BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LANE TEACHOUT, Claimant, v. STRYKER CORPORATION, Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2016-018860** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed August 27, 2018**

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 25, 2017. Claimant was present along with his attorney, Taylor Mossman-Fletcher of Boise. Susan R. Veltman, also of Boise represented Stryker Corporation (Stryker), Employer, and Old Republic Insurance Company, Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and Referee Powers issued a proposed decision for review by the Commission on July 27, 2018. After careful review of the proposed decision, the Commission has decided that different treatment is warranted on the questions of whether Employer had actual knowledge of Claimant's occupational disease within sixty (60) days following the date of first manifestation, whether Claimant was exposed to the hazards of his disease for a period of sixty (60) days, and whether Claimant's disease is

"acute" or "non-acute." The Commission therefore declines to approve the proposed decision and issues these Findings of Fact and Conclusions of Law in lieu thereof.

ISSUES

The issues to be decided are:

1. Whether Claimant contracted a compensable occupational disease arising out of his employment, and, if so,

2. Whether Claimant gave Stryker timely notice of the same; and, if not,

3. Whether Defendants were prejudiced by the untimely notice.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffered a compensable occupational disease, bilateral deep vein thrombosis resulting in pulmonary emboli (DVT/PE), as the result of frequent air travel required by his work as a Medical Education Consultant for Stryker's Foot and Ankle Division.

Stryker contends that Claimant has failed to prove that his DVT/PE was caused by his employment or that such condition was characteristic of and peculiar to that employment. Even if Claimant can surmount the causation question, his claim must still fail because he did not give timely notice to Stryker that his condition was work-related and has not rebutted the presumption that Defendants were prejudiced thereby.

Claimant responds by asserting that he gave appropriate notice to his immediate supervisor that his DVT/PE was work-related and even if he did not, Stryker had actual knowledge of the same. Finally, Claimant has proven that if proper notice was not given that Stryker/Surety was not prejudiced thereby.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his domestic partner, Linda Kiehner, presented at the hearing.

2. Joint Exhibits (JE) 1-21.

3. The Industrial Commission legal file.

FINDINGS OF FACT

Hearing testimony

Claimant

1. Claimant was 58 years of age and residing in Boise at the time of the hearing. He stood 6 feet 5 inches tall and weighed between 220 and 250 pounds at all times relevant to these proceedings.

2. Claimant is a high school graduate who attended two universities in Texas in business administration without obtaining a degree from either. He has been employed in medical device and sales management for about 30 years.

3. Stryker supplies orthopedic surgeons across the country with technical support and devices pertinent to that specialty. Claimant began his employment with Stryker on January 4, 2016 as a medical education consultant. His salary was $125,000 and he could have earned up to $190,000 (depending on the amount of bonuses) per year had he remained employed a full year.

4. Clamant testified that a large part of his job: "… was to fly from city to city or town to town across the central part of the country to attend and to advise on surgical cases of total ankle/foot and ankle surgery. That was one component." HT., p. 21.

5. The other component was to certify and instruct orthopedic surgeons on how to perform such surgeries. He also trained sales representatives on how to perform total ankle/foot surgeries utilizing Stryker products. "In addition to that, I flew around the country. I flew at least two trips during this two-and-a-half month period to Florida to go to national sales meetings or to labs where we did do cadaver labs to teach orthopedic surgeons how to do it." HT., pp. 21-22. In pre-Stryker employment, Claimant sometimes traveled by air three to four weeks a month.

6. Claimant described his general health prior to March 2016 as "excellent." *Id.*, p. 22.

7. Claimant considered Nick Toboy and Stormy See to be his direct supervisors, although he had more daily contact with co-workers Eric Grothe and Tom Thomison.

8. Nick Toboy testified that Claimant was hired as a medical education consultant over the central region of the United States and that Claimant was to work out of Austin, Texas. Toboy Dep., pp. 12-13. Mr. Toboy testified that Claimant was expected to make the move to Austin by the first part of 2016. Toboy Dep., p. 13. Therefore, he supposed that if Claimant was traveling between Boise and Austin in early 2016 it was for personal reasons. Toboy Dep., pp. 34-35.

9. On the other hand, Claimant testified that he had business relationships with at least three orthopedic surgeons in the Boise area that were important to Employer. Claimant testified that it was Employer's expectation that he maintain these relationships until such time as Employer could hire someone else to work in the Boise area. HT., pp. 27-29. Therefore, for the first 90 – 120 days of his employment by Employer it was critical for him to maintain and cover business in Boise.

10. On cross-examination, when reminded of the situation in Boise in early 2016, Nick Toboy acknowledged that it was necessary for Claimant to work in both Boise and Austin during the transition period, until a new representative could be hired by Employer in Boise. Mr. Toboy did not controvert Claimant's testimony that this transition period was expected to last 90 – 120 days from Claimant's start date. Toboy Dep., pp. 36-37. From this testimony we conclude that Claimant's air travel between January 4, 2016 and March 16, 2016 was for business purposes.

