

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F110726**

GENE KING, EMPLOYEE

CLAIMANT

VS.

ENSCO, INC., EMPLOYER

RESPONDENT

AIG CLAIMS SERVICES, INC., CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 3, 2003

Hearing held July 17, 2003, in El Dorado, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Gary Davis, Attorney at Law, 1415 North McKinley, Suite 415, Little Rock Arkansas 72205.

Respondents are represented by Ms. Carol Worley, Attorney at Law, 400 West Capitol, Suite 1900, Little Rock, AR 72201.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in El Dorado, Arkansas, on July 17, 2003. A prehearing telephone conference was held on this claim on May 19, 2003, with a Prehearing Conference Order filed on that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. The employee-employer-carrier relationship existed between the parties on March 25, 2001;
3. Claimant earned an average weekly wage sufficient to entitle him to the maximum compensation rates should this claim be found compensable.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant sustained a compensable inhalation injury on March 25, 2001, for which he is entitled to indemnity and medical benefits.
2. Controversion and attorney's fees.

In regard to these issues, claimant contends that he sustained compensable injuries to his lungs for which medical treatment was required and temporary disability incurred. Claimant contends that he was temporarily totally disabled from March 25, 2001, through March 5, 2002, for which he is entitled to temporary total disability benefits. Claimant further contends that medical expenses have been incurred as a result of this injury for which he is entitled to medical benefits and that the claim has been entirely controverted for purposes of attorney's fees. Claimant specifically reserves the right to pursue any additional benefits. Conversely, respondents contend that the claimant did not suffer a compensable inhalation or any other type of injury under the Arkansas Workers' Compensation Act. Specifically, respondents contend that no incident actually occurred which supports a work-related injury. Respondents further contend that the medical evidence does not support a compensable injury. Finally, respondents contend that they did not receive notice of any work-related injury until October 4, 2001, when the claimant filed this claim for workers' compensation benefits. Alternatively, respondents contend that if the claim is found compensable, respondents are entitled to a credit

for short term and long term disability benefits claimant received during the period of time he was off work.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on May 19, 2003, and contained in the Prehearing Order filed on that same date are hereby accepted as fact.

2. Claimant did not report a work-related incident or claim a work related exposure when he first became ill.

3. The first report of claimant being exposed to chemicals at work appears in Dr. Richard Dietzen's June 19, 2001, medical report in which the claimant requested a letter from Dr. Dietzen for his professional opinion regarding the cause of claimant's illness.

4. Claimant has failed to prove by a preponderance of the evidence that he sustained an inhalation injury on March 25, 2001.

CONCLUSION

Claimant has been an employee of respondent-employer for approximately 13 years. Respondent employer disposes of chemical waste products. In his job

capacity, claimant is required to open barrels of chemicals for possessing. Claimant contends that in the possess of handling a barrel of chemicals he sustained an injury to his lungs on March 25, 2001. In this regard, claimant testified that after the daily safety meeting and being advised by the A-person who had reviewed the Material Safety Data Sheet that the materials were non-hazardous, claimant suited up in his Tyvek suit, put on his respirator and proceeded to the floor to open a barrel. Claimant testified that he tears down his respirator every morning, cleans it, and puts in a new filter. After getting geared up with everything to protect himself, claimant proceeded to the floor and rolled a drum onto the turner. Claimant then slowly released the bolt on the drum to release any pressure in the drum. Claimant further testified:

But in that particular day when I backed it off, as soon as I broke it kind of loose it didn't act like it was loose and I turned it another time, when I did the drum said "Pop" and when it did it said (indicating) and come back in my face and I tightened it back down real quick like, because any time you have got something like that, you want to get it away from you.

Claimant testified that he noticed he was having trouble breathing within five minutes of this occurrence. Claimant further testified that he did not have any problems prior to this incident.

On cross-examination, claimant testified that he did not know what was wrong with him that morning. Claimant admitted that he did not complain of a

chemical exposure on March 25th because he “didn’t really know” what was wrong.

