BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RONALD ROKOVITZ, Claimant, v. CITY OF BOISE, Self-Insured Employer, Defendant.	**IC 2009-010995** **2009-011530** **2010-014414** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed April 13, 2011

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 in Boise on October 1, 2010. Claimant was present and represented by Richard S. Owen of Nampa. Susan R. Veltman of Boise represented the self-insured Employer, City of Boise. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on December 28, 2010.

ISSUES

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

1. Whether Claimant's bilateral carpal tunnel syndrome (CTS) is the result of a compensable occupational disease; and, if so,

2. A determination of Claimant's average weekly wage.

In his post-hearing briefing, Claimant asserted his entitlement to temporary total disability (TTD) benefits. Defendant properly points out that Claimant's entitlement to TTD benefits was not a noticed issue. Defendant is correct and Claimant's entitlement to TTD benefits will not be decided.

CONTENTIONS OF THE PARTIES

Claimant contends that he contracted bilateral carpal tunnel syndrome (CTS) as the result of his 33-year employment with the City of Boise as a construction inspector, and timely notified Employer. His duties included removing heavy manhole covers with a pry bar and hammer, pounding stakes, and climbing in and out of manholes. While perhaps not the sole cause, these activities were certainly factors in the development of Claimant's CTS as the cause of such condition is multifactorial. Claimant further seeks reimbursement for his carpal tunnel release surgeries.

Employer contends that Claimant's CTS was not caused by his work, because he never complained of symptoms until after he retired. Even if causation exists, Claimant failed to report his CTS within 60 days of its manifestation. Further, Claimant exaggerated the extent of his lifting of manhole covers and hammering, such that his medical expert based his causation opinion on inaccurate information. It is more probable that Claimant's CTS was caused by his chain saw use over the years. Moreover, Claimant's occupation as a construction inspector did not subject him to any risks for the development of CTS not found in the general run of occupations.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his co-worker Gregory Molsee, taken at the hearing;

2. Claimant's Exhibits 1-9, admitted at the hearing;

3. Defendant's Exhibits 1-3, 5, and 7-25, admitted at the hearing;

4. The post-hearing deposition of Rodde Cox, M.D., taken by Claimant on October 5, 2010; and

5. The post-hearing deposition of John Smith, M.D., taken by Defendant on October 21, 2010.

After having considered all the above evidence and briefs 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 64 years of age and resided in Caldwell at the time of the hearing. He worked for the City of Boise first as a surveyor for five years, then as a construction inspector for 28 years. He retired in May of 2009.

2. On April 27, 2009, Claimant was involved in a work-related motor vehicle accident (MVA). He had both hands on the steering wheel when he was side-swiped by another vehicle. He was treated for left shoulder and neck pain. Although Claimant testified that he complained about numbness and pain consistent with CTS in his initial medical visit on the day of his MVA, the medical records do not reflect that he did so. The first time such complaints were definitively mentioned in Claimant's medical records was on May 13, 2009, when Claimant saw Michael Gibson, M.D., who reported, "At this visit he did complain of occasional tingling of the fingers of his left hand which was of brief duration." Defendant's Exhibit 17, p. 326.

3. On November 16, 2009, Claimant saw Rodde Cox, M.D., at his attorney's referral.[1] Based on Claimant's complaints, Dr. Cox suspected CTS and ordered electrodiagnostic studies to rule out cervical radiculopathy versus CTS. Those studies were performed on December 4, 2009 by Dr. Cox. The studies confirmed severe bilateral CTS, right worse than left. Dr. Cox, a physiatrist, referred Claimant to John Smith, M.D., an orthopedic surgeon.

4. Claimant first saw Dr. Smith on March 15, 2010, at which time he confirmed the diagnosis of bilateral CTS. Dr. Smith noted that, per history, Claimant's bilateral hand numbness and pain began around June 2009.[2] On April 6, 2010, Dr. Smith performed a left carpal tunnel release. A right carpal tunnel release was scheduled 12 days after the hearing, but that surgery was to be performed by a physician other than Dr. Smith.

DISCUSSION AND FURTHER FINDINGS

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code §72-102(22), which defines occupational diseases and related terms as follows:

> (a) "Occupational disease" means 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, but shall not include

[1] The referring attorney was not Mr. Owen, but was an attorney retained to assist Claimant in his third-party action against the driver of the vehicle that side-swiped him.

[2] In an April 19, 2010, follow-up, Claimant indicated that his bilateral hand numbness began at the time of his MVA.

psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.

(b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.

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

Lastly, Idaho Code §72-439 provides:

An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.

Claimant's job duties:

5. Claimant began his lengthy employment with the City of Boise in 1976 as a surveyor. His duties included pounding in construction stakes on city-owned projects. After about five years in that position, Claimant was promoted to the position of construction inspector, which he held for the following 28 years. Apart from the more physical duties performed as a construction inspector, to be described in more detail later, Claimant was required to write project diaries, prepare pay estimates (this required climbing in and out of manholes to inspect contractors' work) and change orders, as well as public relations work.