11. Claimant described his "average" number of flights per week between January/February until March 16, 2016: "Eight, ten, sometimes twelve flights. I flew anywhere from the Pacific Northwest to Minneapolis; to Detroit; to Evansville, Indiana; to Appleton, Wisconsin; to Dallas, Texas; to Houston, to Lubbock; to San Antonio; to Austin - - excuse me, Kansas City, Kansas. And I had taken two long trips to - - one to Tampa and one to Fort Lauderdale, Florida, during that 60-some odd-day period." HT., pp. 31-32.

12. However, Claimant's enumeration of the average number of flights he took per week in the course of his employment leaves the Commission unable to ascertain how many days of exposure he had to flying while employed by Employer. In this regard, Claimant acknowledged that in arriving at his estimate of how many flights he made per week, he included every leg of the particular journey from his starting point to his intended destination:

> Q: What I want to figure out is approximately how many days per week you were engaged in air travel. I know when your asked, it was sometimes up to eight, fourteen flights a day - - or I'm sorry, a week. My mistake. And so correct me that that includes, for example, if it look [sic] you three different legs to get to Wichita, Kansas, that you would consider that three flights. Is that accurate?
>
> A: Yes.

HT., p. 68. When asked to give his best recollection of how many days per week he was involved in some type of air travel, Claimant gave the following explanation:

> Q: [By Ms. Veltman]: So out of a calendar seven days, how many days on average would you be engaged in air travel?
>
> A: Minimum of three, if not four.
>
> Q: Would you say an average of four or less?
>
> A: Possibly one week of the weeks I worked there.
>
> Q: And if you can recall back to, again, the period from January to mid-March, did you ever have weeks where you did all seven days of air travel?
>
> A: Off the top off my head, I cannot tell you. I don't remember.
>
> Q: But your recollection today is an average of three to four days per week of air travel?
>
> A: Minimum.
>
> Q: Are you able to give an average?
>
> A: Repeat - - specifically repeat the question. We're talking days. We're talking flights. Are we talking flights again or are we talking days?
>
> Q: No. I'm continuing to talk days. Previously you said an average was three, and then you said or sometimes four.
>
> A: And sometimes more than that.
>
> Q: That's why I'm trying to get an average.
>
> A: Then it's higher than what I would - - my recollection, it's higher than what I would tell you and what I've told you. I'll give you an example. On Monday I could be in Austin, Texas. In between then and Friday, I had gone to Kansas and then come back to Texas, and then I had gone to Florida. Then I did a lab Saturday and Sunday, and then I would fly back to Texas. And then the next week on a Sunday, and then sometime the next week I might be in Evansville, Indiana. Everything changes and everything was going crazy at that point in time.
>
> Q: So are you able to give an average of days per week that required air travel?

A: Minimum of three, sometimes as much as seven. No week was typical.

HT., pp. 69-71. From this, we conclude that it is Claimant's testimony that he flew three days per week, at a minimum, and sometimes up to seven days per week. Claimant's first day of work was January 4, 2016, and the last day upon which he could have flown was March 15, 2016, a total of 71 days, or 10 weeks, 1 day. At five days of flying per week, Claimant's total flying days would equal 50, and a fraction. At six days flying per week, Claimant's total days of flying would equal 60, and a fraction. However, from Claimant's testimony it is difficult to extract a more specific answer to the question of whether he was exposed to the hazards of flying, i.e., the hazards eventually implicated in causing his occupational disease, for a period of at least 60 calendar days.

13. In describing the type of aircraft in which he generally flew, Claimant testified:

> A: I would say about half the time, if not more, I was flying small commuter regional jets from tertiary markets. Larger and larger secondary markets, typically, it was a larger plane.
>
> Q [By Ms. Mossman]: And so kind of describe what it was like for you inside the plane. And for the record can you just tell us how tall you are and, approximately, how much you weigh?
>
> A: I am six-five. I used to be closer to six[1], but I'm six-five. At the time I weighed about 250 to 255 pounds.
>
> Q: Okay. So tell us, in both jets, what the circumstances were like for you, in particular, inside those jets.
>
> A: I always flew coach, never first class. They weren't those kind of planes. As I said half or greater were these Canadian regional air jets.
>
> The ceiling on the walkway is maybe 5 ½, not even 6 feet. I am six-five. And during the time period we were traveling it was the dead of winter. Everybody had large coats, bags, whatever.
>
> They are very small seats. In a normal airplane I have trouble with them. I've flown to Europe a couple of times, Hawaii. I've flown enough I know to get up and move around. But in the commuter jets, especially in the winter time, I can't get up and move around.

[1] The Commission is unable to determine what Claimant meant by this comment.

They've got the small cart coming through.