In this regard, claimant specifically testified:

“Q. [Ms. Worley] When you talked to Viola right after whatever happened, you told her you could not breathe, did you tell her that you thought you had breathed in some type of fume or chemical?”

“A. [Mr. King] No, ma’am, I didn’t know. I really didn’t know.

“Q. Would there be anything Viola could tell by looking at you, did you have anything on your face mask or on your Tyvek suit? I mean would she be able to say, “Yes, I saw something on him?”

“A. Well, not if it wasn’t any liquid of any kind.

“Q. Well, was there?”

“A. If it was a fume, no, ma’am.

“Q. When you went in and talked to Joe, did you tell him that you thought you had been exposed to fumes or chemicals?”

“A. Well, I said that a while ago, I said that I didn’t know what had happened.

“Q. And in fact, you did not mention anything to anyone at the hospital either or any of your treating physicians until June the 19th of 2001, is that correct?”

“A. No, ma’am, because of the fact that when it happened I didn’t really realize nothing - -

“Q. And when you say, “No, ma’am,” that was kind of a poorly-stated question.

“A. Not really - -

“Q. Just a minute. Did you tell any of your medical care providers that you thought you had been exposed to

any type of fumes or chemicals before June 19th of 2001?

“A. I didn’t really even think about it.

“Q. Is that no?

“A. No, I guess not.

“Q. And you did not - -

“A. Because, in fact, Steve came up to the hospital the day that I was up there and Steve asked me himself. He can verify this. He asked me, he said, “What happened?” I said, “I don’t really know.”

“Q. You did not tell him anything about any exposure?

“A. No, ma’am, because I didn’t really know what had happened.

“Q. And in fact, you did not tell anyone out there at ENSCO or Brambles or Teris or whatever it is now, that you had any, or claiming any exposure until October of 2001, when you filed your claim, is that right?

“A. Well, basically - -

“Q. You need to just answer my question. Was that the first time - -

“A. I guess that’s right, yes, ma’am. [T55-57]

Claimant was taken the hospital by his wife on the morning of March 25, 2001. The hospital records for this visit were not introduced into evidence as the parties were never able to obtain these records from the hospital. However, claimant and his wife testified that he received a breathing treatment, was prescribed an antibiotic and was released from the hospital. Later that night, claimant’s condition appeared to worsen, and his wife again took claimant to the

Emergency Room on March 26, 2001. Claimant was admitted to the hospital for a month and one day.

Claimant was initially treated by his family doctor, Dr. Richard Davis. In the History and Physical report dated March 26, 2001, Dr. Davis's impression was that of Acute Respiratory Distress Syndrome, and Pneumonia. Claimant soon came under the care of Dr. Richard Dietzen, a pulmonologist. While in the hospital claimant developed additional problems related to the treatment of his condition.

The medical records do not contain a history of chemical exposure at work until claimant asked Dr. Dietzen for a letter of his professional opinion regarding whether claimant's condition was caused by an accident or an illness. In this regard, Dr. Dietzen's medical record date June 19, 2001, states:

2) need letter of MD prof. Opinion re: accident vs. illness ? re: inh. of chem from barrels.

In a form letter dated July 12, 2001, but signed by Dr. Dietzen on July 26, 2001, Dr. Dietzen noted that his records show an accident on or around March 25, 2001. However, Dr. Dietzen elaborated further on this form to state:

this was brought to my attention only after hospitalization and not known to me at time of admission when patient was being intubated.

Dr. Dietzen prepared a letter dated October 12, 2001, addressed to claimant's family physician and the company physician, Dr. Richard Davis, in

response to an inquiry into whether the claimant's disabilities were work-related.

