BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROURKE VEENENDAAL, Claimant, v. FISH BREEDERS OF IDAHO, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-005037** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed November 14, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above entitled matter to Referee Douglas A. Donohue. Referee Donohue conducted a hearing in Twin Falls on December 11, 2012. Claimant was represented by Patrick Brown, Esq. Employer/Surety was represented by Neil McFeeley, Esq. At hearing, the parties presented oral and documentary evidence. As well, the pre-hearing depositions of Leo Ray and Betty Clemmons were admitted into evidence. Following hearing, the depositions of D. Matt Wettstein, DPM and Andrew McCall, DPM were taken in accordance with the Judicial Rules of Practice and Procedure. Both parties submitted closing briefs. The matter came under advisement on July 22, 2013. Referee Donohue submitted his Findings of Fact, Conclusions of Law and Recommendation to the Commission on or about October 4, 2013. The Commission has elected to issue its own Findings of Fact, Conclusions of Law and Order in this matter.

ISSUES

By agreement of the parties, the following issues are before the Industrial Commission for determination:

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

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;

4. Whether and to what extent Claimant is entitled to the following benefits;

   a. Temporary partial and/or temporary total disability benefits;

   b. Permanent partial impairment;

   c. Disability in excess of impairment;

   d. Medical care;

5. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

6. Whether Claimant's entitlement to benefits should be affected by application of Idaho Code § 72-432.

We deem Claimant to have withdrawn his argument that he suffered injury as a result of an industrial accident. At hearing, counsel for Claimant only argued that Claimant suffers from a compensable occupational disease. (See transcript 8/14-21). Moreover, the post-hearing briefing fails to reveal that Claimant relies on an accident/injury theory of recovery. The Commission will evaluate the claim as an occupational disease claim.

In post-hearing briefing Claimant argues, for the first time, that he is entitled to an award of attorney's fees under Idaho Code § 72-804. This is not among the issues noticed for hearing, and the Commission will not consider Claimant's request in this proceeding.

Finally, Claimant contends that the issues of Claimant's entitlement to PPI and to PPD benefits are no longer before the Commission in view of Dr. McCall's testimony that Claimant is not at maximum medical improvement. As developed below, the Commission does not reach the issues of impairment and disability in this matter, but for different reasons.

CONTENTIONS OF THE PARTIES

Claimant was initially employed by Employer to assist in the construction of concrete fish runways at Employer's fish farm. In late September of 2010, he took a new job with Employer as a fish feeder. Claimant contends that this work required him to walk on twelve inch wide planks and six to eight inch wide concrete runway dividers while carrying 50 pound sacks of fish feed on his right shoulder. It is Claimant's contention that this weight, combined with the fact that he used a peculiar gait while walking on the narrow surfaces referenced above; i.e. placing one foot in front of the other, caused an unusual distribution of pressure on his feet which, in turn, led to ulcerations on the ball of his right foot. Claimant contends that the occupational exposure referenced above also led to the need for surgery performed by Dr. McCall to excise a neuroma in Claimant's right foot, and to shorten Claimant's metatarsal bones. Claimant contends that timely notice was given to Employer following the manifestation of Claimant's occupational disease. Claimant contends that his disease did not become manifest until the end of December of 2010.

Defendants contend that Claimant has not met his burden of showing that he has suffered a compensable occupational disease. As a threshold matter, Defendants contend that Claimant

has failed to demonstrate by competent medical evidence that the condition for which he seeks benefits is causally related to the hazards of his employment. Defendants contend that, at the very most, all the medical evidence establishes is that Claimant's foot ulcerations may be caused by the way in which his work required him to carry bags of fish feed. However, Defendants argue that these ulcerations have fully resolved, and that the conditions for which surgery was required are altogether unrelated to Claimant's occupational exposure. Defendants further contend that even if Claimant's condition is related to his employment, his claim is barred by virtue of his failure to demonstrate that he was exposed to the hazards of his non-acute occupational disease for a period of 60 days or more. Defendants contend that notice is not timely under Idaho Code § 72-448 since Claimant did not give notice to Employer within 60 days following the November 1, 2010 date of manifestation, the date of manifestation identified by Claimant in his Complaint. Defendants contend that Claimant is not entitled to PPI or PPD. In this regard, Defendants argue that Claimant's entitlement to PPI and PPD were noticed issues, and that Claimant may not unilaterally withdraw these issues from those to be considered by the Commission in this proceeding. Simply, Claimant failed to put on proof that he is entitled to impairment and/or disability, and therefore, his request for benefits must fail. Finally, Defendants argue that the medical evidence fails to establish that Claimant is entitled to past or prospective medical treatment.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. Oral testimony at hearing of Claimant, his parents Dick and Sigrid Veenendaal and Employer, Leo Ray;