We've all flown in the last five to ten years. Flights are booked almost 95 to 100 percent across the board. You can't stretch out. I've done this before as a living. I almost always got an aisle seat unless I was changing my travel plans on the fly, which was a very - - which was a weekly occurrence.

I would be scheduled to go to, say, Tulsa, but I wouldn't go to Tulsa. I'd have to go to Dallas, or I'd have to go to Kansas City.

Q: It doesn't sound like there's a typical flight for you, but were the flights longer than an hour or two hours?

A: Yes. By the time you threw in getting on the plane, taxiing, flight, I would say the minimum flight I flew was about two hours.

HT., pp. 32-33.

14. Claimant responded as follows when asked to explain what happened leading up to and on the morning of March 16, 2016:

Best of my knowledge, I'd been in Wichita, Kansas, and I was due to go somewhere else. I had to switch planes at the last moment to get back here (Boise). I had flown in - - I had several plane rides to get from Kansas back to here.

I think I got here at the airport at 2:00 in the morning. I was running late. I didn't get home until 3:00 or so, and that's on the 15th.

And then on Wednesday morning the 16th, I just could not seem to catch my breath very well. I just had difficulty breathing.

Q. And so what did you do?

A. I took Linda (Claimant's domestic partner) to the airport because she had to fly for business. And before I dropped her off she said, "You really" - - she goes, "This is not like you. You have shortness of breath. You need to go see somebody." Especially, I was about to get on a plane the following day and go on about an 11-day Florida to wherever [sic].

So I went to my primary care physician. They did a physical exam. As I said, I've been in there three, four months ago for a full workup. Basically, the PA said, "I can't find anything wrong with you, but we're going to draw some blood, do some tests. You appear very healthy other than I can't figure out why you have shortness of breath. ["]

That was, I want to say, mid– to late morning. Late that afternoon - - I've still got the voice mail - - basically said, "We just got your tests back. You need to go - - your D-dimers are elevated through the roof." Or something along those lines, "You need to go to an ER now."

> I live in the East End about eight blocks from here. I went - - after taking care of my dogs, putting them in the kennel - - because I've got two yellow Labs - - I then went to the ER and they started doing tests.

HT., pp. 34-36.

15. The tests referred to above revealed that Claimant was suffering from bilateral deep venous thrombosis and massive bilateral saddle pulmonary emboli. Claimant described what he saw on the films as: "…it looked like the Milky Way in the chest - - the lungs itself [sic]. And in the main branches it looked like somebody had shoved marshmallows into the main branches on both sides." *Id.*, p. 36.

16. Claimant was admitted to the hospital from the ER and was discharged in the late afternoon of March 19th. On the morning of March 17, Claimant composed an e-mail to Nick Toboy, Stormy See, Eric Grothe, and some others informing them that he was in the hospital and would let them know when he was discharged. The recipients responded by expressing their concerns and condolences.

17. Claimant had a follow-up appointment with his primary care physician, Was Nasser, M.D., on March 24, 2016, who informed Claimant that he had never seen diagnostic films showing the extent of his DVT/PE on a living person. Claimant testified that Dr. Nasser, who has treated Claimant for about 15 years and was familiar with Claimant's employment situation, told him of the cause of his condition:

> "He goes, "The only thing it can be is the amount of flying you're doing. You never had to travel this much before, and nothing else about your life changed, your home, what you do for a living, physically, except the flying was the only thing different. And that's when he told me this is what caused it."

HT., p. 39.

18. On March 22, 2016, Claimant received an e-mail and voice mail from Megan Judge, who identified herself as being from the HR department at Stryker informing him that she

would be sending paperwork to fill out so that he could be placed on short-term disability (STD).[2] Claimant received the STD paperwork, copy of the FMLA act, as well as a medical authorization release from The Hartford. Claimant received and filled out the appropriate forms, but because he was still weak from his DVT/PE, it took him a week to do so.

19. JE–10 is a copy of Claimant's Verizon phone bill from March 24, 2016 through April 22, 2016 that shows what numbers called Claimant and the location from which the call was placed, and the date and length of each conversation. JE–10 reveals that between the dates just identified, Claimant spoke with Nick Toboy, Eric Grothe, and Tom Thomison. Of course, the contents or subject matter of the calls is not discernible. However, Claimant testified that he did recall telling Tom Tomlinson that his condition was caused by frequent flying. He does not remember telling the same to Nick Toboy, although Nick testified in his deposition that Claimant may have told him of the cause. Claimant remembers telling Eric Grothe about the flying because Eric told Claimant that flying could not be the cause of his DVT/PE because he (Eric) flies as much as Claimant and he (Eric) does not have DVT/PE. This conversation upset Claimant.

20. Claimant described his physical condition during the timeframe of the above-referenced telephone conversations this way:

> Incredible difficulty breathing. Incredible difficulty breathing just laying [sic] down. You can be awake for 10, 12, 14 hours a day. But at that point in time my day consisted of being up. I was awake, but I was on my bed, my feet elevated above me, and I would fight to breathe.
>
> If you breathe too deeply, the emboli in the main branches, it's like paper through a straw. Air can go through there, but you have to breathe very easy, very shallow, very controlled. If you don't breathe deep enough, you don't get enough air and you get light-headed.