6. At hearing, Claimant was asked to describe his job duties during the last five years of his employment. One of the most physical activities associated with Claimant's construction inspector duties was the removal and replacement of cast iron manhole covers. He testified that he would be required to remove the covers four out of every five workdays. He had a special "T-bar" type tool he would use to break the manhole cover free from its base and lift it off of the manhole. Claimant placed the weight of the manhole covers at 60 to 100 pounds and testified that he would pick up between 5 and 50 manhole covers a day, depending on the size of

the project being inspected. Once Claimant lifted off the cover, he would slide it out of the way. It was only necessary to lift the cover high enough to clear the opening of the manhole.

7. Claimant testified as follows at hearing regarding his use of the "T-bar" in removing the manhole covers:

> One thing I would like to point out is that the first pull, sometimes these manhole covers did not come off. You would have to repeatedly jerk this bar in order to pry that loose because, if you're familiar with them at all, there would be debris and tar from the ACHD's overlay projects that would sometimes make it more difficult.

Hearing Transcript, p. 35.

8. Claimant testified that the manhole covers in an entire subdivision would have to be removed at least twice. The first time would be for the preliminary acceptance; the second time would be for the final acceptance of the project. Claimant would actually have to climb down steps into the manhole of the sewage or drain pipe and inspect the same for debris. The manholes ranged in depth from 6 to 30 feet.

9. Chip sealing posed a particular problem for Claimant when removing manhole covers:

> When ACHD does chip sealing, and I think several of us in here have probably seen the process, they go through with a truck with tar on it, spread out this tar on the street and then come along and put three-quarter gravel, rock chips on top of that tar, known as chip sealing, and in the process of spreading that tar, a lot of that gets in the recesses of the manhole covers and usually glue those things down. You know, when it gets hot, like it is now, it would just bake that tar into the recesses of the manhole covers and it would make them extremely difficult to get off.
>
> Q. (By Mr. Owen): Are you able to get it off with the tool that you brought?
>
> A. Majority of the time, no.
>
> Q. What did you do?
>
> A. I took a three- or four-pound sledgehammer and you'd have to pound around the edges of the manhole and break it loose from that tar coating that was on there and try to pull them off.

Hearing Transcript, p. 39.

10. Claimant also had difficulty removing manhole covers in wintry weather:

> Yes, the frost when the temperature dropped, the frost would get into the recesses of the manhole, underneath the manhole cover, and that caused the same sort of problems that the tar coating did. Frost would get up in there and you'd have to break the manhole loose, again, with the use of a hammer. Cast iron being as brittle as it is, there were times when I broke manhole covers.

Hearing Transcript, p. 41.

11. Claimant also used three- to eight-pound sledgehammers when pounding stakes.

12. ICRD Field Consultant Don Thompson prepared a Job Site Evaluation (JSE) in October 1996 following a shoulder injury Claimant suffered. Mr. Thompson generally described the duties of a construction supervisor as, "Visits construction sites and makes sure that City construction guidelines are followed. Drives vehicle back and forth from job sites. Does paperwork needed for documentation." Defendant's Exhibit 5, p. 98. According to the JSE, in an 8-hour day, Claimant would spend "About one hour in-office work, 2 ½ hours driving, 4 ½ hours at job sites. This, of course, varies with daily needs." *Id.* The JSE further indicates that Claimant would need to lift up to 100 pounds occasionally, or 1%-33% of the day. "Main things lifted include level and tripod, and manhole covers. May lift/carry level as many as 8 times per day, but will not handle it at all on some days. Manhole covers weigh about 100# and the lifting frequency also varies from 0 – 10 times per day." *Id.* Although Claimant does not entirely agree with it, Claimant acknowledged that he signed that he reviewed the JSE on October 9, 1996.

The medical evidence:

Dr. Cox:

13. Claimant first saw Dr. Cox on November 16, 2009, at the suggestion of his attorney, John Lerma, who suspected that Claimant may have CTS following his MVA. Dr. Cox noted

that Claimant's left shoulder was "tugged" by Claimant's seatbelt at the time of the MVA and it has been increasingly uncomfortable since. Dr. Cox also noted that Claimant had both of his hands on the steering wheel. Claimant was complaining of numbness throughout his left upper extremity, as well as some achiness in his left shoulder that began shortly after his MVA. Dr. Cox did not have available any prior medical records from immediately post-MVA. Dr. Cox further noted that, "His symptoms are increased with lifting, pushing, sleeping, hand use and driving, and are relieved with avoiding the above activities and keeping his hands below shoulder level." Defendant's Exhibit 21, p. 420. Dr. Cox recommended electrodiagnostic studies of Claimant's left upper extremity to rule out cervical radiculopathy versus CTS.

