BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GORDON FULLER, Claimant, v. MICRON TECHNOLOGY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 01-504069** **01-510368** **03-524395** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed: July 21, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on November 12, 2004. Paul J. Augustine represented Claimant. E. Scott Harmon represented Defendants. The parties presented oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The case came under advisement on March 21, 2005 and is now ready for decision.

ISSUE

As modified and agreed upon by the parties at hearing and in their briefs, the sole issue to be resolved is:

1. Whether Claimant suffered a personal injury as a result of an accident arising out of and in the course of his employment specifically in reference to incidents alleged on April 9, 2001,

and October 27, 2003.

CONTENTIONS OF THE PARTIES

Claimant contends his condition, i.e., a cervical spine injury, was caused by a work-related accident that occurred on October 27, 2003.

Defendants assert that Claimant's cervical injury cannot be attributed to an accident at work on October 27, 2003, nor is it related to his earlier lumbar injury of April 9, 2001.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Testimony of Claimant and Alberta Fuller, offered at hearing;
2. Claimant's Exhibits 1 through 9 and 11 through 17, admitted at hearing;
3. Claimant's Exhibit 10 provisionally admitted at hearing and formally admitted post-hearing;
4. Defendants' Exhibits A through N, admitted at hearing;
5. Post-hearing depositions of Paul J. Montalbano, M.D., and Timothy E. Doerr, M.D., each with one exhibit; and
6. The Industrial Commission legal file.

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

FINDINGS OF FACT

CLAIMANT

1. Claimant was first hired by Employer in September 1994 to work in plant maintenance. During his first year of employment, Claimant did maintenance work inside the plant. After one year, Claimant was transferred to outside maintenance, where he remained for nine years.

2. In April 2001, Claimant sustained an injury to his lumbar spine. Dr. Doerr, a board-certified orthopedic spinal surgeon, testified that he first saw Claimant on May 14, 2001, upon a referral from an occupational medicine physician. Dr. Doerr evaluated Claimant and opined his lumbar injury was work-related. On or around May 30, Dr. Doerr performed right L4-5 and L5-S1 discectomies. Dr. Doerr saw Claimant during a continuous period of follow-up. The last such follow-up visit was May 9, 2002, wherein Dr. Doerr's note indicates in pertinent part that Claimant "was doing well until about December of 2001 when he fell at work and now has had increasing right leg pain . . . has been unresponsive to conservative treatment." Defendants' Exhibit H, p. 142. An MRI of Claimant's lumbar spine was scheduled and Claimant was kept on light-duty restrictions.

3. Claimant eventually returned to work for Employer. Claimant was laid off in February 2003 for reasons unrelated to his 2001 injury.

4. On October 6, 2003, Employer rehired Claimant as a production janitor. The new position paid less than his previous job in maintenance. His new position entailed extensive vacuuming and mopping. At the time he was re-hired, Claimant walked with a slight limp and experienced occasional low back and hip pain on the middle right side. Claimant was able to perform his duties despite his limp and occasional pain. Claimant spoke highly of and liked working for Employer.

OCTOBER 27, 2003, INCIDENT

5. Claimant testified about the events of October 27, 2003, as follows. That morning he "was feeling great" and started work at 6:30 a.m. Transcript, p. 29. Claimant's supervisor told Claimant that he would be working in one of the fabrication (fab) units that day. Claimant put on a clean suit in order to enter the fab:

> . . . I had bent down to do the last portion of my boot and I felt this pop in the middle

> of my back.[1] I never thought anything about it, you know. It's just – I figured it was just a bone popping. And when I got up, I got up kind of fast . . .

Id., at p. 30. After suiting up, Claimant and his supervisor, Norm, entered the fab:

> . . . And as I was walking in, we walked clear to the end of the fab, and we have a glove wrap there that [Norm] was showing me what I need to stock for the day and as I was coming back up I was following him and as soon as we got up to the door I stopped and his back was to me and I felt, really, the tingling in my face and, then, down my shoulder and down my arm started and I didn't know what was going on, and then, I waited there a few minutes, and then, I said, Norm, I don't really feel well. By that time I was in a full sweat and I – Norm says, well, man, you're sweating, he says we need to get out of here . . .