[2] The Hartford Life and Accident Insurance Co. (The Hartford) actually administered Stryker's STD policy. See JE 9.

> If you breathe too deeply, you get light-headed because you can't get enough air in. And more importantly, you can't get air out.
>
> So you're very light-headed, you have difficulty concentrating for long periods of time. I had tremendous chest pains on both sides of my chest and front and back. My legs did not really hurt at all at that point in time. I mean, I had swelling, and they were achy. But when this is a 6 or a 7, the 8 or the 10 takes over your whole body.
>
> Q. And just for purposes of the record, when you say, "this is a 6 or a 7" are you talking about you legs?
>
> A. DVT in my legs. The 8, 9, and 10 is the PE in my lungs.

HT., pp. 46-47.

21. Claimant testified that Linda was generally in the same room as he was when he was conversing with representatives of Stryker. Because Claimant and Linda both have medical backgrounds, he knew that it was important to remember and record as much of a telephone conversation as possible. However, as explained above, Claimant was having certain cognitive issues due to his DVT/PE and he wanted Linda present and the speaker phone on when possible. At that time, Claimant was not aware that he was notifying Stryker of a workplace injury, he was merely informing his supervisor and co-workers what his doctor thought was the cause of his problems. Claimant further testified that Stryker had access to his medical records from the get-go, wherein Dr. Nasser opined as to the cause of Claimant's DVT/PE by at least March 24.

22. Shortly after Claimant's hospitalization, he was required by Stryker to be on STD and he was informed by the administrator of that program, The Hartford, that he could perform absolutely no work including answering e-mails, texts, phone calls, etc., while receiving STD. Claimant qualified for STD retroactive to March 17, 2016. Claimant did not question why he was receiving STD rather than workers' compensation benefits.

23. Claimant had fairly regular contact with The Harford regarding his physician appointments. He would provide copies of chart notes to Nick Toboy, Eric Grothe, and Megan

Judge. Ms. Judge contacted Claimant in June of 2016 informing him that Stryker needed a copy of his doctor's chart notes or he would be terminated. Claimant thought that request was strange because Stryker, The Hartford, and his private insurance carrier all had access to his medical records pursuant to the medical records release authorizations he provided to them. In any event, Claimant complied and physically went to Dr. Nasser's office, obtained his records, and sent them to Ms. Judge toward the end of June 2016. Nonetheless, Claimant was terminated by Stryker on July 11, 2016.

24. At hearing, Claimant was asked about his recovery and current condition and answered as follows:

> Okay. This has been the most difficult thing I've ever faced in my life. I probably was in total denial the first 90 days of just how serious this was.
>
> I have been in pain every day since this happened. The pain is different today than it was a year-and-a-half ago.
>
> I have difficulty breathing, and I suffer from what's called "postural hypotension," meaning if I bend over to pick up the newspaper, the stick for the dog, I raise back up, and I get light-headed, and I have to lay [sic] down.
>
> About three-and-a-half to four months ago I had another event of this type, except, luckily, this time it was confined to my legs, and it did not really go into my chest. They caught it. I knew the signs.
>
> Once I figured out what was going on - - I have daily pain. I have limited, if very little, ability to function. I can't sit for very long like the - -
>
> I can't sit for any length of time. I do get light-headed from the hypertension [sic]. I have difficulty breathing. Stress or activities of daily living can send me into a breathing shortness. My leg balloons.
>
> I am wearing thigh-high support hose from my crotch down to the tips of my toes on both legs. I will be doing this a minimum of two years, if not for the rest of my life. I will be on Xarelto for the rest of my life.
>
> There are certain sports and activities I can never do again because of that. I can't get on a mountain bike. It's debatable whether I'll ever be able to ski again.
>
> If I ever get in an accident or get hurt, I have to carry some type of identification that allows the first responders or doctors to know that I'm on Xarelto type of blood-thinning medication for the rest of my life.

HT., pp. 60-61.

25. On cross-examination, Claimant testified that he was first informed that his DVT/PE was the result of an occupational disease on March 24, 2016. His written notices were his March 17, 2016 e-mail (JE 7, p.17) and a signed medical release in early April 2016. Claimant acknowledged that Ms. Judge testified in her deposition that she did not receive Claimant's medical records until June 28, 2016 and he does not dispute her testimony in that regard, although he does not understand why Stryker had not requested his medical records that establish causation sooner.

26. Claimant testified that the only Stryker representative that he spoke to regarding his injury/condition was Ms. Judge, but he did not verbally inform her that his injury/condition was work-related. Claimant did testify that he does not remember telling Nick Toboy about causation, but Mr. Toboy testified in his deposition that he remembers Claimant so informing him. Claimant further testified that he told Eric Grothe and Tom Tomison that his doctor related his DVT/PE to excessive flying. In light of Claimant's earlier testimony that he only had contact with Ms. Judge prior to his termination, it is unclear when he conveyed the causation information to Mr. Tomison and Mr. Grothe.