Dr. Cox conducted the studies on December 4, 2009. They revealed severe bilateral CTS. Dr. Cox then referred Claimant to an orthopedic surgeon. Dr. Cox initially believed that Claimant's symptoms were caused by a contusion over his carpal tunnel at the time of his MVA.

14. Claimant returned to see Dr. Cox on June 3, 2010, at the request of his attorney. By that time, Claimant suspected that his CTS may be work-related and not caused by his MVA. Claimant discussed with Dr. Cox his job duties in detail, brought with him the T-bar he used to remove manhole covers, and a friend and co-worker who performed similar duties as Claimant and had similar symptoms. In his office note for that date, Dr. Cox noted:

> At this point, the job description as outlined by Mr. Rokovitz certainly requires a significant amount of high force gripping by gripping onto the metal device that he pulls the manhole covers with, and with high force gripping involved in climbing up and down the ladders. As a result, it is my opinion on a more probable than not basis, that these work related activities are the cause of his bilateral carpal tunnel syndrome.

Id., at p. 426.

15. At Dr. Cox's deposition, Claimant's counsel further described Claimant's job duties as follows:

Q. (By Mr. Owen): Let me just make some representations to you, Dr. Cox, and go ahead and ask you some medical opinions. Like I said, we had the hearing in this case already.

Mr. Rokovitz testified, in addition to the use of the metal bar, which he used to lift the manhole covers. Also, there were plenty of occasions where he had to loosen the manhole cover with the use of a three- or four-pound sledge. For instance, when the road would be chip sealed, that would cause a sealing of the manhole cover, or when the road was frozen, or when there had been a lot of traffic. He testified that it would take repeated hammering around the edges of the manhole cover to loosen it up.

In addition, he used the hammer to stake out jobs. And by that, I mean, he would pound stakes into the ground in a survey method to make sure the contractors knew where to dig or where not to dig. He also testified that he would go up and down ladders quite a bit, and you made a note of that. And I guess that's the extent of that.

And the other thing I wanted to represent, Dr. Cox, is that all of these tasks were very repetitious. Mr. Rokovitz testified he did the manhole covers. He would pick those up between 5 and 50 times a day. The staking was repetitious. And going up and down the ladders was very repetitious.

Now, based on the history that you took and the representations I've made to you, Doctor. Do you have an opinion to a reasonable degree of medical probability, as to whether or not those work activities were a cause of Mr. Rockovitz's bilateral carpal tunnel?

A. I feel the repetitive, high force gripping that he was doing with the hammering, as well as pulling the manhole covers, likely was the cause of his carpal tunnel syndrome.

Dr. Cox Deposition, pp. 10-11.

Dr. Cox described the amount of forceful gripping required of Claimant's job as "unusual."

16. Claimant has a history of chain saw use. Regarding the same, Dr. Cox testified:

Q. (By Mr. Owen): All right, sir. I've got a couple of other medical records I want to show you, and ask for your comments, Dr. Cox. Mr. Rockovitz had seen Dr. Watkins a couple of times before.

And specifically, I wanted to direct your attention to some records that show he had seen Dr. Watkins, in October of 2001, for problems with his right index finger. And at that point Dr. Watkins talks about a vibration neuropathy in his right index finger.

There has been some evidence in this case, Dr. Cox, that Mr. Rokovitz uses a chain saw from time to time to cut firewood at his home. Does this history play into your opinion? Does this have an effect on what you've indicated your opinion is on causation?

A. Well, I guess the use of the chain saw, and that vibration could certainly put someone at risk for carpal tunnel syndrome. That's one of the things that we would ask a person with carpal tunnel to try and avoid, is using laboratory [*sic*-vibratory] hand tools, and that sort of thing.

Q. Okay.

A. And the index finger is supplied by the median nerve, if it's on the palmer aspect of the index finger, anyway. That would be a little odd presentation for carpal tunnel to have the index finger involved. And I can't tell based on that, whether he's thinking that it was vibration to the digital nerves that run the index finger, versus a carpal tunnel.

. . .

Q. All right, sir. Doctor, if we assume that Mr. Rockovitz does run a chain saw from time to time, and did so before he saw you and after he saw you, does that mean that his carpal tunnel syndrome is not caused by what he did at work?

A. No, not necessarily.

Q. Okay. Is it possible that the chain saw is one of these multifactorial things? The chain saw may be affecting the presentation in some way?

A. Yes.

Q. But it doesn't mean that the work did not cause it?

A. Correct.

Id., pp. 13-14, 16.

17. On cross-examination, Dr. Cox explained how he went from the MVA causation theory to the repetitive trauma theory:

I think down the road, there was some further information that was provided to me that indicated that timing-wise, the symptoms of numbness, and things in his hand, didn't come on until sometime after the accident. And if the theory that this was a contusion, or a bruising to the nerves, that should have been a fairly immediate onset of symptoms with the accident.