2. Claimant's Exhibits A through R admitted at hearing;

3. Defendants' Exhibits 1 through 3 admitted at hearing; and

4. Post-hearing depositions of Andrew McCall, DPM and D. Matt Wettstein, DPM.

A number of objections were raised during the depositions of Drs. Wettstein and McCall. Only two of those objections are significant enough to require comment and treatment by the Commission. Dr. McCall's deposition was taken by Claimant on January 25, 2013. Dr. McCall was asked whether he had an opinion as to whether or not Claimant's work activity caused the ulceration to the bottom of Claimant's right foot. This led Defense counsel to interpose the following objection:

> MR. MCFEELEY: Objection to the form of the question. Calls for information which was not disclosed in Dr. McCall's reports and is later apparently - - or seeks later-developed opinions and expert opinions which were not disclosed.
>
> Dr. McCall Deposition, p. 6, ll. 18-22.

Similarly, in his March 11, 2013 deposition, Dr. Wettstein was asked by Defense counsel if he did not believe that Claimant's condition was hereditary versus occupationally caused. This led Claimant's counsel to make the following objection:

> MR. BROWN: I'm going to object at this point. I'll explain to you what's happening in a minute. But my objection is to obtaining causation opinions that were not previously disclosed, including under Rule 10. With that, we agree we'll go ahead and make the record rather than disrupting the deposition at this point.
>
> Dr. Wettstein Deposition, p. 9, ll. 5-14.

These objections require further treatment, because sustaining them, may result in a determination that Claimant has failed to adduce medical evidence sufficient to establish a causal relationship between the hazards of his employment and right foot condition of which he complains.

Concerning Dr. McCall's testimony on the issue of causation, it is first to be noted that at the outset of the case Defendants propounded certain standard discovery requests to Claimant,

among them Defendants interrogatory number 5. That interrogatory and Claimant's response thereto are set forth at Defendants' Exhibit number 1 as follows:

> INTERROGATORY NO. 5: Please state the name, address and telephone number of each person you intend to call as an expert witness in this matter and provide a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
>
> RESPONSE TO INTERROGATORY NO. 5: Claimant objects to this interrogatory to the extent it seeks information about experts consulted, but not expected to testify, on the grounds that it seeks attorney work product and is beyond the scope of I.R.C.P. 26(b)(3). Without waiving the objection, Claimant has not retained experts for the purpose of testifying at this point in time. Claimant reserves the right to call any of Claimant's healthcare providers or their agents identified in the medical records to testify about opinions and conclusions derived during the course of diagnosis and treatment, which is set out in the medical records and medical bills.
>
> Defendants' Exhibit Number 1, Interrogatory No. 5 and Response to Interrogatory No. 5.

Accordingly, Claimant reserved the right to call any medical care provider for the purpose of testifying about any of the opinions and conclusions derived during the course of treatment, as set forth in the medical records.

Turning to Dr. McCall's records, those records do not reveal any opinion held by Dr. McCall concerning the cause of Claimant's right foot complaints. The closest the records come to revealing such an opinion is Dr. McCall's entry of February 14, 2011 in which he stated:

> This 53 year old male presents today for followup evaluation of capsulitis, possible nerve entrapment, and ulcer. He has been in the CAM walker and non weight bearing. His symptoms have improved. He is still concerned about carrying the 50 lb bags along the narrow concrete walk way, as this is what triggered his symptoms initially.
>
> Claimant's Exhibit H, p. 77.