Linda Kiehner

27. Linda Kiehner has known Claimant for about ten years and they have been domestic partners for the past year-and-a-half. She was living with Claimant during March 2016. Linda is the owner of a company that distributes medical devices associated with skin and wound care.

28. Linda understood Claimant's position at Stryker: "He was retained by Stryker Corporation as a foot and ankle specialist, specifically in total ankle repair. And his position, I

believe, was called a medical educator, in which he would be going in and teaching orthopedic surgeons that specialized in foot and ankle how to implant their particular device." HT., p. 79.

29. After Claimant's hospitalization for his DVT/PE, Linda was privy to various conversations Claimant had with Ms. Judge, Nick Toboy, and Tom Thomison. She would be in the same room as Claimant who had the speakerphone on. Claimant would begin each conversation by telling the other party that he was short of breath and may not be able to continue the conversation.

30. Linda testified that when she saw Claimant in the hospital on March 18, Claimant was on the phone with Mr. Toboy. She heard Claimant tell Mr. Toboy that: "I'm in the hospital. My doctors are telling me I've been diagnosed with bilateral saddle pulmonary emboli and DVTs in both legs, and they think it was caused by my flying for work." *Id.*, p. 82. On cross-examination, Linda testified that "I could not give you a date, ma'am [that she first heard Claimant tell Mr. Toboy that his condition was related to flying]. It was the week after he had discharged out of the hospital, that I remember." *Id.*, p. 85.

31. After Claimant returned to the home he shared with Linda, he had further telephone conversations with Mr. Toboy that primarily concerned finding coverage for the demonstrations, meetings, etc., Claimant had scheduled. Even so, Linda testified that Claimant told Mr. Toboy and everyone he spoke with that his DVT/PE was caused by his frequent flying required by Stryker.

Pre-hearing deposition testimony

Megan Elise Judge

32. Defendants took the telephonic deposition of Ms. Judge on August 28, 2017. Ms. Judge is the HR Analyst for Stryker and has held that position for two-and-a-half years as of the time of her deposition.

33. Ms. Judge testified that Nick Toboy was Claimant's direct supervisor in March 2016. Stormy See was Mr. Toboy's direct supervisor. Eric Grothe was not Claimant's supervisor, nor was Tom Thomison.

34. Ms. Judge first learned that Claimant was missing work on March 22, 2016 when she was so informed by Michael Hulsman, Stryker's HR manager. He told Ms. Judge that Claimant was off work since March 17th and needed some information regarding STD. Ms. Judge sent Claimant some paperwork to fill out regarding STD; she received the information back from Claimant on April 4, 2016 including a signed medical records release authorization. Ms. Judge testified that she never used the authorization to obtain Claimant's medical records.

35. Ms. Judge did receive documentation from Claimant's physician on June 28, 2016 (See Exhibit 1 attached to Ms. Judge's deposition transcript, JE 18). This letter from Dr. Nasser did not address causation. Claimant was eventually approved for STD. During this process, Ms. Judge testified that she was unaware that Claimant was asserting that his condition was work-related until July 11, 2016:[3]

> It would have been in July when Michael Hulsman and myself called Lane to let him know that we could no longer accommodate his disability leave, and that we would have to move forward with a termination, as we can no longer hold his job. At that point during that discussion, Lane had mentioned, you know, "This - - this may have even been caused by my job, but that was the - - the first time that I had heard that."

[3] Ms. Judge was positive it was July 2016, but was not positive that it was the 11th.

Judge Dep., p. 10.

36. Ms. Judge testified that Claimant was eligible for STD but not for FMLA because he had not been employed by Stryker the required 12 months. In the event a Stryker employee reports an injury or illness, it is up to the employee or his or her supervisor to let her, Ms. Judge, know if the employee is claiming the injury or illness is work-related. Ms. Judge did not inquire whether Claimant's illness was work-related when she contacted him on March 22, 2016, or any other time. The Hartford is responsible for approving or denying STD, not Stryker, so Ms. Judge saw no need to request Claimant's medical records. Workers' compensation claims, are handled through Stryker's third party adjuster, Sedgwick/Intermountain Claims.

Eric Grothe

37. Defendants took Mr. Grothe's deposition telephonically on August 28, 2017. He served as Stryker's senior key account manager at times relevant hereto, but knew Claimant professionally before 2016. Mr. Grothe was not involved with Claimant's hiring at Stryker; Nick Toboy and Stormy See were. In March 2016, Mr. Grothe supervised only one person and that person was Tom Thomison. Nick Toboy was Claimant's immediate supervisor and above him, Stormy See. Mr. Grothe is not an officer at Stryker.