So barring the accident as a cause, then the thought was, well, what are other potential causes that could have caused that? He came in, and explained to me a lot of the repetitive high force gripping and things he was doing at work.

> And I felt that it was certainly a consideration that work could have caused this carpal tunnel.

Id., pp. 18-19.

18. Claimant never made any complaints of carpal tunnel-like symptoms during his 33 years with Employer. Regarding Claimant's delay in having or reporting carpal tunnel symptoms, Dr. Cox testified:

> That's a good question. It always amazes me how often people come in, and may have a rip-roaring severe carpal tunnel syndrome, that really didn't have much in terms of complaints, until suddenly they begin getting pain. But the numbness they might not really notice.
>
> I had a patient yesterday fit that category. They didn't really have any symptoms. And by the time they came in, electrodiagnostically, he had severe carpal tunnel syndrome. But just recently he began having pain, that began him receiving treatment. So I'm not sure I could say that.

Id., p. 22.

19. Dr. Cox was unaware of any other job duties performed by Claimant other than removing and replacing manhole covers, hammering, and staking. He testified that he would need to know what other duties Claimant performed in the event Claimant overstated the repetitive nature of the aforementioned duties.

Dr. Smith:

20. Dr. Smith, an orthopedic surgeon, first saw Claimant on a referral from Dr. Cox[3] on March 15, 2010. It was Dr. Smith who performed Claimant's left carpal tunnel release. At his March 2010 visit, Claimant reported that his symptoms began in June 2009, a couple of months after his MVA, the event to which Claimant attributed those symptoms. Claimant did not discuss his job duties or report that he had any difficulties when he worked and did not relate

[3] Interestingly, Dr. Cox testified that he did not know Dr. Smith.

any CTS symptoms to his work. Dr. Smith would consider the lifting of manhole covers with the T-bar to be heavy manual labor.

21. Regarding whether the hazards of developing carpal tunnel syndrome are peculiar to his employment, Dr. Smith testified:

> Q. (By Ms. Veltman): And for the purposes of the next few questions, which I'll call hypothetical No. 2, I'd like you to consider some modifications to this job site evaluation and to assume that the need to lift manhole covers is increased to 10 to 50 times per day as opposed to 0 to 10, also assume it's sometimes necessary to use a hammer to loosen it, that part of the job involves grasping ladders to get in and out of the manholes, and assume that the total amount of forceful grasping is 50 percent of an eight-hour workday.
>
> A. Okay.
>
> Q. If you consider those factors, would you consider the hazards of carpal tunnel syndrome to be peculiar to the job duties?
>
> MR. OWEN: Let me ask a question.
>
> Doctor, do you understand what we're asking? "Peculiar to the job," do you know what that means?
>
> THE WITNESS: Well, that it's more likely than not that someone - - my answer would probably be, no, that I don't feel that someone who does that job is particularly prone to develop carpal tunnel syndrome.
>
> MR. OWEN: That's how you interpret the question?
>
> THE WITNESS: Yeah.
>
> MR. OWEN: That's all I wanted to know.
>
> (BY MS. VELTMAN): Well, what are some - - based on your understanding of what it means to have the hazards of a job - - carpal tunnel hazards being peculiar to the job duties, what types of occupations or jobs would you identify as jobs which you would consider hazards of carpal tunnel syndrome to be peculiar?
>
> A. Any occupation which would have repetitive vibratory force on the wrist, such as operating a jackhammer, or in which weight bearing on the wrist would be a constant problem - - or a part of the job.
>
> Typically, keyboarding of computers has traditionally been associated with carpal tunnel syndrome, but there hasn't been any real evidence to support that. It's more of an accepted thing than anything proven by studies or the data.
>
> With the increased use of keyboards, you know, in the commonplace in our society, we would expect to find a lot more carpal tunnel syndrome, things like that, were in fact related, you now, or a causative factor.

> Q. Earlier in your testimony you mentioned that forceful gripping can be a cause of carpal tunnel syndrome, yet that you wouldn't consider the hazards of carpal tunnel to be peculiar to the job duties we've discussed.
>
> How do you reconcile those two statements?
>
> A. The fact that if we have several people doing that job, very few would end up developing carpal tunnel syndrome, and so there are more factors involved in developing this problem than the simple act of grasping.
>
> I think forceful grasping is a risk factor for developing carpal tunnel syndrome, but people who do heavy grasping do not necessarily form or develop carpal tunnel syndrome.

Dr. Smith Deposition, pp. 16-18.

22. Dr. Smith expressed some concern that Claimant did not complain of carpal tunnel-type symptoms during the period of time he was doing the bulk of his forceful gripping, etc., at work. He explained that:

> A. I think there would be a strong temporal relationship to the stress and demands on the wrist and the development of symptoms, meaning, they should correlate, the symptoms with the activities.
>
> Q. Why?
>
> A. Carpal tunnel syndrome is basically a mechanical problem. If you push on the nerve, it reacts. If you don't push on the nerve, it should be fine. And so in that way there is strong temporal relationship, again, with the symptoms and the problem and the activities of the wrist.