However, the most that can be said for this entry is that it merely represents Dr. McCall's reiteration of what Claimant told Dr. McCall about a work related triggering event. The entry in no wise establishes that Dr. McCall held the same opinion. The record does not disclose that Dr. McCall provided any subsequent record or report in which he rendered an opinion on the cause of Claimant's right foot condition. However, over Defendants' objection, Dr. McCall testified that Claimant's right foot condition developed because of intrinsic and extrinsic factors, the extrinsic factor in Claimant's case being the carrying of 50 pound bags of fish feed while walking along the runways. This is an opinion that is not revealed in Dr. McCall's writings, nor is it one to which Defendants were alerted by any supplemental response to Defendants' initial discovery request. To determine whether Dr. McCall's testimony should be admitted requires review of J.R.P. 7, J.R.P. 10 and I.R.C.P. 26.

J.R.P. 10 governs post-hearing depositions, such as those of Drs. Wettstein and McCall. J.R.P. 10(E)(4) governs the type of expert opinion that is admissible via post-hearing deposition:

> Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing as well as on expert testimony developed in post-hearing depositions. Lay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders.

Therefore, in a post-hearing deposition an expert witness may render an opinion that is based on exhibits and evidence admitted at hearing. In other words, such an opinion is not objectionable merely because it was arrived at after hearing based on evidence and testimony adduced at hearing. There is nothing in the testimony of either Dr. McCall or Dr. Wettstein that is objectionable under J.R.P. 10. However, the judicial rules also contain provisions which require

parties to timely disclose the opinions of the experts on whom they intend to rely. J.R.P. 7 (C), relating to discovery, provides, in pertinent part:

> Procedural matters relating to discovery, except sanctions, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure.

Therefore, pursuant to this rule, the parties are expected to conduct discovery in accordance with the appropriate provisions of the Idaho Rules of Civil Procedure. I.R.C.P. 26(b)(1) provides that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Regarding expert opinions, I.R.C.P. 26(b)(4) establishes that "discovery of facts known and opinions held by experts. . .acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition," including a "complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions [and] any exhibits to be used as a summary of or support for the opinions."

Thus, Rule 26 "unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony." *Duspiva v. Fillmore*, 293 P.3d 651 (2013), citing *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897, 900 (1991). However, the decision whether to exclude undisclosed expert testimony is "committed to the sound discretion of the trial court," or here, the Commission. *Id*., citing *Schmechel v. Dille*, 148 Idaho 176, 180, 210 P.3d 1192, 1196 (2009). In considering how to exercise its discretion, the Commission should act within the "outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available." *See Id., citing Sirius LC v. Erickson*, 150 Idaho 80, 87, 244 P.3d 224, 231 (2010). The decision whether to exclude should be reached by an "exercise of reason" *Id*.

Here, the record does not reveal that Claimant disclosed to Defendants any of the opinions to which Dr. McCall testified prior to Dr. McCall's deposition. Nor is there anything in Dr. McCall's medical records that would alert Defendants to whether Dr. McCall held the opinion that Claimant's right foot condition was, to some extent, related to the demands of his employment.

In short, while it may have been permissible for Dr. McCall to formulate an opinion based on the evidence in this case, including evidence developed as late as the date of hearing, that rule in no way relieves Claimant from the obligation to timely supplement his discovery responses to Defendants in order that Defendants are afforded a little time, at least, within which to prepare for what may be coming. Were we to rely on Rule 10 alone to evaluate the admissibility of opinions such as this then any opinion expressed by an expert in the course of a post-hearing deposition would be admissible, so long as it was not based on evidence developed manufactured or discovered following the hearing. Trial by ambush would be the rule of the day. To avoid this, the Commission adopted J.R.P. 7 which, in turn, mandates that procedural issues relating to litigated cases, including the conduct of discovery, shall be governed by the Idaho Rules of Civil Procedure.

Claimant identified Dr. McCall as a potential expert witness. I.R.C.P. 26, by way of J.R.P. 7, requires of Claimant that he provide Defendants with the substance of Dr. McCall's opinion prior to the scheduled deposition. It is clear that Claimant had prior knowledge of Dr. McCall's opinion in this regard. Claimant and his parents met with Dr. McCall in February of 2011, and at that time, were told by Dr. McCall that Claimant's condition was related to his

employment. Dr. McCall Deposition, pp. 6, l. 23 – 7, l. 8. This opinion was not timely disclosed to Defendants.