Id., at pp. 30-31. Claimant and Norm exited the fab and went into the clean room where Claimant took off his suit and rested for a bit. Norm and another supervisor then took Claimant to Employer's health clinic.

6. Chart notes for Claimant's visit to the clinic state:

> 54-year-old male presenting with an episode of lightheadedness, clamminess and some slight shortness of breath that occurred this morning at 5:30, developed shortly after the lightheadedness and clamminess. He has developed some right lower back pain and burning pain down the right leg into the foot.

Claimant's Exhibit 1, p. 113. The note went on to discuss Claimant's earlier lumbar injury and subsequent surgery, as well as Claimant's continuing complaints of right lower lumbar and leg pain. On exam, the physician's assistant noted:

> Patient is alert and oriented, appears in no acute distress. . . . Cranial nerves II–XII intact and symmetrical. . . . Neck is supple without any carotid bruits. . . . DTRs 2/4 and symmetrical throughout upper and lower. He has good grip strength.

Id.

7. At hearing, Claimant testified that the clinic doctor thought he was having a mini stroke, "and I said – I says my back hurts and I said I don't think that I'm having a mini stroke."

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[1] Claimant subsequently testified that the pop was "in the middle between my shoulder

Transcript, p. 34.

8. Because the clinic staff was concerned about Claimant's risk for a cardiac or atherosclerotic event, Claimant's wife was contacted. She came to the clinic and took Claimant to St. Luke's emergency room (ER). Claimant testified that the ER doctor also checked Claimant for a mini stroke, "and I said it wasn't a mini stroke, I says it's my back, it hurts, and they were doing all kinds of tests and everything." *Id.*, at p. 35. Claimant was tested for cardiac problems and stroke. All of his test results were unremarkable. Claimant was given pain medication and sent home.

9. Mrs. Fuller testified that after receiving a phone call from Employer, she took Claimant to the ER. She asserted Claimant "kept complaining his back was hurting, he hurt his back, and nobody would pay any attention." *Id.*, at p. 58.

10. Claimant did not return to work for Employer after October 27, 2003, though he did return to Employer's clinic on several occasions. On November 7, 2003, physical therapy staff at the clinic performed a spine evaluation on Claimant. As to the mechanism of injury, Claimant reported that he had a "pop" in his *central lumbar spine*. Claimant returned to the clinic on November 10. He reported that since the date of the fab incident, he had "a burning feeling in his right groin and numbness radiating down his leg . . ." Claimant's Ex. 1, p. 111. On exam he moved his neck easily, had a negative Spurling, and was not tender to neck palpation. His hand grip strength was normal bilaterally. Medical records from the November 10 visit describe Claimant's diagnosis as an exacerbation or re-injury of his low back. Claimant returned to the clinic on November 17 with his symptoms unchanged. On December 12, 2003, Claimant presented at the clinic "with an acute flare up of his chronic low back pain." *Id.*, at p. 115.

FOLLOW-UP CARE WITH DR. MAIER

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blades." Transcript, p. 32.

11. Michael K. Maier, M.D.,[2] Claimant's primary physician, saw Claimant on October 28, 2003, for follow-up. Dr. Maier wrote in the subjective portion of his note that on October 27, at the ER, Claimant had complained of "involvement of his face, right arm and right leg." Defendants' Exhibit D, p. 66. On October 28, Claimant reported some "mild burning up in his face this morning," and, "some persistent burning pain in his right hip." *Id*. In the assessment portion of the chart note, Dr. Maier opined that Claimant's complaints were, "[l]ikely anxiety. However, [Claimant] certainly has risk factors for atherosclerotic issues." *Id.*, at p. 67.

12. Dr. Maier saw Claimant again on November 5, 2003. In the subjective portion of the chart, Dr. Maier noted:

> Claimant has had resolution of his neurologic symptoms. No recurrence. Still have problems intermittently with his back with radiation to the anterior thigh.