Id., p. 19.

23. While Dr. Smith does not believe Claimant's forceful gripping at work caused his CTS, he does opine that Claimant's chain saw use, his physical activities, and advancing age are all risk factors for the development of CTS.

24. On cross-examination, Dr. Smith conveyed his understanding that Claimant's work activities need not be the sole cause of his CTS for his claim to be compensable. Dr. Smith remains of the opinion that Claimant's chain saw usage as well as his heavy manual labor at

work[4] all had a cumulative effect on the development of his CTS. Dr. Smith also discussed in his deposition what "repetitive" means with respect to creating a greater risk than the general population for developing CTS:

> Q. (By Mr. Owen): Let me ask you this, Doctor. If we have a job that exposes a worker to repetitive, forceful gripping on a daily basis, at least four hours out of that eight-hour job, does that expose that person to a risk of getting carpal tunnel that is greater than the risk faced by the general public?[5]
>
> A. Could you define "repetitive"?
>
> Q. More than half the time. More than half the time he's working he's engaged in forceful, repetitive gripping.
>
> A. I'm not sure I know how to answer that, because there would be a difference if he was doing heavy gripping on an assembly line versus like lifting bales of hay where you do that activity maybe for several hours, but the actual grip and lift is, you know, separated by periods of time. I mean, and that's kind of how we think of repetitive motions is more, again, the nonstop push, push, push.
>
> Q. Let's take that example first then.
>
> Let's say Mr. Rockovitz is engaged in those kinds of activities either with this tool where he's lifting 100-pound manholes or using a three-pound sledgehammer, and there are days when that activity goes on, let's say, more than four hours, and he's doing it repetitively - - I mean continuously.
>
> Does that activity expose him to a greater risk that's faced by the general public?
>
> A. Yes.
>
> Q. Where would you cut that off, Doctor?
>
> How do you parse that out and say, well, no, if you're only doing it this much, it's not a greater risk?
>
> How do you make that determination?
>
> A. I don't think I would be able to make the determination what the cutoff is.
>
> Q. It's kind of like splitting the hair once too many, isn't it?
>
> A. Correct.

[4] At the time Dr. Smith reached this opinion, he was unaware of Claimant's job duties but knew generally that he worked as a laborer for Boise City.

[5] The Referee is hard-pressed to know how Dr. Smith is qualified to answer this question without further foundation regarding his knowledge of the risk of contracting CTS ". . . faced by the general public."

Id., p. 29-30.

25. Dr. Smith conceded that he did not know the extent of Claimant's chain saw use. Because Claimant informed him that he had several chain saws, Dr. Smith concluded that he was more than a casual user. Finally, Dr. Smith was unaware of Dr. Cox's causation opinion until so informed by Claimant's counsel:

> Q. Do you disagree with that [Dr. Cox's opinion]?
>
> A. Again, only to the extent that he didn't have or appear to have any symptoms associated with the work and the job that he did.
>
> Q. And where did you get that information, that Mr. Rokovitz didn't have any symptoms at the time he was performing his job?
>
> A. That his only complaint was that it began several months after the accident, and we usually try to be very specific about the nature of the onset of his symptoms.
>
> Q. Would it be fair to say, Dr. Smith, that in a lot of these cases - - carpal tunnel cases specifically - - that the causation is multifactorial, there's more than one reason for it?
>
> A. Yes.
>
> Q. Would you think that Mr. Rokovitz's case fits into that category?
>
> A. Yes.

Id., p. 34.

26. There are two major issues confronting the Referee in this matter. The first is whether Claimant gave Employer notice of his CTS within 60 days following its manifestation. The second is whether Claimant's job duties were such that the contraction of CTS was characteristic of and peculiar to Claimant's particular job as a construction inspector with the City of Boise.

Manifestation:

The record establishes that Employer was first put on notice of Claimant's occupational disease on June 10, 2010. I.C. § 72-701 requires Claimant to give notice within 60 days

following the date of manifestation. The term "manifestation" is a term of art, and is defined in I.C. § 72-102(19) as follows:

> "Manifestation" means the time 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.

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

Here, it is clear that a "qualified physician" informed Claimant of the work-related nature of his disease on or about June 3, 2010, when Claimant conferred with Dr. Cox. If this is the date of manifestation, then the claim is timely made. However, Defendant asserts that notwithstanding the fact that Dr. Cox favored Claimant with his opinion on the work-related nature of Claimant's condition on or about June 3, 2010, Claimant independently "knew" that his condition was work-related as early December 2009 or January 2010. If true, then Claimant had an obligation to give notice within 60 days following this date. Accordingly, in order to understand whether notice was timely given as required by I.C. § 72-701, we must understand the strength of Claimant's conviction (if any) concerning the work-related nature of his symptomatology prior to the date of his June 3rd conversation with Dr. Cox. In this regard, it is important to recall that under the first prong of I.C. § 72-102(19), in order for manifestation to occur, it must be shown that Claimant "knows" that his condition is causally related to the demands of his employment. Where Claimant merely harbors a suspicion that he suffers from a work-related condition, which suspicion has not yet matured into a conviction concerning the work-related nature of his disease, manifestation has not occurred. (See *Sundquist, supra*.)