This case is dissimilar from *Serrano v. Four Seasons Framing*, 2013 IIC 0021(2013). In *Serrano*, we ruled that Dr. Doerr's deposition testimony, which elaborated and expanded on previously stated opinions, should be admitted into evidence, notwithstanding that those opinions were more detailed than those expressed in Dr. Doerr's previous writings. We admitted Dr. Doerr's deposition testimony because that testimony was substantially similar to opinions expressed by Dr. Doerr in a previously disclosed report. Here, nothing in the record suggests that Defendants were ever apprised that Dr. McCall had an opinion on causation, much less what that opinion might be. For the reasons stated, we sustain Defendants objection to the admissibility of that portion of Dr. McCall's testimony relating to the cause of Claimant's right foot condition.

As to Dr. Wettstein's testimony on the issue of causation, we find that it is largely identical to the opinion set forth in his note of November 7, 2012, discussed *infra*. In both instances, Dr. Wettstein states that it is only a possibility that Claimant's work contributed to his right foot condition. *See*, Claimant's Exhibit K, p. 110; Dr. Wettstein's Deposition, pp. 12, l. 8-13, l. 7. Therefore, we overrule Claimant's objection to Dr. Wettstein's testimony, because Dr. Wettstein's opinion was previously disclosed in his note of November 7, 2012.

FINDINGS OF FACT

1. Claimant was 55 years old as of the date of hearing. He completed the 11th grade. He has not obtained his GED. He has no vocational training and no military service history. His past work history is primarily as a manual laborer. Many of his past jobs required him to spend long periods of time standing or walking.

2. Although Claimant has a history of prior back injury, he denied having any problems whatsoever with his feet prior to starting work for Employer. None of the prior medical records in evidence reveal that Claimant complained of problems with his feet prior to the commencement of his employment with Employer.

3. Claimant commenced his employment with Employer in the spring of 2010. Initially, he was involved in the construction of new concrete runways for Employer's fish raising operation. On September 24 or September 28 of 2010 Claimant's job responsibilities changed. At that time, he started work as a fish feeder. In this job he was involved in transporting fish from Employer's various fish raising operations to a central processing plant. This work consumed only a fraction of his work day. By Claimant's testimony, the rest of his work day was devoted to feeding fish at Employer's various locations. Claimant testified that he spent five to six hours per day in this work. Other testimony of record from Employer's owner, Leo Ray, suggests that Claimant's fish feeding work took about three and a half hours per day. At some of Employer's locations fish were fed from devices that did not require manual filling. Others needed to be manually filled on a daily basis. This work required of Claimant that he carry 50 pound bags of fish feed over his right shoulder. He carried these bags while walking down six to eight inch wide runway dividers or twelve inch wide planks to fill the various hoppers he was charged with servicing. The narrow width of the runway dividers/planks on which he was required to walk caused a gait alteration; rather than walking in a normal fashion, he was required to place one foot in front of the other while negotiating these surfaces, all while carrying a 50 pound sack of feed on his right shoulder.

4. Claimant first began to notice discomfort in his feet, his right foot primarily, around November 1, 2010. Initially, he speculated that he might be suffering from gout.

Claimant has no history of gout, but he knew that people who suffer from gout frequently have problems with their feet. At the same time, he also stated in his recorded statement that from the very outset, he was always "suspicious" that his problems were related to the way in which he had to carry bags of feed at his place of employment, because he had never had foot problems prior to going to work for Employer. After Claimant first noted the onset of symptoms, he bought a special pair of shoes which he was told would be helpful to someone who spent all day on his feet. The shoes did not alleviate Claimant's problems with pain and swelling. He developed a blood filled ulceration on the ball of his foot between his big toe and the neighboring toe. Claimant showed these blisters to Leo Ray, Employer's owner, in October or November of 2010. (Transcript 106/14-21).