38. Mr. Grothe does not remember when he first learned that Claimant had some medical issues but vaguely remembers hearing from a co-worker of Claimant that Claimant had been ill. He remembers talking with Claimant on the phone on occasion in March 2016, but does not recall ever speaking with Claimant regarding the cause of Claimant's DVT/PE.

Nick Toboy

39. Mr. Toboy's deposition was taken telephonically by Claimant on October 19, 2017. In March 2016, Mr. Toboy was a field education manager for Stryker. He also had direct

management of two technical STAR specialists, one of which was Claimant. Mr. Toboy met Claimant shortly before he, Claimant, was hired by Stryker by Mr. Toboy and Mr. See in the fall of 2015. In March 2016, Mr. Toboy was Claimant's direct supervisor and Mr. See was Mr. Toboy's direct supervisor.

40. Mr. Toboy testified that Claimant's "territory" consisted of Texas, Oklahoma, Arkansas, Kansas, Nebraska, Iowa, Minnesota, South Dakota, and North Dakota. JE 21, p. 14. The plan was to have Claimant move to Texas so he would not have to travel so much. However, this had not been accomplished by March 2016. Mr. Toboy acknowledged that Claimant was required to travel "a lot" by air for Stryker. *Id.* at 13.

41. In the event of a workplace injury, Mr. Toboy would expect the injured worker to report the injury directly to him so that he could contact HR to begin processing the claim. Claimant's telephone logs indicate that on March 24, and 29th Claimant and a number matching Mr. Toboy's phone number were connected for 12 minutes and 9 minutes respectively. Mr. Toboy has no recollection of those calls or another one on April 14, 2016.

42. Mr. Toboy first learned of Claimant's hospitalization and DVT/PE issues from an e-mail sent by Claimant on March 17, 2016 (JE 8, p. 30) that reads:

> Folks,
>
> As of last night, I am currently in the hospital being treated for bi-lateral pulmonary emboli.
>
> (And I thought it was just an upper respiratory infection).
>
> As a result, I will be unable to lead the STAR certification course laid on for this Saturday in OKC with Dr. Hardison and rep. Kevin Bailey.
>
> This may also prevent me from covering (3) STAR's in Lubbock and the Denver advanced training course next week. I will let you know about my availability next week just as soon as I can.
>
> Thanks.

Mr. Toboy responded:

Lane,

That is awful! I will get on this right away to get these events taken care of. Call me when you're feeling up to it.

Nick.

Id.

43. Toboy did not dispute that Claimant's cell phone records correctly reflect that he had a 12 minute telephone call with Claimant on March 24, 2016, a 9 minute phone call with Claimant on March 29, 2016, and on April 14, 2016, a call with Claimant lasting 9 minutes. Toboy Dep., pp. 27-28. Toboy did not have a specific recollection of what was discussed during these three phone calls. More generally, he testified as follows concerning what he remembers from one or more of those conversations:

> Q: [By Ms. Mossman]: Okay. Going back to those phone calls we were discussing, you testified you don't have any specific recollection of what was said during those phone calls. Do you have a general recollection of any idea of what the two of you may have talked about during that time frame?
>
> A: I can't - - you have to repeat the dates. But if they were prior to this scenario, then they would have involved general case coverage and general working calls on a day-to-day basis. If it was after, it was about probably his working condition and me checking in on him as a friend and as a colleague to see how he was doing.
>
> Q: Yeah. The dates, just for your sake, were March 24th, March 29th, and April 14th. So you're saying that those conversations would have talked about his availability and also your concern over his condition?
>
> A: Correct.
>
> Q: Okay. Do you have any specific recollection in talking to him about the cause of the pulmonary embolism?
>
> A: Vaguely, we talked about it occurring from flying.

Toboy Dep., pp. 31-32. Toboy also testified that he is aware that people who fly a lot are at risk for DVT or PE. Toboy Dep., pp. 22-23.

DISCUSSION AND FURTHER FINDINGS

Notice

44. Idaho Code § 72-448 provides in pertinent part:

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

45. Idaho Code § 72-102(18) provides: "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.

46. From the evidence before us, we conclude that Claimant's date of manifestation was most likely March 24, 2016, the date on which he received definitive assurance from Dr. Nasser that his (Claimant's) condition was related to the demands of his employment. During his hospital stay between March 16, 2016 and March 18, 2016, it appears that other physicians reached the conclusion that Claimant's condition was related to air travel. JE 3, pp. 27-28. However, these records do not reflect what was actually discussed with Claimant. It was not until he met with Dr. Nasser on March 24 that Claimant seems to have finally learned his condition was work related. HT., pp. 39-40. However, because we conclude that Nick Toboy received actual knowledge of Claimant's work related disease sometime between March 24, 2016 and

April 14, 2016, it is unnecessary to decide whether Claimant's date of manifestation was March 16, 2016, March 24, 2016, or some date in between.