Turning to the record, we find that there are some inconsistencies in Claimant's testimony concerning the date on which he first learned that his condition was related to the demands of his employment. On the one hand, Claimant testified it was not until he met with Dr. Cox on June 3, 2010, that he was apprised of the connection between the demands of his work and his diagnosis of CTS. On the other hand, there is considerable testimony adduced on cross-examination of Claimant tending to suggest that he knew that his condition was related to the demands of his employment some months prior to June 3, 2010, and independent of anything he learned from his treating/evaluating physicians. In particular, the Referee finds the following excerpts from Claimant's testimony instructive:

> Q. (By Ms. Veltman) At this time you first saw Dr. Cox in November of 2009, did you believe that your carpal tunnel symptoms were related to your car wreck?
>
> A. Yes.
>
> Q. When did you first suspect that those symptoms may be related to your job duties with the City of Boise, such as lifting the manhole covers?
>
> A. Well, I spoke to Dr. Sant about it and I also spoke to the gal who was the nurse assigned to the case from the insurance company and she along with, and I don't remember her name at this point, along with my attorney Mr. Lerma thought I needed to go see a nerve doctor and Dr. Cox would not take anyone without a recommendation and it was my attorney who made the recommendation and the appointment for me to get the testing done by Dr. Cox.
>
> Q. Okay. That didn't answer my question as to when did you first suspect that your carpal tunnel symptoms might be related to your work?
>
> A. I told that to Dr. Sant all through my treatment that I would have this tingling in my hands, but nobody would pay attention.
>
> Q. Okay; so when you were treating with Dr. Sant, did you represent to him then that you thought the tingling was related to your job duties?
>
> A. He wouldn't talk to me about it. I put it down on the form that you fill out. When you went in to see him, you had to fill out a form as to what you were there for and what symptoms you had and what was bothering you and I filled those out and he basically

told me he was not there to treat anything related to my shoulder. He was there strictly to treat my hip. He ignored everything I said.

Q. Okay, and did you try to tell him it was your job duties?

A. We never got that far. He refused to discuss it.

. . .

Q. BY MS. VELTMAN: All right. Regardless of what you were able to talk about with Dr. Sant, during the time frame that you were seeing Dr. Sant, is that when you realized that your carpal tunnel syndrome might be related to lifting manhole covers and other job duties with the City of Boise?

A. At the time I seen Dr. Sant I didn't even know it was carpal tunnel syndrome. All I knew is that I had this numbness in my hands and I didn't know what it was caused by and I couldn't get him or anybody else to listen.

Q. Okay, and at that time what did you attribute that numbness to?

A. At that time I figured it was still connected to the shoulder injury.

Q. Okay; so when is it that you thought it would be related to lifting manhole covers?

A. Probably about the time I talked to John Lerma about it.

Q. Okay, and what would the approximate date of that be?

A. I'd say it was about two weeks before Dr. Sant released me, approximately.

Q. Okay; so that puts us mid January of 2010; does that sound about right?

A. I don't know.

. . .

Q. (By Ms. Veltman) All right; so when you saw him for testing, which I believe it was December 2009, did you talk about the cause of your symptoms at all on that visit?

A. I don't recall.

Q. Okay; so when it was actually, sorry, my mistake, the third visit with Dr. Cox in June of 2010, did you let him know it was your opinion that your symptoms were related to your job duties?

A. That my symptoms were related to what?

Q. To your job duties.

A. Yes.

Q. Okay, how did you come to that conclusion?

A. I read up on carpal tunnel damage on the Internet and found out, you know, repetitive work, which my work was, could be causational to carpal tunnel issues.

Q. And what was the time period when you did that Internet research?

A. I did it bit by bit. I have dial-up service on my Internet which is slower than molasses in January and it was probably over a period of about a couple, three weeks before two and two started adding up.

Q. Okay, three weeks from when?

A. Probably three weeks from my testing.

Q. Okay; so approximately three weeks after the testing in December of 2009?

A. Approximately.

Q. And when I asked you in your deposition when you first put it together in your own mind that doing that work caused your carpal tunnel, you indicated probably after Dr. Cox's report; is that accurate?

A. I think it was after my initial visit to him.

. . .

Q. (By Ms. Veltman) Okay, and when did you first know it was your work activities that caused carpal tunnel?

A. I believe it was after I initially talked to John Lerma, because he has had other cases that involve carpal tunnel damage and he says, he told me, he said regardless of the cause that he felt that I needed to be tested and I called at his recommendation, I called Dr. Cox. Dr. Cox wouldn't see me without somebody's referral, so John referred me to Dr. Cox. (*Id.* at pp. 86-87).