5. Claimant first sought medical treatment for his right foot condition from Craig Holman, DPM on December 21, 2010. Dr. Holman's note reflects that Claimant presented with complaints of pain in the ball of his foot and his heel, from which he had suffered for about 30 days. On exam Claimant was noted to have a cavus foot type. Dr. Holman thought he had metatarsalgia and plantar fasciitis bilaterally. Dr. Holman gave Claimant an injection in his foot and recommended that he try over the counter orthotics. Claimant was next seen by Dr. Holman on January 17, 2011. At that time, Dr. Holman noted the presence of a sub metatarsal lesion on the ball of the right foot. He debrided this, noting the presence of a three millimeter ulceration on the ball of the right foot, which was extremely tender. He diagnosed a pressure induced ulceration of the ball of the right foot. Following debridement of the wound he told Claimant to stay off of his feet for two days. He recommended that Claimant consider orthotics to control the weight bearing issues with the right foot.

6. Claimant did not see Dr. Holman again, and was next seen for care of his right foot difficulties by Andrew McCall, DPM. Claimant first saw Dr. McCall on January 21, 2011. In his note of that date, Dr. McCall noted Claimant's right foot ulceration. He also thought Claimant had evidence of severe capsulitis of the second and third metatarsal joints. By February 2, 2011 Dr. McCall felt that most of Claimant's pain was emanating from a neuroma at the second interspace.

7. On February 14, 2011, Dr. McCall recorded the following history from Claimant:

> This 53 year old male presents today for followup evaluation of capsulitis, possible nerve entrapment, and ulcer. He has been in the CAM walker and non weight bearing. His symptoms have improved. He is still concerned about carrying the 50 lb bags along the narrow concrete walk way, as this is what triggered his symptoms initially.
>
> Exhibit H, p. 77.

Dr. McCall's note of February 14, 2011 does not reflect whether he shared Claimant's belief about the cause of his right foot difficulties. The February 14, 2011 note suggests that Claimant's right foot ulceration was largely resolved by that visit. Dr. McCall felt that Claimant continued to suffer from capsulitis of the second and third metatarsal joints. He continued to feel, however, that most of Claimant's symptomatology was related to a neuroma at the second interspace. Dr. McCall's note of February 28, 2011 reiterates Claimant's subjective sense that his problems were related to his employment. Claimant's symptoms were essentially unchanged. Dr. McCall recommended continued non-weight bearing. Dr. McCall also noted that by February 28, 2011, Claimant had filed a workers' compensation claim. By March 28, 2011, Dr. McCall felt that Claimant's failure to improve with unweighting suggested a failure of conservative treatment. He recommended a shortening osteotomy of the right second and third metatarsals to address the capsulitis, and excision of the neuroma at the right second interspace.

Surgery was performed on March 31, 2011. Claimant testified that the surgery did little, if anything, to relieve his symptoms.

8. As noted, Claimant has stated that while he initially entertained the possibility that he might be suffering from gout, he was, from the very outset of his symptoms, suspicious that his work was causing his right foot difficulties. However, at hearing, Claimant testified that he first learned that his condition was causally related to the demands of his employment on or about December 21, 2010, the date on which Dr. McCall advised him that his right foot condition was due to the heavy weights he carried at work, and the gait alteration he was required to endure while performing this work:

> Q. Okay. So, when you got to Dr. Holman - - or to Dr. McCall in December, you indicate he told you that the work was causing it. Tell me what he told you, as best you can remember, about how work was causing problems with your feet.
>
> A. He said that the weight from the feed sack and the abnormal way you walk on the ball of your foot when you put one foot in front of the other - - he was normally when a person receives extra weight and they are standing normally their first automatic is to separate their feet further, which allows the hips to distribute the weight down both legs. When I put the weight on my shoulder instead of widening my stance and let the hips do what they do, I had to put one foot in front of the other. So, instead of widening I put it to zero is the way he kind of described it.
>
> Q. So that would cause extra pressure on - -
>
> A. And that would cause extra pressure.
>
> Transcript, pp. 46, l. 25 – 47, l. 17.

(See also Transcript 75/23-77/6). Claimant was quite insistent that it was Dr. McCall who first apprised him of the work related nature of his condition. However, Claimant did not see Dr. McCall for the first time until January 21, 2011. If Claimant is to be believed in his testimony that it was Dr. McCall who first told Claimant about the work related nature of his condition, then Claimant could not have been so advised prior to January 21, 2011.