Id. Dr. Maier diagnosed "[l]ikely hyperventilation and anxiety secondary to claustrophobia. Do feel it is important to prevent recurrence and therefore should avoid using fab suit. Also avoid tight spaces." *Id.* Claimant, when queried whether Dr. Maier had discussed such symptoms with him, responded: "Yeah, but I told him I wasn't excited." Transcript, p. 50.

13. Claimant returned to Dr. Maier a number of times between November 5, 2003, and February 2004 for a number of issues including asthma and his chronic back and leg pain. Nothing in the chart notes for those visits indicates any complaints related to Claimant's neck or upper extremities.

FOLLOW-UP CARE WITH TIMOTHY E. DOERR, M.D.

14. Claimant saw Dr. Doerr on October 30, 2003, after a nearly 18 month hiatus. He was complaining of right leg pain and numbness. Dr. Doerr's note reads, in pertinent part:

> At this point with a one-year history of symptoms unresponsive to conservative

[2] Dr. Maier's name is spelled throughout Hearing Transcript as "Meyer."

> treatment, I think that a repeat imaging study is warranted. Gordon is severely claustrophobic, therefore, I think a CT myelogram of the lumbar spine is warranted.

Defendants' Exhibit H, p. 145. In an addendum to the October 30 chart note, Dr. Doerr wrote:

> Gordon does state that he is having some right sided facial paresthesias as well. I have instructed him that I certainly do not see these coming from his spine and definitely not related to his lumbar pathology.

Id., at p. 147. Dr. Doerr advised him to follow up with his primary physician. Mention of the fab unit incident that had occurred three days earlier is noticeably absent from the charts.

15. When Dr. Doerr was deposed, he was asked about his awareness of Claimant's October 27 incident:

> I asked him – when he came in on the 30th, I asked him what he was in for, and he said he was in because, over the last year, his right leg pain and numbness was gradually getting worse. He didn't make any mention of a recent injury.

Dr. Doerr Depo., at p. 18.

16. The CT myelogram was done and suggested a recurrent right L4-5 disc protrusion, but it could not differentiate between disc material and scar tissue. When Dr. Doerr next saw Claimant on November 20, 2003, he recommended an MRI to make the necessary differentiation "despite the fact that [Claimant] had significant claustrophobia." *Id.,* at p. 10.

17. Claimant returned to Dr. Doerr on December 11. The lumbar MRI showed "postoperative change on the right side at L4-5 and L5-S1. There is no evidence of a recurrent disc protrusion." Defendants' Exhibit H, p. 154. The next day, Claimant presented at Employer's clinic with an acute flare up of his chronic low back pain.

18. Additional imaging, including a screening spine MRI and a lumbosacral plexus/right hip MRI was ordered to try to identify the cause of Claimant's pain complaints. The screening spine MRI revealed "disc herniations at C4-5 and C5-6 with cord compression and myelomalacia." *Id.,* at

p. 160. Dr. Doerr testified that myelomalacia means "softening of the spinal cord" and shows on the MRI as "increased water or fluid in the spinal cord consistent with swelling in the spinal cord." Dr. Doerr Depo., p. 12. Such swelling can be caused by "trauma" or "compression." *Id.* Dr. Doerr testified:

> After I got his screening spine MRI and saw the cord compression, I pressed him further to whether he had had any trouble with his upper extremities or with balance, and he stated that he had some pain in his arms and some balance difficulties.

Id., at pp. 19-20. See also, Defendants' Exhibit H, p. 160 (March 30, 2004 medical note) wherein Dr. Doerr writes:

> On further questioning, the patient does state that he feels that over the last several months he may have been having some difficulty with his balance. He also had pain and numbness radiating into both arms in addition to his low back pain with pain radiating in the right groin.

19. In the March 30 note, Dr. Doerr characterizes Claimant's low back and right groin pain as secondary to the previous lumbar surgery. He could not relate the newly discovered C4-5 and C5-6 herniations to that earlier surgery. Dr. Doerr recommended surgical treatment of the cervical disc herniations.