Hearing Transcript, pp. 80-87.

This testimony, taken as a whole, tends to reflect that no later than December 2009 or January 2010, Claimant had come to the conclusion that his condition was related to the demands

of his employment. The Referee appreciates, as noted above, that Claimant has also testified that he did not understand his condition to be work-related until he conferred with Dr. Cox on June 3, 2010. However, from a review of Claimant's testimony on this point, it appears that he arrived at Dr. Cox's office on June 3, 2010, not so much for the purpose of making inquiries of Dr. Cox as to whether his condition was work-related, as for the purpose of persuading Dr. Cox to the conclusion that Claimant had already reached concerning the etiology of his complaints. Claimant arrived at Dr. Cox's office prepared to give Dr. Cox a detailed description of his work activities. In addition, he had thought to bring with him a tool with which he lifted manhole covers, as well as a co-worker who had developed symptoms similar to his. (*See*, Hearing Transcript pp. 63, 65).

From these facts the Referee finds that Claimant "knew" that his condition was related to the demands of his employment no later than January 2010. As such, notice is untimely pursuant to I.C. § 72-701. The Referee is unaware of any facts that would excuse timely notice under I.C. § 72-704, and for this reason, lack of timely notice is fatal to Claimant's occupational disease claim.

"<u>Characteristic of and peculiar to</u>":

27. Even if it is assumed that the claim is not time-barred, the provisions of I.C. § 72-102(22)(a), create yet another impediment to the prosecution of this claim.

Assuming, without deciding, that Claimant's work, including removing manhole covers, hammering, and climbing ladders is causally related to the development of his CTS, Claimant nevertheless bears the burden of proving that the hazards to which he was exposed are "charactertistic of, and peculiar to" his occupation. *See,* I.C. § 72-102(22)(a).

The phrase "characteristic of and peculiar to," was first construed in *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 518 P.2d 770 (1978). There, the claimant contended that his pulmonary disease was the result of rock, dust and other airborne irritants to which he was exposed in the course of his employment as a heavy equipment operator. The Commission concluded that the claimant's pulmonary disease was not due to the nature of his occupation, nor was it characteristic of and peculiar to his employment. In reaching this conclusion, the Commission relied, in part, on the testimony of a medical expert who opined that heavy equipment operators do not routinely develop emphysema. In reversing the Commission, the Court expressed its concern that the Commission may have entertained an overly restrictive notion of how "peculiar" to a given employment the hazards must be. In remanding the matter to the Commission for further action, the Court provided the following guidance as to the meaning and application of the term "characteristic of and peculiar to":

> "The term 'peculiar to the occupation' is defined in *Glodenis v. American Brass Co.*, 118 Conn. 29, 170 A. 146, 150, and quoted in Mr. Justice Reid's opinion in *Samels v. Goodyear Tire & Rubber Co*., 317 Mich. 149, 26 N.W.2d 742, 745, as follows: 'The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates *exclusively* from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations.'" (Emphasis in original).
>
> *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978) (*citing Underwood v. National Motor Castings Division, etc.*, 329 Mich. 273, 276, 45 N.W.2d 286-87 (1951)).

It is for the Commission to determine whether Claimant has met his burden of proving whether the hazards causing his occupational disease where characteristic of and peculiar to his employment. The Commission is afforded wide discretion in making the factual determination as to whether or not Claimant has adduced facts sufficient to meet the *Bowman* test. See *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 14 P.3d 372 (2000). These

determinations are ordinarily quite fact specific, as demonstrated by at least two cases considered by the Court since *Bowman*. In *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996), the claimant was employed as a shop manager for the employer's tire store. His duties required a substantial amount of lifting, bending and twisting in connection with his duties installing tires on vehicles. After performing this work for a period of time, the claimant began to note increasing low back pain, but without the occurrence of a specific inciting event. He pursued a claim for workers' compensation benefits under an occupational disease theory. In rejecting the claim for compensation, the Commission ruled, *inter alia*, that the claimant had failed to adduce proof sufficient to establish that the conditions of his employment exposed him to a hazard which distinguished it in character from the general run of occupations. In particular, the Commission noted that the claimant's work was "not distinguishable from many other occupations which involve strenuous or heavy labor." The Court upheld the Commission's decision, ruling that there was substantial and competent evidence supporting the conclusion that the activities implicated in injuring the claimant were typical of activities common to the general run of occupations involving manual labor.