9. Claimant did not return to work following his January 21, 2011 visit to Dr. McCall. In his recorded statement, Claimant stated that sometime in November or December of 2010 his immediate supervisor, Lou Bolton, told him that he needed to get his feet fixed because it was obvious that Claimant was having difficulty performing his work. In his recorded statement Claimant also stated that at some point between his January 21, 2011 and February 2, 2011 visits to Dr. McCall's office, he had a discussion with Betty Clemmons in which he told her that he was not getting any better. According to Claimant, Ms. Clemmons told him that if it was his intention to pursue this condition as a work related injury, he would need to fill out some paperwork. On February 2 or February 3 of 2011 Claimant provided workers' compensation paperwork to Ms. Clemmons, which eventually led her to the preparation of the Employer's Notice of Injury and Claim for Benefits dated February 23, 2011. According to Claimant's recorded statement, he believes that Employer was first advised of the work related nature of Claimant's condition on or about February 2, 2011.

10. Claimant's assertions in this regard are not inconsistent with other testimony of record. Leo Ray testified that he came to understand that after Claimant's last day of work, he told Lou Bolton, possibly some time in January, that he (Claimant) thought his problem was work related. According to Mr. Ray, Ms. Bolton encouraged Claimant to complete workers' compensation paperwork. (Transcript 108/15-25). Betty Clemmons testified that she was aware in the first part of November of 2011 that Claimant was having problems with his feet. She testified that she did not understand that Claimant thought his problems were work-related until after he started seeing doctors in December. At that point, she started telling him that if he thought his condition was work related he should fill out some "paper work". Ms. Clemmons acknowledged that Claimant came to her with this paperwork in early February of 2011, and that

this paperwork led her to prepare the Employer's First Report dated February 23, 2011. (Clemmons Deposition 26/19-27/16).

11. Dr. McCall moved from the area, and Claimant was next seen for treatment/evaluation of his right foot condition on November 7, 2012 by Matt Wettstein, DPM. To Dr. Wettstein Claimant gave a history that he had been suffering from a right foot pain for two years, which initially started while working for Employer. Claimant gave a history that he had been required to carry very heavy loads along the top of a six inch wall. Dr. Wettstein noted that Claimant had undergone a shortening osteotomy of the metatarsals as well as the removal of a neuroma. Though Claimant acknowledged some initial improvement following the surgery, the passage of time left him with increased pain and discomfort. Significantly, Claimant noted that his toes no longer contact the ground while walking. Dr. Wettstein diagnosed Claimant as suffering from hammertoe, pes cavus deformity and metatarsalgia of the right foot. On the issue of the etiology of Claimant's condition, Dr. Wettstein offered the following comments:

> Plan: I had a long discussion with Rourke about his condition and what possibly caused it. He has a high arch which is a foot type that puts him at risk for developing hammertoes and pain at the MPJs. However, it is possible that the work he was doing and the conditions in which he worked could have contributed to the development of his pain. He was on his feet for extended periods of time and standing on hard surfaces in addition to being required to carry heavy loads. The surgery he had was appropriate for him at the time. He has had the complication of floating toes, which is contributing to his ongoing pain. We discussed possible treatments for him at this time. Conservatively, I recommended that he use felt padding and splinting of the toes. I dispensed the padding and tape and educated him on their use. A pad was placed directly to his foot which he can transfer to his orthotic if it provides him with good relief. The splinting can be done whenever the arch is sore. He should also ice the area. We discussed further surgical intervention should he fail this conservative treatment. This would be a difficult revision surgery, which would require hammertoe corrections.
>
> Claimant's Exhibit K, p. 110.

Claimant did not see Dr. Wettstein on more than one occasion.

12. Claimant testified he continues to suffer from pain and discomfort in his right foot, and that this discomfort is such that he does not believe he can return to any of his prior employments. He hopes to find lighter duty employment which does not require constant time on his feet.