20. Claimant testified that during the March 30, 2004 visit, Dr. Doerr discussed the recent imaging that showed the cervical herniations and told Claimant that he needed surgery "up in the neck area." Transcript, p. 42. When Claimant was questioned as to whether he had told Dr. Doerr during the March 30 visit that the symptoms of numbness and pain in his arm had existed in October of 2003, Claimant responded in the negative: "No, I didn't go see him for that." *Id.,* at p. 44.

21. Dr. Doerr saw Claimant next on May 13, 2004. The chart note indicates that Claimant responded well to physical therapy for his low back/right groin pain, and was "adamantly opposed to any [cervical] surgery at this time in part because of a concern about financing this."

Defendants' Exhibit H, p. 164. An addendum of even date discharges Claimant "from his industrial injury related low back problem. His further follow-up is related to his cervical pathology which is not related to his industrial injury." *Id.* This was Claimant's last documented visit to Dr. Doerr.

22. Dr. Doerr testified about the May 13 visit:

> . . . We had a very frank discussion at that time that this [cervical disc herniations and spinal swelling] was a problem that needed to be addressed, but it wasn't related to his work injury.
>
> [Claimant] told me that he couldn't afford to have it done unless we could – unless it was covered by work comp. And I told him that there's nothing in his records, nothing that he's told me, nothing that would indicate it was related to any of his work injuries.
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> ***
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> And it was shortly thereafter that my nurse contacted him, because he didn't show up for further follow-up. . . . And at that point, he told my nurse, who relayed to me, that he had found a physician who thinks it's work-related, and that's where he's going to have his surgery.

Dr. Doerr Depo., pp. 16-17. Dr. Doerr further opined:

> I have taken care of [Claimant] for a long time. I know [Claimant] very well. And I have absolutely no doubt in my mind that the disc herniations were unrelated to his industrial injury.

Id., at p. 17. He opined likewise as to causation of the spinal swelling.

23. None of Dr. Doerr's records include any reference to an accident on October 27, 2003. Dr. Doerr testified:

> . . . All I recall is that [Claimant] made no mention of an injury and made no mention of any symptoms that could even be remotely attributable to neck pathology until March of 2004.

Id., at p. 19.

24. Claimant testified that he attempted to tell Dr. Doerr about the October 2003 incident on one of his visits:

> . . . And I tried to explain it to him, but he would just listen for a little bit and, then, he

> would pop out of the room, like – you know, like he was too busy to listen to me.

Transcript, p. 37. Mrs. Fuller testified in a similar vein. She claimed surprise at the mention of surgery and described her difficulty in communicating with Dr. Doerr:

> . . . every time I tried to ask Dr. Doerr a question with every visit, he was short, sweet, out the door. He wouldn't hardly discuss anything.

Id., at p. 60.

25. On June 18, 2004, Surety wrote Dr. Doerr seeking clarification of his opinion on causation. Surety specifically asked Dr. Doerr to clarify whether Claimant's cervical pathology was related to his 2001 injury or the October 27, 2003 fab incident. Dr. Doerr's June 22 reply is less than a model of clarity:

> With regard to your queries, I have followed [Claimant] since the time of his initial industrial injury in 2001. It is absolutely clear to me that [Claimant's] cervical myelomalacia is completely unrelated to his industrial injury. At the time of his industrial injury he had only symptoms of back pain and radicular leg symptoms. He has had repeat flares of his lumbar symptoms but has never made a claim to me of any cervical symptoms related to his industrial injury. His myelomalacia is in my opinion 100% attributable to his underlying degenerative condition. I see no evidence that he developed a spinal cord injury as a result of any industrial accident.

Defendants' Ex. H, p. 167. By the time of his deposition in December 2004, Dr. Doerr is aware of the October 2003 incident, and opines that the cervical condition is not the result of *either* industrial injury. In particular, Dr. Doerr discussed that Claimant's report of a "pop," whether in his lumbar spine as first reported, or in his thoracic spine between his shoulder blades as he later claimed, could not be related to injuries that appeared above both locations in the cervical spine.