In *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 14 P.3d 372 (2000), the claimant was employed as a loss prevention consultant. His work required him to travel by automobile on a regular basis. During his trips he would meet with up to four clients per day, and his duties would require him to hand write 1½ - 4 pages of notes per client. While at his office, the claimant's duties also included the use of a computer keyboard. The claimant began to develop symptoms consistent with carpal tunnel syndrome, and after consulting with a physician, he was given this diagnosis. The claimant pursued a claim for workers' compensation benefits, contending that his carpal tunnel syndrome was due to the aforementioned work

activities. Employer argued, *inter alia*, that the hazards to which the claimant was exposed were not characteristic of and peculiar to his employment under the *Bowman* standard. The Commission found the hazards to which the claimant was exposed could be distinguished from the general run of occupations. The Commission determined that exposure to long periods of repetitive upper-extremity motions, including writing, keyboarding, and gripping of a steering wheel, were hazards which did not occur in the general run of occupations. Although there was conflicting expert testimony that tended to support Employer's position, the Court ruled that there was substantial and competent evidence supporting the Commission's decision finding that the claimant had met his burden of proving that the hazard to which he was exposed was characteristic of and peculiar to his employment.

The fact-specific nature of these determinations is further illustrated by the Industrial Commission case *Watson v. Joslin Millwork, Inc.,* 2009 IIC 0274 (2009). In Watson, the claimant argued that the Industrial Commission cases of *Flores v. Boise Cascade*, 2008 IIC 0420 (2008) and *Wiltz v. Subway*, 2001 IIC 0867 (2001), supported the proposition that because the claimant's job involved a great deal of heavy lifting, twisting, bending, etc., that job created a risk of injury that was distinguishable from the risk to which workers are exposed in the general run of occupations. In rejecting this argument, the Commission noted that both *Flores* and *Wiltz* were decided on their own peculiar facts, and concluded that although the claimant's job did involve a good deal of heavy and manual labor, so do many, if not most, jobs that might generically described as "blue collar." In *Watson*, no particular machine or constant repetitive activity was implicated in causing the claimant's disease. The facts were found to be dissimilar from those at issue in *Flores* and *Wiltz*, and more like the facts of *Ogden v. Thompson*, *supra*. Ultimately, the Commission concluded that the claimant had failed to meet his burden of

establishing that the hazards to which he was exposed were characteristic of and peculiar to his employment.

28. Here, the Referee finds that Claimant's job-related activities fail to rise to the level of repetitiveness contemplated by statute and case law. Claimant's removal of manhole covers was sporadic and allowed for rest periods between each removal. The more frequent removal of the covers occurred during the building boom and decreased significantly during Claimant's last years of employment when building slacked off. There were days when Claimant would remove no manhole covers and there were days when he might remove 5-50 of the covers, according to his testimony. There was no testimony regarding the amount of time that would lapse between the removals of the covers. In other words, the removal of manhole covers, even when they were required to be loosened with a hammer, was not a constant, forceful, repetitive activity that consumed a significant part of Claimant's workday. In fact, the previously mentioned JSE for a construction inspector, prepared in 1996, indicated that in an 8-hour workday, Claimant would sit 3.5 hours and combine standing and walking for 4.5 hours. Claimant could also be expected to lift up to 100 pounds occasionally (1%-33% of an 8-hour day). The JSE also indicated that Claimant would be expected to remove manhole covers weighing 100 pounds from 0 to 10 times per day.[6] Claimant's position as a construction inspector afforded him the opportunity to perform a myriad of daily duties other than performing repetitive motions affecting his carpal tunnel. His duties allowed for more varied activities and more variety. *See,* Finding #27.

29. Most manual labor jobs require just the kind of activities performed by Claimant: some walking/standing; some sitting; some use of the upper extremities; and, from time to time, some heavy lifting. However, and critical here, those activities were never performed

[6] Claimant testified that he lifted the covers more frequently than what is reflected in the JSE, although he acknowledges signing the JSE.

continuously and repeatedly, i.e. in a manner that would distinguish Claimant's job from the general run of manual labor jobs. *See*, Ogden v. Thompson, supra. Cases awarding compensation for CTS as an occupational disease generally involve constant, repetitive use of the hands producing immediate symptoms, a situation not present here.

30. The Referee finds that Claimant has failed to prove that his bilateral carpal tunnel syndrome resulted from a hazard of such disease that was characteristic of and peculiar to his job as a construction inspector.

31. Based on the foregoing findings, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he has a compensable occupational disease.

2. All other issues are moot.

RECOMMENDATION

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

DATED this __30th___ day of __March__, 2011.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __13th____ day of _April__, 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:

RICHARD S OWEN
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NAMPA ID 83653

SUSAN R VELTMAN
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ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RONALD ROKOVITZ, Claimant, v. CITY OF BOISE, Self-Insured Employer, Defendant.	)	**IC 2009-010995** **2009-011530** **2010-014414** **ORDER** Filed April 13, 2011

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 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 conclusions of law as its own.

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

1. Claimant has failed to prove he has a compensable occupational disease.

2. All other issues are moot.

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

DATED this __13th__ day of __April__, 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 __13th___ day of __April__ 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
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SUSAN R VELTMAN
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ge Gina Espinosa