MEDICAL TESTIMONY

13. Claimant was first seen by Dr. McCall on January 21, 2011. Although not reflected in his initial chart note, Dr. McCall testified that he had a history from Claimant that Claimant developed the ulceration on the bottom of his right foot while working at a fish hatchery. Over Defendants' objection, Dr. McCall testified that in his view Claimant's pathology; i.e. his foot ulceration, was the result of certain intrinsic and extrinsic factors. According to Dr. McCall, the "intrinsic" factors responsible for Claimant's ulceration include his long metatarsal bones which create a boney prominence on the bottom of the foot. Per Dr. McCall, Claimant's long metatarsal bones are an anatomic variation intrinsic to Claimant, and unrelated to his work. However, Claimant's peculiar anatomy led to the development of his right foot ulceration when he was subjected to walking while carrying heavy weights. Claimant's work, which caused pressure to the bottom of his foot, was the "extrinsic" factor which, in combination with Claimant's anatomy, produced the ulcerations noted by Drs. Holman and McCall.

14. Dr. McCall testified that by February 2, 2011, Claimant's ulceration had healed. Concerning the surgery, and the need for surgery, Dr. McCall testified that the surgery was intended to address Claimant's long metatarsal bones, an intrinsic condition altogether unrelated to the subject accident. Dr. McCall did not comment on whether the neuroma excised at the time of surgery was entirely an intrinsic phenomemon, or whether it was, in some respect, related to

what he described as the extrinsic factors of walking and carrying. Finally, Dr. McCall testified that he believed that Claimant's work contributed to the development of the ulceration because Claimant did not have this condition before he began work at Employer's place of business. Dr. McCall concluded that Claimant's work contributed 60% to the development of Claimant's right foot ulcer.

15. Dr. Wettstein saw Claimant on only one occasion on November 7, 2012. He diagnosed Claimant as suffering from hammertoe and a high arch. Hammertoe is a condition in which a toe is contracted and pulled upward. Dr. Wettstein noted that Claimant had hammertoes on both the left and the right feet. This condition is associated with a high arched foot, which Claimant also possesses. Dr. Wettstein also noted that Claimant suffers from metatarsalgia, which is a term which references pain in the ball of the foot, but Dr. Wettstein thought this was related to Claimant's hammertoes. Over the objection of Claimant's counsel, Dr. Wettstein opined that it is only possible that Claimant's work is responsible for contributing to Claimant's current complaints. He agreed that it is possible that Claimant's pre-existing anatomic abnormalities were aggravated by his work.

DISCUSSION AND FURTHER FINDINGS

Occupational Disease

16. The Idaho Workers' Compensation Law defines an "occupational disease" as "a disease due to the nature of an employment in which the hazards of such disease actually exists, are characteristic of, and peculiar to the trade, occupation, process or employment. . ." Idaho Code § 72-102(22)(A). Compensable occupational diseases are enumerated at Idaho Code § 72-438. That section recognizes that the list of occupational diseases contained in that section are not intended to be exclusive. Under Idaho Code § 72-437 a claimant suffering from an

occupational disease is entitled to compensation upon becoming disabled from performing his work in the last occupation in which he was injuriously exposed. *Mulder v. Liberty Northwest Insurance Co.*, 135 Idaho 52, 14 P. 3d 372 (2000), however, makes it clear that a claimant is entitled to medical benefits even though he is not yet disabled as a result of his occupational disease.

17. Under Idaho Code § 72-439, an employer is not liable for the payment of compensation for a "non-acute" occupational disease unless the employee was exposed to the hazards of such disease for a period of 60 days. No such limitation exists for "acute" occupational diseases. In *Bint v. Creative Forest Products*, 108 Idaho 116, 697 P.2d 818 (1985), the Court addressed the distinction between acute and non-acute occupational diseases. Noting that the Idaho Workers' Compensation statutes provide no definitions for the terms, the Court construed an "acute" occupational disease as one having a sudden onset, sharp rise and short course.

18. Under Idaho Code § 72-448, an injured worker is obligated to give notice to employer of his occupational disease within 60 days following the date of "manifestation". Manifestation is defined at Idaho Code § 72-102(19) as "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."