DR. MONTALBANO

26. Claimant sought a second opinion from Dr. Montalbano, a neurological surgeon. Dr. Montalbano testified that he first saw Claimant upon a referral by Dr. Maier on May 26, 2004. While Dr. Maier's chart indicates that the referral pertained only to Claimant's low back and

radicular pain, Dr. Montalbano stated that the referral was for "low back pain, right leg pain, as well as neck pain; for an overall neurosurgical evaluation." Dr. Montalbano Depo., p. 6. According to Dr. Montalbano's report of May 28, 2004, Claimant told Dr. Montalbano that his low back and right lower extremity pain started after his 2001 accident. He also reported to Dr. Montalbano that:

> [H]is neck pain and low back pain started while bending over buckling his boot. He reports experiencing a burning sensation in his upper extremities as well as on the right side of his face.

Defendants' Exhibit N, p. 287. Dr. Montalbano reviewed the March 17, 2004 screening MRI that revealed "spondylitic changes from C4 to C7" and "evidence of a spinal cord injury as well as myelomalacia at those levels." Dr. Montalbano Depo., p. 8.

27. Dr. Montalbano recommended, and ultimately, performed "[a]nterior cervical decompression [and]fusion [with] instrumentation from C5 to C7." *Id.*, at p. 17.

28. There is some confusion in Dr. Montalbano's records regarding the onset, and therefore causation, of Claimant's cervical complaints. The record is clear that, at least initially, Dr. Montalbano attributed Claimant's cervical complaints to the 2001 injury. See, Defendants' Ex. N., p. 288:

> ASSESSMENT/EVALUATION: [Claimant] is a 55-year-old right-handed white male who presents with evidence of a spinal cord injury. *Due to the lack of any other incident that would account for his symptomatology*, I relate his spinal cord injury to his work-related injury in 2001. I have explained this to [Claimant] in detail.

Emphasis added.[3] See also, Dr. Montalbano Depo., pp. 23-24. Subsequently, although Dr. Montalbano could not explain how he came into the information, or when the changes were made, he made handwritten changes to the May 28, 2004 letter (Claimant's Ex. 10, pp. 3 and 21),

[3] Exhibit N is the document Dr. Montalbano's office sent to Surety in response to a records request.

indicating that the cervical injuries were the result of the October 27, 2003 fab incident. Dr. Montalbano opined that such surgery "was reasonable and necessary based on [Claimant's] work-related injury of 10/27/2003." Dr. Montalbano Depo., p. 17.

29. Dr. Montalbano was equally firm that Claimant's cervical pathology was not related to his April 2001 lumbar injury. When asked whether the cervical disc problem could have started in 2001 and progressed over time, Dr. Montalbano agreed that it could have.

30. When asked whether the degenerative finding concerning Claimant's cervical disc was "consistent with an injury currently occurring [sic] only seven months earlier," Dr. Montalbano responded:

> The degenerative findings in [Claimant's] spine correlates in a similar fashion to a 55-year-old white male, whether its degenerative findings that have progressed, beginning at which time period is unknown. Certainly his degenerative findings did not exist within that seven-month period.
>
> ***
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> The degenerative findings [Claimant] noted on his MRI scan, as well as in his operative experience was based on several years, not just a seven-month period.

Id., at p. 31.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY - CAUSATION

31. An "accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto*

Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995).

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *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 Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

32. The pivotal issue in the instant case is whether Claimant suffered a work-related accident, resulting in cervical disc injuries, on October 27, 2003. Two treating physicians provided two differing opinions as to the cause of Claimant's cervical pathology. This is not surprising. What is surprising is that causation is the only substantive issue on which these two treating physicians disagree. Both doctors agree that as of March 2004 (the date of the screening MRI that showed the cervical problems), Claimant had cervical herniations with spinal canal compromise and myelomalacia. Both doctors agree that the cervical pathology is not related to Claimant's 2001 lumbar injury. Both doctors agree that Claimant had pre-existing degeneration in his cervical spine. Both doctors agree that Claimant's pathology was substantial. Both doctors agree that Claimant's pathology required urgent surgical intervention. Given that they agree on so much regarding Claimant's condition, how is it that they reached two different conclusions as to its cause?