Dr. Dietzen specifically wrote:

On more recent visits, starting June 19, 2001, Mr. King has asked me to support possible association between his respiratory disease, which was felt to be idiopathic pneumonia, possibly pneumococcal, resulting from ARDS versus completely idiopathic ARDS, that is the cause was not known after study. Cultures did not identify the organism causing his respiratory failure. He did have some hemoptysis on the day of and perhaps the day prior to admission on March 26. That admission for ARDS was complicated by DVT and subsequently by postphlebotic syndrome. His initial hospitalization was also complicated by shingles, which has left him with posthepatic neuralgia in the left upper chest axilla and shoulder region. He also had a pre-existing diagnosis of asbestosis and subsequent to ARDS has a severe restrictive problem, which has varied between a forced vital capacity of 53% on August 10 before prednisone, to 28% on August 28 after prednisone 30 mg per day for seven days, then improving on August 31 to a forced vital capacity of 61% following a total of nine days of prednisone.

Chemical exposure is inherent in his work at Ensco from his description of the process. He states that he opens barrels containing toxic substances, which are not always identified. Although these usually come with documentation, he is not always aware of what he is dealing with. He did wear respirators at work. He was part of a crew that on a given day would handle various barrels of substances, but among the members of that crew, it could not be stated with certainty which crew member had opened which barrel.

On our last visit, August 28, 2001, he requested to clarify his history of chemical exposure. He stated that he did tell someone on March 25 or 26 that he had opened a barrel containing chemicals and that "there was nothing wrong until I went out on that floor." Here he refers to the factory floor. He stated that "I didn't get

sick I just broke a drum open in the turner. It had a vacuum on it. I felt something was wrong, and I said I couldn't breath. I went to the hospital. I didn't know I had an accident that day. Steve McKinney (sic) asked how I felt. I didn't know, I just didn't feel good. All Dr. Mason did was give me antibiotic and chest x-ray and sent me home. You always have a respirator on when you are out on the floor. My respirator was leaking (a yellow Draeger respiratory(sic))." "The doctor at St. Vincent's said, 'Something brought you down.'" "I don't want to go to court; I want to work."

Since the definition of idiopathic means unknown cause, the cause is certainly open and there is a reasonable likelihood that occupational chemical exposure predisposed this patient to the idiopathic ARDS syndrome and or pneumonia with ARDS. His chest film already showed scarring as of May 19, 2000, and was read by an ILO reader as perfusion 1/1 consistent with pneumonconiosis. His disability, however, is clearly much worse following his hospitalization beginning March 26.

It cannot be said with certainty whether the proximate cause of that hospitalization was a chemical inhalation based on lack of evidentiary data other than hear say (sic) from Mr. King remotely following the event. He may not have been able to give an adequate history at the time of the event due to his condition, in extremis. On the other hand, there was a recorded specific denial of a significant caustic chemical exposure at the time of his admission on March 26. The situation is sufficiently unclear to me that were I asked to testify, I would likely reiterate this. My memory at this time does not serve to elaborate further upon the previous written record as to the exact quotation on March 26, 2001....

The parties deposed Dr. Dietzen on June 20, 2002. Dr. Dietzen's deposition was introduced into evidence by the claimant. Dr. Dietzen described his initial encounter with the claimant on December 26, 2001, as follows:

My initial impression in the Emergency Room was that although he worked at Ensco, he had not had any recent smoke or fume inhalation. There was no mention to me on that first day of opening barrels or anything like that. He was able to communicate to a fairly limited degree about things. He was intubated meaning they had put a tube down, anesthesia, put a tube down to begin him on ventilator so his ability to give history was limited and asking had he just been exposed to something had been, no, so I went with that. I did not hear about opening a barrel until much later.

When asked in his deposition as to possible causes for claimant's condition, Dr. Dietzen stated; "Possible causes could be an inhalation injury, an infection, atypical type of pneumonia infection. Those are primarily the two." When asked if inhalation was the most probable reason for the claimant's hospitalization, Dr. Dietzen testified:

It's probably not fully discernible at this point. Medically, there would be no evidence one could go back to and say this was an inhalation because there are no specimens as far as I know that you could go to even on the second day of his hospitalization and start testing for things that he might have inhaled that might have caused the problem if you're forensic. We don't know what was in that barrel. There's no apparent way to identify what was in that barrel that he opened. Likewise, many infections are never identified.