47. Claimant did not give written notice of the manifestation of his occupational disease within sixty (60) days following the date of first manifestation. Therefore, we must turn to the provisions of Idaho Code § 72-704 to understand whether the facts of this case support excusing lack of written notice. Idaho Code § 72-704 provides:

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

Therefore, delay of notice, as in this case, is not a bar to proceedings on proof that Employer had knowledge of the injury or occupational disease within sixty (60) days following the date of manifestation.

48. In this case, Claimant's immediate supervisor, Nick Toboy, acknowledged that Claimant's work involved a great deal of air travel. Toboy also acknowledged that he was generally aware that the immobility occasioned by air travel creates a risk for deep venous thrombosis. Finally, he acknowledged that in the course of telephone conversations taking place between March 24, 2016 and April 14, 2016, he learned (albeit "vaguely") that Claimant took the position that his (Claimant's) disease occurred from flying. See Toboy Dep., pp. 31-32. We conclude that this testimony is sufficient to demonstrate that Toboy, Claimant's immediate supervisor, had actual knowledge of the assertion that Claimant's condition was causally related to his employment. Therefore, we conclude that Claimant's failure to provide written notice within the time allotted is excused. Having determined that Employer had actual acknowledge

of Claimant's assertion that his disease was related to the demands of his employment within sixty (60) days following the date of first manifestation, we do not reach the question of whether Claimant met his burden of proving that Employer was not prejudiced by lack of notice.

Occupational Disease

49. 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

50. Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code § 72-102(22) which defined 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 . . .

(b) "Contracted" and "incurred" when referring to an occupational disease, shall be equivalent to 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 or her work in the last occupation in which injuriously exposed to the hazards of such disease; and "disability" means the state of being so incapacitated.

51. Idaho Code § 72-437 defined the right to compensation for an occupational disease:

> When an employee of an employer suffers an occupational disease and is thereby disabled from his or her work in the last occupation in which he or she was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature or process in which he or she was employed within the period previous to his or her disablement as herein after limited, the employee, or in the case of his or her death, his or her dependants shall be entitled to compensation.

Idaho Code § 72-439 specifies additional requirements for those seeking to prove an occupational disease:

> (1) An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.
>
> (2) An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.
>
> (3) Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.

Of particular relevance to this case is the requirement that for a "non-acute" occupational disease, Claimant bears the burden of proving that he was exposed to the hazards of the disease for a period of sixty (60) days. No such requirement obtains for so-called "acute" occupational diseases.

52. In sum, in order to prevail on his claim, Claimant must prove:

(1) That he was inflicted by a disease;

(2) That the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged;

(3) That the disease was incurred in, or arose out of and in the course of his employment;

(4) That the last injurious exposure to the hazard of the disease occurred while he was employed with Employer, and

(5) That he became disabled as a result of the disease.

(6) That in the case of a non-acute occupational disease, Claimant was exposed to the hazards of such disease for a period of at least sixty (60) days.

47. From the evidence before us, we conclude that Claimant does have a disease (DVT/PE) which was actually incurred in his employment. Defendants assert that Claimant failed to show causation; specifically, they assert Dr. Nasser lacks foundation for his causation opinion. However, Defendants do not offer contrary medical evidence or opinion to show why Dr. Nasser's opinion should be rejected. Dr. Nasser opined clearly and succinctly that Claimant's DVT/PE was related to his flying for work:

> "DVT/PE- this was certainly due to his extensive air travel. He is clinically improved." JE 2, p. 15.
>
> "I have expressed that I am willing to document that his job caused his DVT/PE so he will file a work comp claim and I think that is entirely reasonable. He was flying numerous times a week, in small jets where he was relatively immobile. There were no other factors historically that predisposed him to this DVT/PE… I am certainly of the view that his DVT/PE was caused by his work - numerous weekly flights in small airplanes." *Id.* p. 27-28.

No magic words are necessary to establish causation, only a doctor's plain unequivocal opinion. Moreover, as noted above, the emergency room physicians also opined Claimant's DVT/PE was probably related to his flying.

> "1. Extensive bilateral pulmonary emboli: The source for his pulmonary emboli is most likely from his legs. The etiology for deep vein thrombosis is unclear, most likely secondary to sedentary lifestyle *to include long flights and prolonged sitting at work.* Again, the patient demonstrated no evidence of trauma to his legs or operations in his legs recently. This is the 1st documented pulmonary emboli…
>
> 2. Left leg deep thrombosis: Again, etiology is unclear, *most likely secondary to prolonged sitting and long flights*." [emphasis added].

JE 3, p. 28. Both the ER physician and Dr. Nasser were aware Claimant had complained of shortness of breath in the weeks prior to his hospitalization and still opined that his DVT/PE was

more probably than not related to his flying.[4] Dr. Nasser knew Claimant wore compression socks and the ER physician knew Claimant had a history of vein stripping and, again, both still opined that Claimant's DVT/PE was related to flying. Later physicians who treated Claimant concurred: "His initial event was considered provoked due to plane travel and immobility. He has no family history of deep vein thrombosis or PE." JE 3, p. 114. Claimant has met his burden on causation.