33. Drs. Doerr and Montalbano reached different conclusions on the causation question because each had only a part of the story. Dr. Doerr had a complete understanding concerning Claimant's 2001 lumbar injury, but he was completely in the dark regarding any subsequent industrial injuries during the time he treated Claimant subsequent to October 27, 2003. Dr. Montalbano, on the other hand, heard about the fab incident and the cervical complaints during Claimant's first visit. What Dr. Montalbano did not have during that first visit were the medical

records that revealed substantial inconsistencies in Claimant's reporting.

34. A brief review of the pertinent findings regarding Claimant's course of medical treatment is illustrative of the two different stories that Dr. Doerr and Dr. Montalbano heard.

When Claimant presented to Employer's health clinic shortly after the fab incident, he made no complaints suggesting cervical involvement. On exam, cranial nerves II through XII were intact, and his neck was supple, and he demonstrated good grip strength. Based on Claimant's history and his presenting symptoms, providers at the clinic were most concerned about the possibility of a coronary or vascular event.

When Claimant presented to the ER later the same day, he made no mention of neck pain. The ER staff did a very thorough work up on Claimant and the medical notes are correspondingly thorough–yet they contain no indication of any cervical complaint or symptoms.

Dr. Maier, Claimant's primary physician, saw Claimant *the day after* the fab incident. With the exception of a mild burning sensation in his face, and his chronic low back/leg pain, Claimant's symptoms had resolved. Claimant provided no history that would suggest a cervical injury. Dr. Maier concluded that Claimant's symptoms were the result of hyperventilation and anxiety caused by claustrophobia, of which Claimant had a long history. Dr. Maier recommended avoiding future use of fab suits and work in tight places.

When Claimant returned to Dr. Doerr just three days after the fab incident, there is still no mention of neck pain, or any history that might lead Dr. Doerr to consider a cervical injury; in fact, Claimant does not even mention the fab incident, an omission Claimant confirmed at hearing. Completely unaware of the recent fab incident, Dr. Doerr addressed the facial symptoms by noting they could not be related to Claimant's low back problem because facial sensation comes from nerves that exit *above* the cervical spine. He advised Claimant to see Dr. Maier regarding the facial

symptoms. When Claimant returned to Dr. Maier on November 5, all of his symptoms, except his chronic low back pain with radiation into the thigh, had resolved.

The first time that Claimant discusses a specific mechanism of injury related to the fab incident is at Employer's health clinic on November 7, when he describes a "pop" in his *lumbar spine*.

On March 30, 2004, Claimant returned to Dr. Doerr who now had the results of a screening spine MRI. Dr. Doerr explained that the screening spine revealed disc herniations at C4-5 and C5-6 as well as cord injury. It is only after five months of treatment and specific questioning in light of the MRI results, that Claimant mentions to Dr. Doerr that he had experienced some pain in his arms and some balance difficulties, but Claimant still does not tell Dr. Doerr about the fab incident.

On Claimant's last visit with Dr. Doerr, the doctor discussed the seriousness of the cervical problems, and explicitly addressed why Claimant's cervical pathology could not be related to the low back injury from 2001—the only industrial injury of which Dr. Doerr was aware. Of particular interest were Claimant's remarks during this conversation that the only way he could afford the necessary surgery were if it were attributed to an industrial injury. If Claimant truly believed that the cervical injuries occurred on October 27, 2003, why then did he not take this opportunity to tell Dr. Doerr about the fab incident? Claimant's continuing efforts to avoid discussion of the fab incident with Dr. Doerr are simply inexplicable unless Claimant knew that his cervical injuries were not the result of the fab incident.

Once it became clear to Claimant that Dr. Doerr would not attribute his cervical problems to his 2001 injuries, he quit treating with Dr. Doerr.

In February 2004, Dr. Maier referred Claimant to Dr. Montalbano for his recurrent low back and radicular leg pain. While Claimant reported the low back and radicular leg pain to Dr.

Montalbano, he also reported the neck pain and told Dr. Montalbano that it started coincident with the fab incident. Based primarily on Claimant's incomplete or disingenuous reportage, and apparently under the mistaken belief that the fab incident occurred in 2001, Dr. Montalbano initially attributed the cervical spinal injury to the fab incident in 2001. Subsequently, Dr. Montalbano learned of his error regarding the timing of the fab incident, and clarified that Claimant's cervical pathology could not be attributed to his 2001 injury.