We have people who have no history of inhalation of anything who come in with a very similar syndrome of just getting sick suddenly, getting some kind of pneumonia. The culture is never identified exactly what it is and they get better. Because we're not always dealing with forensics, we don't always make an effort to find what that problem was if the patient has gotten better. We consider our treatment and the results to be adequate there.

When asked what the most probable cause of claimant's attack was,

Dr. Dietzen testified:

"A. [Dr. Dietzen] In my own mind I would be asking some other questions to determine that. Those other questions would be what evidence was brought forward before he went through this illness, got better and thought about it for a while but he did inhale something while opening a drum. Since I did not hear about that early, since I was rather late in hearing about that, I presumed that he's telling the truth. If he is telling the truth, then that's the most likely cause.

"Q. [Mr. Davis] If he's telling the truth - -

"A. But we have a great deal of uncertainty about whether or not he, in fact, inhaled anything to a significant degree, whether or not he had any immediate symptoms that weren't reported or that were reported but forgotten or not heard, not recorded.

"Q. If he's telling us the truth about what happened, are you telling us that the most probably [sic] cause then would be the inhalation if he's telling us the truth about what happened?

[Ms. Worley] Object to the form.

"A. He subsequently told me that he opened the barrel and it took his breath away and if that's exactly what happened, then whatever compound was in there is likely to have caused this sequence of events that led to his hospitalization.

"Q. Do you have any reason not to believe the gentleman?

"A. Not in particular except that I've been questioned a great deal from Ensco and led to understand that there is a difference of opinion apparently on the significance of this inhalation and whether or not it was reported before. It means a great deal to him because without

something work-related, he had no disability coverage.
[D15-17]

On cross-examination by respondent, Dr. Dietzen testified that if the claimant had his respirator mask on then chances of having a significant inhalation would be decreased. Dr. Dietzen further testified on cross-examination that if one assumes the claimant is telling the truth and the chemical he was exposed to was sufficiently concentrated or toxic enough to be able to bypass the mask:

The evidence would support exposure given that exposure had occurred, that evidence would support the severity of the exposure since the nature of the chemical and extent of the exposure is relatively unknown, one can use this evince(sic) do (sic) support the possibility that he may have been exposed.

Finally, Dr. Dietzen was questioned about his opinion set forth in the October 12, 2001, correspondence he sent to Dr. Davis. In this regard, Dr. Dietzen testified:

“Q. In your report of October 12, 2001, you stated that it cannot be said with certainty whether the proximate cause of that hospitalization was a chemical inhalation based on lack of evidentiary data other than hearsay from Mr. King remotely following the event. Is that still your position today?

“A. Yes.

“Q. You have no medical documentation to support a chemical inhalation; is that correct?

“A. No documentation to support or refute that claim.

“Q. And no lab tests, no samples, nothing like that?

“A. No.

“Q. No toxicology reports or forensic reports?

“A. None that I know of. [D25]

At the hearing, claimant complained that the respirator he was using at the time of this alleged incident was too elongated and only fit small faces or elongated faces. Claimant testified that the masks did not seal around the face well, and allowed moisture to leak underneath the mask. On cross-examination claimant admitted that he never lodged a written complaint about how his mask fit prior to this alleged incident in March of 2001. Claimant stated that “we told Joe Knight about it” but he did not call Mr. Knight to corroborate any such complaints.

Steve McKinnon, the safety manager for respondent employer, testified for respondents. Mr. McKinnon testified with regard to the type of mask claimant was wearing on March 25th. In this regard, Mr. McKinnon testified that the filters were leaking carbon into the masks, so the filters were changed out on all the masks. However, Mr. McKinnon testified that regardless of the filters leaking carbon, the filters were still able to filter out chemicals. Mr. McKinnon further testified that the style or type of mask utilized by the claimant on March 25, 2001, is still in use and is used for all the supplied air, only with a different connection. A different style of mask is now used for respirators because it offers a different combination of agents for filtering which are able to filter additional chemicals. With regard to the fit of the masks, Mr. McKinnon testified that all masks, including the claimant’s mask, were

annually fit checked on the individuals to ensure the sealing ability of the masks to the faces of the individuals.

