is nothing in Claimant's testimony that suggests that at the time he consulted with Dr. Sturges, he was either told by Dr. Sturges, or independently developed the conviction, that his umbilical hernia was work related. That Claimant did not wish to alert his employer to the fact that he had suffered an injury that might be disabling, does nothing to support the proposition that Claimant knew his condition was work related. Claimant would, presumably, have the same concerns about alerting his Employer to a disabling condition that was not work related.

2. Claimant contends that he did give Employer notice of his occupational disease within 60 days following the date of manifestation. (See, C. Brf., p.3). In support of these assertions, he evidently relies upon his visit to the after-hours urgent care clinic on July 10, 2009. There, he was examined by Jeff Givens, M.D. Dr. Givens authored a work status report, which is contained as part of Defendant's Exhibit C. That report reflects a date of injury of January 5, 2009. It further reflects that Dr. Givens released Claimant "to the job of injury," without restrictions on July 10, 2009. Dr. Givens diagnosed Claimant as suffering from obvious inguinal and umbilical hernias on July 10, 2009. Dr. Givens faxed a copy of his work status report to Employer, who received it on July 10, 2009, and evidently interpreted the note as articulating a claim against Employer, since by July 16, 2009, Employer had filed an Employer's First Report with the Industrial Commission reflecting a January 5, 2009 date of injury.

3. It is unclear what, if anything, happened on January 5, 2009. Claimant offered no testimony on this. Possibly, the January 5, 2009 date is a reference to his first discovery of his injury in late 2008 or early 2009.

4. Claimant testified that on approximately May 20, 2009, he was chatting with a friend of his at church who had just undergone an inguinal hernia repair. In the course of this discussion, Claimant testified that he came to the realization that he, too, suffered from an inguinal hernia. Armed with this realization, Claimant testified that he wanted to get in to see a doctor for further evaluation, but "procrastinated" and put it off until he finally saw Dr. Givens on July 10, 2009, at his wife's urging.

5. There is some discrepancy in Claimant's testimony concerning when he first knew that the problems he was experiencing carried a diagnosis of hernia. On the one

hand, Dr. Sturges evidently told Claimant back in January 2009 that he suffered from an umbilical hernia that probably did not warrant much concern. On the other hand, Claimant has testified that he did not know that he suffered from a hernia until he had a conversation with a friend at church on or about May 20, 2009. Resolving this dispute is of less interest to us than understanding the date on which Claimant first knew, or was first told by competent medical authority, that his condition (however described) was causally related to the demands of his employment. As noted above, in his brief Claimant intimates that he first made this connection when he spoke with his friend at church on or about May 20, 2009:

> I just hoped that the fact is clear that I did report my injury within 60 days of realizing that I had one. Maybe I should have called DSI instead of the after-hours, but I didn't know what to do once I realized that there was something seriously wrong especially the bigger the hernia became throughout the month of June, 2009.

C. Brf., p. 3.

6. Claimant had hernia repair surgery in May 2010.

7. Claimant was laid off April 10, 2009, and admits he told no one at Employer's about his hernias before that time. He has not returned to work for Employer.

8. Claimant has not received any workers' compensation benefits for his hernia claim.

9. Claimant did not suffer an accident causing a personal injury.

DISCUSSION AND FURTHER FINDINGS

Claimant concedes that he does not associate the onset of his difficulties with a particular mishap/event. (Hr. Tr., 11/19 – 12/9). Therefore, the Commission need not consider Claimant's theory of recovery under an "accident/injury" path. Claimant can pursue his claim, if at all, under an occupational disease theory. I.C. § 72-448 provides, in

pertinent part:

> Unless written notice of the manifestation of an occupational disease is given to the employer within sixty (60) days after its first manifestation, or to the industrial commission if the employer cannot be reasonably located within ninety (90) days after the first manifestation, and unless claim for worker's compensation benefits for an occupational disease is filed with the industrial commission within one (1) year after the first manifestation, all rights of the employee to worker's compensation due to the occupational disease shall be forever barred.

I.C. § 72-448(1).

Idaho Code § 72-102(18) provides: "'Manifestation' means the time when an employee knows that he [*sic*] has an occupational disease, or whenever a qualified physician shall inform the injured worker that he [*sic*] has an occupational disease."

The definition is stated in the disjunctive. Manifestation means either the date on which a claimant "knows" that he or she suffers from an occupational disease or the date on which a qualified physician informs a claimant that he or she has an occupational disease. *See*, *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

10. The record clearly establishes that Employer's first notice concerning Claimant's injuries was the date on which it received Dr. Given's notes on July 10, 2009. Employer clearly believed that the notes were sent to it for the purpose of notifying Employer of the fact that Claimant had suffered a work related injury. Otherwise, Employer would not have felt compelled to file an Employer's First Report with the Industrial Commission on or about July 16, 2009. We find, therefore, that Employer received notice of Claimant's occupational disease claim on July 10, 2009.

11. In order to ascertain whether Claimant's notice to Employer was timely, we need only ascertain whether Claimant's date of manifestation occurred less than 60 days prior to July 10, 2009. If it did, then notice to Employer was timely. If it did not, then the claim is barred by reason of Claimant's failure to give timely notice under I.C. § 72-448.

12. The only date that falls within the 60 day window afforded by our finding on the date of notice is May 20, 2009, the date of Claimant's conversation with his friend at church. If this is the date on which Claimant first realized that his hernia difficulties were related to the demands of his employment, then notice is timely, since the May 20, 2009 conversation took place less than 60 days prior to July 10, 2009. The Commission finds that Claimant first knew that his hernias were work related on May 20, 2009. In this regard, it is significant that he identified May 20, 2009, as the date of manifestation of his alleged occupational disease in his subsequent complaint. With a May 20, 2009 date of manifestation, notice to Employer is timely pursuant to I.C. § 72-448.

13. In addition to demonstrating that he has complied with the provisions of I.C. § 72-448, Claimant must demonstrate all other elements of a compensable occupational disease in order to establish entitlement to benefits under this law. Of particular relevance to the facts of this case, is the requirement that Claimant demonstrate a causal relationship between the demands of his employment, and his alleged disease. Claimant is required to put on medical proof establishing causation, and this proof must establish causation to a reasonable degree of medical probability. Here, Claimant has altogether failed to adduce substantial and competent medical evidence establishing causation to the requisite degree of medical probability. The only medical record offered into evidence is the work status report authored by Dr. Givens. Although this report proved sufficient to alert Employer to Claimant's designs upon a workers' compensation claim, it does not constitute medical evidence sufficient to establish that the demands of Claimant's employment caused Claimant's umbilical and inguinal hernias. Therefore, the Commission concludes that Claimant has failed to prove this essential element of his occupational disease claim.

CONCLUSIONS OF LAW

1. Claimant did not suffer an "accident" producing an "injury."

2. Claimant did give timely notice of his alleged occupational disease as required by I.C. § 72-448.

3. Claimant has failed to prove that a causal connection exists between the demands of his employment, and his alleged occupational disease.

4. Claimant's complaint should therefore be dismissed with prejudice.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant did not suffer an "accident" producing an "injury."

2. Claimant did give timely notice of his alleged occupational disease as required by I.C. § 72-448.

3. Claimant has failed to prove that a causal connection exists between the demands of his employment, and his alleged occupational disease.

4. Claimant's complaint should therefore be dismissed with prejudice; and,

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

DATED this __3rd___ day of ___February_____, 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 _3rd_____ day of ___February_____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TIM MCPHERSON
4650 BARDWELL DR
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BRADLEY J STODDARD
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__/s/_____