19. Here, Defendants contend that Claimant's notice to Employer of his occupational disease is untimely. In order to judge the timeliness of Claimant's notice to Employer, we must identify the date of notice, as well as the date of manifestation. Idaho Code § 72-448 requires of Claimant that he give written notice to Employer. However, Idaho Code § 72-704 excuses lack of written notice where it is shown that Employer, his agent or representative, had knowledge of

the injury or occupational disease. Here, the evidence leaves the Commission unable to ascertain the date on which Employer was first apprised of Claimant's contention that his right foot condition was the result of his exposure to an occupational hazard. There is some testimony from Betty Clemmons that suggests that Employer may have first learned of Claimant's contention that he thought his foot problem was related to his employment some time in December of 2010. (Clemmons Deposition 26/4-27/2). Ms. Clemmons testified that when Employer became aware that Claimant thought he might have a work related condition, Claimant's immediate supervisor, Lou Bolton finally persuaded Claimant to come in and fill out some workers' compensation paperwork. Claimant provided this paperwork on February 2 or 3, which later led Ms. Clemmons to prepare the February 23, 2011 Employer's First Report of Injury. From this, it seems clear that Employer's knowledge concerning Claimant's contention that his condition was work related pre-dated February 2 or 3 of 2011, but by how much, the record is unclear.

20. As to the date of manifestation, Claimant testified that although he had "suspicions" from the very outset that his condition was related to the demands of his employment, he was also evidently unsure enough about these suspicions that he also entertained the possibility that he might be suffering gout. Under the first prong of Idaho Code § 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 he suffers from a work related condition, which suspicion is not yet matured into a conviction concerning the work related nature of his disease, manifestation has not occurred. (See *Sundquist v. Precision Steel and Gypsum, Inc.*, 141 Idaho 450, 111 P. 3d 135 (2005).

Therefore, we discount Claimant's suspicions or fears, which he may have had from the very outset, as insufficient to identify a date of manifestation.

21. For his part, Claimant contends that he first knew that his condition was related to the demands of his employment when his treating physician, Dr. McCall, so advised him on December 21, 2010, the date of his first visit with Dr. McCall, the date on which Dr. McCall recommended for him a CAM walker, and the date on which he last worked. The problem with Claimant's insistence in this regard is that it was Dr. Holman he saw on December 21, 2010. Claimant did not see Dr. McCall until January 21, 2011. Neither the records of Dr. Holman nor Dr. McCall shed any light on whether either of these physicians ever advised Claimant that his condition was likely related to the demands of his employment. However, Claimant has unambiguously testified that it was Dr. McCall who put him on notice of the work related nature of his condition. From this, we conclude that Claimant is simply mistaken about the date on which this conversation took place and find that Claimant first learned of the work related nature of his condition when he conferred with Dr. McCall on January 21, 2011. Even if Claimant's date of manifestation was December 21, 2010, as he has testified, notice to Employer would still be timely; only 44 days elapsed between December 21, 2010 and February 2, 2011.

Causation

22. Medical testimony to a reasonable degree of medical probability is required to prove a causal connection between the occupational disease and the occupational exposure which caused it. *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as having more evidence for than against. *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974). Here, the medical records of Drs. Holman, McCall and Wettstein are inadequate to meet Claimant's burden of demonstrating that his right foot

condition is causally related to the demands of his employment. The only evidence which might allow Claimant to meet his burden in this regard is to be found in the deposition testimony of Dr. McCall. However, as developed above, we have determined that Dr. McCall's testimony concerning the cause of Claimant's condition is not admissible. There being no other medical evidence of record sufficient to allow the Commission to conclude that it is more probable than not that Claimant's condition is causally related to the demands of his employment, we conclude that Claimant has failed to meet this critical element of his *prima facie* case.

CONCLUSIONS OF LAW AND ORDER

1. Employer was afforded notice of Claimant's occupation disease claim within 60 days following the date of manifestation.

2. Claimant has failed to demonstrate by medical evidence that his alleged occupational disease is causally related to the demands of his employment.

3. As such, the claims for TTD/TPD, PPI, PPD and medical benefits are moot.

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

DATED this 14th day of November 2013.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November 2013, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was served by regular United States Mail upon each of the following:

PATRICK D BROWN
335 BLUE LAKES BLVD N
TWIN FALLS ID 83301

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

ka _/s/_____