Mr. McKinnon testified that he visited with the claimant in the Emergency Room on March 25, 2001. After asking the claimant if there was an incident or exposure at work, or if claimant's problems were work-related, the claimant denied anything occurring at work causing his breathing problems. Mr. McKinnon stated that the claimant was coherent and did not appear to be "out of it" when he spoke to the claimant in the Emergency Room, therefore, as the safety manager, Mr. McKinnon did not initiate an investigation into the cause of claimant's illness. Mr. McKinnon explained that he understood the claimant to have a pneumonia-type problem after talking with the claimant in the Emergency Room.

Claimant's co-worker, Gracie Allen, also testified on behalf of respondents.

With regard to the events on the morning of March 25, 2001, Ms. Allen testified:

"A. [Ms. Allen] And I told him what safety gear to put on, equipment and everything, he put it on, and went off to work.

"Q. [Ms. Worley] Told who, Mr. King?

"A. Yeah, Gene King.

"Q. All right.

"A. I usually be [sic] in the office and I walked out of the office to see what was going on. I seen him leaning against a drum, and when I asked him what was going on, that's when he said he couldn't breathe and I told him to go to the break room.

“Q. At any point in time during this conversation did you smell anything or see anything that looked unusual other than him leaning against the drum?

“A. No.

“Q. Were you able to tell whether any of the drums out there had been opened?

“A. No.

“Q. Was there any particular odor out there that you noticed?

“A. No, none I noticed.

“Q. Any visible gas?

“A. No.

“Q. Was he coughing or appear to be nauseated at all?

“A. No.

“Q. Did he indicate to you that he had had, you know, any incident that had had happened right then or just prior to that where he might have been exposed to any fumes or chemicals?

“A. No, not to me. [T91-92]

Ms. Allen further testified that the claimant was wearing his mask and it looked to be on correctly. Ms. Allen did not observe anything spewed on the claimant or on his clothing.

As a result of claimant's breathing problems and associated conditions, claimant was off work until March 5, 2002, during which period of time claimant

received short term disability benefits for 17 weeks. Claimant did not have long term disability coverage.

Ark. Code Ann. § 11-9-114 provides:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

For purposes of this statute, an “accident” refers to an event “caused by a specific incident and identifiable by time and place of occurrence.” See, generally City of Blytheville v. McCormick, 56 Ark. App. 149, 939 S.W.2d 855 (1997). Accordingly, it is necessary to first determine whether claimant suffered an accident at work on March 25, 2001, which is identifiable by time and place of occurrence. In this regard, claimant testified that he became ill after breaking the seal on a barrel while at work. However, claimant denied any relationship between his work and his illness for the first two and a half months following his illness. Claimant did not report an incident to Gracie Allen, the first person to observe the claimant having breathing problems. Ms. Allen did not observe anything to even suggest that the claimant was exposed to chemicals. Ms. Allen testified that the claimant’s mask was on properly and that there was nothing about the claimant’s person to suggest that anything had spewed out of the barrel. Claimant was visited in the Emergency Room by Steve McKinnon. Mr. McKinnon specifically asked the claimant whether his condition was in any way related to work, to which the claimant responded

negatively. Dr. Dietzen, who first treated the claimant on March 26, 2001, further testified that he obtained a history from the claimant and the claimant denied any exposure while at work. At no time during the initial phase of claimant's treatment did he report or contend that his condition was related to fumes from a barrel.