53. Further, we conclude that the risk to which he was exposed (significant periods of immobility within the confines of an aircraft) is a risk that is characteristic of and peculiar to the demands of Claimant's employment. The travel requirements of Claimant's job distinguish it from the risks of the general run of occupations. *Bowman v. Twin Falls Construction Co.*, 99 Idaho 312, 581 P.2d 770 (1978). We further conclude that Claimant was last injuriously exposed to the hazards of the disease while in the employ of Employer, and that as a consequence of his disease he became disabled.

54. However, it is unclear to us from the evidence at bar whether Claimant's disease is best characterized as an "acute" or "non-acute" occupational disease, and if "non-acute," whether Claimant was exposed to the hazards of the disease for the requisite period of at least sixty (60) days. In this regard, we note that it is not necessary for Claimant to demonstrate that he was exposed to the hazards of flying for 60 continuous days. Rather, it is sufficient for Claimant to demonstrate that during the time period January 4, 2016 through March 16, 2016, he was exposed to the hazards of developing DVT/PE for a total of at least sixty (60) days. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977). Moreover, we note that Claimant need not demonstrate hazardous exposure for what might constitute a "full" day of work in his

[4] Defendants highlight a note from the ER which recorded that Claimant complained of respiratory symptoms up to 5-6 months prior to his hospitalization. Defendant's Brief, p. 3. However, we can find no other reference to that date of onset; all other medical records and

employment in order to meet his obligation of proving a hazardous exposure for that particular day. Per *Bint v. Creative Forest Products*, 108 Idaho 116, 697 P.2d 818 (1985) a "day" of exposure for purposes of Idaho Code § 72-439 means a calendar day of work. Therefore, Claimant would meet his burden of proving a hazardous exposure for a particular day by demonstrating that he was on a plane for some fraction of that day.

55. Finally, while there is some reference in the medical record to the fact that Claimant suffers from an "acute appearing partial deep venous thrombosis," this only appears to reflect the observation that the DVT observed in mid-March of 2016 was not old. See JE 3, p. 87. This note sheds little light on the question that is actually before us, i.e., whether the disease process that ultimately produced the observed DVT was "acute" or "non-acute." Per *Bint, supra*, an acute disease is one "having a sudden onset, sharp rise and short course." Presumably, a non-acute occupational disease is one having a longer onset and a longer course. There is nothing in the record before us that allows us to make a judgment as to whether Claimant's disease process is acute or non-acute. Making this determination may be critical if it turns out that Claimant was exposed to the hazards of developing DVT/PE for less than sixty (60) calendar days. However, as noted, the evidence leaves us unable to do anything more than make a guess on this point.

56. Idaho Code § 72-714(3) vests in the Commission the power (and responsibility) to make such inquiries and investigations as it deems necessary in a particular case. As interpreted by the Court, Idaho Code § 72-714(3) permits the Commission to demand additional evidence should it find that satisfactory evidence on a question of material fact is lacking. *Green v. Green*, 160 Idaho 275, 371 P.3d 329 (2016); *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013). Here, evidence establishing Claimant's disease as acute or non-acute, and

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Claimant's testimony refer to a few weeks, not 5-6 months.

evidence which would allow us to identify whether Claimant was exposed to the hazards of his disease for a period of at least sixty (60) days, is lacking. In view of the humane purposes of the Act, and particularly in view of our conclusion that Claimant's disease is causally related to his employment and of some potential consequence to his ability to engage in gainful activity, we deem it appropriate to retain jurisdiction in this matter for further proceedings with direction to the parties to adduce such additional evidence that would allow the Commission to make an informed judgment on whether Claimant suffers from an acute versus non-acute occupational disease, and if the latter, whether he was exposed to the hazards of the disease for a period of at least sixty (60) calendar days.

CONCLUSIONS OF LAW AND ORDER

1. Claimant did not give timely written notice of his occupational disease, but such failure is excused by Employer's actual knowledge of the same within sixty (60) days following the date of first manifestation;
2. Claimant has proven all elements of his occupational disease claim except the following:
    a. Whether he suffers from an acute versus non-acute occupational disease, and, if the latter;
    b. Whether he was exposed to the hazards of the disease for a period of sixty (60) calendar days.
3. Pursuant to Idaho Code § 72-714(3), the Commission retains jurisdiction in this matter. The parties are directed to adduce additional proof on the issues referenced in (2) above. The Referee shall set a telephone conference in the near future to discuss how such additional proof may be adduced, whether further hearing is required, and setting a briefing schedule.

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

Dated this __27th__ day of __August__, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___27th____ day of __August__, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 W HAYS ST
BOISE ID 83702

SUSAN R VELTMAN
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BOISE ID 83702

el

_____/s/_____