35. During his deposition, taken in November 2004, Dr. Montalbano remained steadfast in his opinion that the cervical injury occurred in October 2003 when Claimant bent to fasten his shoe cover preparatory to entering the fab unit. The following colloquy is informative:

> Q. [Referring to Claimant's Exhibit 1, p. 111] On this record it indicates that [Claimant] on 10/27/03 bent over and felt a pop in his back.
> A. Okay.
> Q. Would that popping sensation, feeling that popping sensation be consistent with a mechanism injury for a spinal cord injury?
> A. Yes.
> Q. Why?
> A. Because of the subsequent symptomology [sic] after he experienced the pop. He noticed numbness in his arms, numbness in his right leg, and he developed an unusual facial sensation.
> Q. Do you have an opinion to a reasonable degree of medical probability, meaning that it's more likely than not, whether the pop that [Claimant] experienced feeling in his back on 10/27/03 was the cause of his spinal cord injury which you diagnosed in May of 2004?
> A. There is absolutely no question in my opinion that the cause of his myelomalacia and his spinal cord injury was a result of his accident on 10/27/03.
> Q. What do you base that upon?
> A. Because as much respect [as] I have for [Claimant], he is not a medically educated individual, he has described a spinal cord injury that is textbook, and he relates that event to when he was performing his janitorial duties on 10/27/03. *His history alone describes a spinal cord injury*.

Dr. Montalbano Depo., pp. 15-16 (Emphasis added). According to Dr. Montalbano, it is tautological that Claimant's reported history proves the injury and the mechanism of injury. Interestingly, the exhibit on which this colloquy was based (a medical record from Employer's health clinic dated

November 10, 2003), provides nothing that would locate where along Claimant's spinal column he felt the "pop" he described. Just three days before, during an evaluation of his spine by Employer's physical therapy clinic, Claimant said that the pop was in his central lumbar spine. Dr. Montalbano clearly stated in his deposition that a pop in the lumbar spine would not cause the cervical symptoms that Claimant reported. He also testified that it would be "rare" for facial symptoms to manifest as a result of herniations at C4-5 and C5-6. *Id.*, at p. 9.

36. Claimant's protestations that the doctors at Employer's health clinic and at the ER did not listen to his complaints are not persuasive. Medical professionals live, and their patients may live or die, on their ability to listen to patients' symptoms and complaints and make a full and complete record of them. None of the initial medical professionals noted any cervical complaints. The first time he describes a "pop" in his back, he locates the pop in his central lumbar spine. By the date of the hearing, this "pop" has moved up from his lumbar spine to the area between his shoulder blades. In fact, Claimant's first *clear* mention of neck pain was when he first saw Dr. Montalbano. Claimant's specific assertion that Dr. Doerr would not listen to him is not credible. Clearly Claimant had some confidence in Dr. Doerr, since Claimant returned to Dr. Doerr on his own volition after the fab incident. Dr. Doerr's records are at odds with Claimant's testimony that the doctor would not listen to him. The chart notes describe numerous efforts on Dr. Doerr's part to extract relevant information from Claimant along with thorough explanations of the significance of the various findings.

37. For the reasons discussed herein, the Referee finds that Dr. Montalbano's opinion regarding the causation of Claimant's cervical injuries is fatally flawed, primarily because it was based on misinformation provided by Claimant.

38. Claimant has failed to establish that he sustained cervical injuries as a result of the

events of that morning. Because of Claimant's prevarications in his dealings with those who treated him, the causation opinion of Dr. Montalbano is tainted and cannot establish to a reasonable medical probability that he sustained cervical injuries when he bent to fasten his shoe cover.

CONCLUSION OF LAW

1. Claimant has failed to prove to a reasonable degree of medical probability that he sustained cervical herniations either as a result of his April 9, 2001 industrial accident, or the October 27, 2003 fab incident.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED This 30 day of June, 2005.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of July, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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db /s/_____