Claimant did not report a relationship between his work and his condition until June 19, 2001. Claimant later advised Dr. Dietzen that he wanted to clarify his history in October of 2001. Since this clarification, claimant's report of exposure on March 25, 2001, has remained consistent. However, claimant had previously specifically denied exposure on more than one occasion.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Claimant testified that his mask did not fit his face properly and allowed moisture to leak into it. However, claimant did not offer any evidence to corroborate this testimony. Steve McKinnon testified that all masks, including the claimant's, are

fit tested once a year. Mr. McKinnon further testified that he never received a complaint from the claimant regarding the mask claimant was using on March 25, 2001. Finally, Dr. Dietzen testified that if the claimant was wearing his respirator then the chances of exposure would be decreased.

Claimant admitted telling Mr. McKinnon that he did not know what was wrong with him on March 25, 2001, when Mr. McKinnon visited him in the Emergency Room. Claimant did not report a work-related chemical exposure at that time. Moreover, claimant did not report a chemical exposure to Ms. Allen when she first found the claimant on the floor experiencing breathing problems.

Claimant testified that he did not have long term disability benefits and that he only received 17 weeks of short term disability. Claimant's lack of long term disability coverage is certainly a motivation to come forward with claims of an exposure after initially advising his co-workers, the safety manager, and his treating physician, that he was not exposed to a chemical at work.

In my opinion, I find claimant's denial of any exposure at the time of his initial illness, and hospitalization to be more accurate than claimant's account of an exposure after learning that he did not have long term disability coverage. The cause of one's condition is of utmost importance when determining a course of treatment. In addition, the facts and circumstances of the events are freshest on one's mind during the period of time right after the event. Claimant repeatedly denied a work-related exposure during this period of time.

In reaching this finding, I acknowledge that Dr. Dietzen testified that he found the claimant to be truthful. However, I note that Dr. Dietzen, himself, questioned the claimant's failure to provide a history of exposure until several months after the onset of his illness.

Claimant's testimony simply is not sufficiently credible to support a finding that his injury arose out of and in the course of his employment. Mooney v. Monday & Associates, Full Commission Opinion filed August 15, 1996 (E4104794); Riley v. Craighead Nursing Center, Full Commission Opinion filed January 13, 1998 (E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion filed December 12, 1998 (E700104); and Arnold v. Dino's, Inc., Full Commission Opinion filed August 1, 2002 (F001514). Claimant did not present any evidence to corroborate his testimony of complaints regarding his mask, nor did claimant present any evidence of the chemical allegedly inhaled or its effect on the lungs. Claimant's entire claim rests upon the claimant's testimony of an incident at work when he released the pressure on a barrel. However, when I weigh this testimony against claimant's initial denials of a work-related incident, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a work-related accident which is the major cause of his pulmonary condition.

Even if I were to find that the claimant sustained an exposure of chemicals on March 25, 2001, a finding I specifically do not make, I would still find that the claimant has failed to meet his burden of proof as to causation.

Dr. Dietzen testified that claimant's condition is possibly related to a chemical exposure. However, he further stated in his October 12, 2001, correspondence, which he reaffirmed in his deposition, that "It cannot be said with certainty whether the proximate cause of that hospitalization was a chemical inhalation based on lack of evidentiary data other than hear say (sic) for Mr. King remotely following the event." Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W. 3d 300 (2001). Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required meet a claimant's burden of proof. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances v. Gaylord, supra, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. § 11-9-102(16)(B). In Frances v. Gaylord, the Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900

(2000), the Arkansas Supreme Court held that a medical opinion based upon theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, 344 Ark. 396, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to “pass muster” such opinion must be more than speculation, and go beyond possibilities. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Dr. Dietzen acknowledged in his deposition that it is possible the claimant was exposed and the exposure caused the claimant’s condition, but all he could do was testify as to possibilities. Moreover, Dr. Dietzen specifically testified that he could not state with medical certainty whether the proximate cause of claimant’s hospitalization was a chemical inhalation. Accordingly, I find that Dr. Dietzen’s causation opinion does not meet the definitiveness required to establish compensability with a reasonable degree of medical certainty.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable lung injury as a result of chemical exposure on March 25, 2001. Therefore, this claim is denied and dismissed.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge