

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210253

RONNIE LONG		CLAIMANT
GLAD MANUFACTURING COMPANY (formerly FIRST BRANDS)		RESPONDENT
LUMBERMEN'S CASUALTY COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
INSURANCE COMPANY-STATE OF PENNSYLVANIA INSURANCE CARRIER	NO. 2	RESPONDENT

OPINION FILED SEPTEMBER 9, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

Respondents No. 2 represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 16, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on November 20, 2002. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties agreed upon the appropriate weekly compensation rates. A copy of this pre-hearing order with that amendment noted thereon was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted

1. On all relevant dates from July 1, 1995 through August 1, 1999, the relationship of employee-employer-carrier existed between the claimant, Glad Manufacturing Company (formerly First Brands) and Lumbermen's Insurance Company.

2. On all relevant dates after August 1, 1999, the relationship of employee-employer-carrier existed between the claimant, Glad Manufacturing Company (formerly First Brands) and Insurance Company-State of Pennsylvania.
3. On all relevant dates from July 1, 1995 through August 1, 1999, the appropriate weekly compensation rates were \$386.00 for total disability benefits and \$290.00 for permanent partial disability benefits.
4. On all relevant dates after August 1, 1999, the appropriate weekly compensation rates were \$386.00 for total disability benefits and \$290.00 for permanent partial disability benefits.
5. The claim is controverted in its entirety by all respondents.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to his respiratory system during his employment with Glad Manufacturing Company (formerly First Brands).
2. The claimant's entitlement to the payment of medical expenses, temporary total disability and/or permanent total disability benefits commencing on April 22, 2002 and appropriate attorney' fees.
3. Liability as between the carriers for any benefits that may be awarded.

In regard to these issues, the claimant makes the following contentions:

"The claimant contends that he has worked since April 4, 1973, at different jobs for the facility known as the Glad plant in Rogers. That is why we need to have all the companies that insured this company during the 20 year work experience of the claimant. Claimant maintains that during this period of time, he was exposed to different air pollutants and hydrocarbons that have aggravated his lung condition and led to the need for treatment. He maintains that he is entitled to total disability."

In regard to these issues, the respondents #1 contend that the claimant did not sustain a compensable injury and the claimant is not entitled to any benefits. The claimant had no objective medical findings sufficient to support his allegations of a compensable injury. In the alternative, if it is determined the claimant sustained a compensable injury, the injury did not occur while Lumbermen's Mutual Casualty Company was the workers' compensation carrier for Glad Manufacturing Company from July 1, 1995 to August 1, 1999, and Lumbermen's Mutual Casualty Company is not responsible for any benefits to which the claimant may be entitled.

In regard to these issues, the respondents #2 contend that the claimant did not sustain an occupational disease as defined by the Arkansas Workers' Compensation Act. In the event that the claimant does have some type of pulmonary disease said disease was a pre-existing condition and has not been aggravated by his employment at First Brands/Glad.

DISCUSSION

I. COMPENSABILITY

The central issue in this case is the question of whether the claimant's current respiratory difficulties are "compensable" under the Arkansas Workers' Compensation Act. In regard to this issue, the burden of proof rests upon the claimant. Clearly, the evidence presented does not satisfy the requirements of Ark. Code Ann. §11-9-114(a). The evidence does not show that an "accident" was the major cause of any "physical harm" that the claimant may have sustained to his "pulmonary" or "respiratory" system. Although the Act does not specifically define the term "accident", it does implicitly define this term when it defines the term "accidental" in Ark. Code Ann. §11-9-102(4)(A)(i). In common usage, an "accident" implies a specific identifiable incident or event, where the specific incident or event is, itself, unusual or unexpected or the ultimate outcome it produces is unusual or unexpected. It is apparent from the actual wording of Ark. Code Ann. §11-9-114(b), that

the legislature intended the term “accident” to be used in this manner. Such a definition would also coincide with the definition of the term “accident” given by the Arkansas Supreme Court in Stallings Brothers Feedmill v. Stovall, 221 Ark. 541, 254 S.W.2nd 460(1953). In the present case, there is absolutely no evidence that any particular “accident” was the cause of any pulmonary or respiratory “physical harm” which the claimant may have experienced.

It is further apparent that the particular employment related activities or work environment, which the claimant alleges is the cause of his pulmonary or respiratory difficulties, was in no way “extraordinary” and “unusual” in comparison to his usual work for the respondent. As previously noted, there is also no evidence that any incident, “unusual and unpredicted” or otherwise, was the major cause of any physical harm he may have experienced to his pulmonary or respiratory system. Thus, the claimant has also failed to meet the requirements of Ark. Code Ann. §11-9-114(b).

In fact, a review of the wording used in Ark. Code Ann. §11-9-114 leads to the inescapable conclusion that the legislature intended to exclude “cumulative” respiratory, cardiovascular, and cerebrovascular difficulties from the definition of “compensable injuries”, just as it had for “cumulative” difficulties involving portions of the body other than “the back” or “hearing”, that were not caused by “rapid repetitive motion”. However, this does not mean that the legislature intended such employment related difficulties to go uncompensated.

Although the claimant has failed to prove that his pulmonary or respiratory difficulties constitute a “compensable” injury or illness under the provisions of Ark. Code Ann. §11-9-114, it remains necessary to determine if the claimant’s pulmonary or respiratory difficulties constitute an “occupational disease” under the provisions of Ark. Code Ann. §11-9-601. In regard to this matter, it is important to note that Ark. Code Ann. §11-9-102(4)(C) expressly states that none of the provisions contained in Ark. Code Ann. §11-9-102(4) shall act to

limit or abrogate a claimant's right to recover benefits from an occupational disease. Thus any requirements contained in this subdivision would not be applicable to a claim for benefits attributable to an occupational disease under Ark. Code Ann. §11-9-601, et seq. including those found in Ark. Code Ann. §11-9-102(4) (D), (E), and (F).

In order to constitute an "occupational disease" within the meaning of Ark. Code Ann. §11-9-601, the claimant must prove that his pulmonary or respiratory difficulties resulted in "disability" and has arose out of and occurred in the course of his employment with this respondent. In order to prove that his pulmonary or respiratory difficulties arose out of and occurred in the course of his employment with this respondent, he must show the existence of a causal relationship between his current pulmonary or respiratory difficulties and his employment activities or environment. The burden of proof in regard to this question is simply by the greater weight of the credible evidence presented, Ark. Code Ann. §11-9-601(e)(1)(B).

In support of his contention that his current pulmonary or respiratory difficulties are causally related to his employment environment, the claimant offers his testimony concerning his perceived effect of his work environment on his pulmonary and respiratory difficulties. He also offers various medical reports and records addressing the possible existence of this causal relationship. He has also introduced warning labels for some of the chemical compounds that were used by the respondents in their manufacturing processes.

The claimant testified that he noticed a progressive deterioration in his respiratory function, going back to the early 1990's (the claimant had worked for the respondent since 1973). In his opinion, his respiratory difficulties increased whenever he experienced an increase in his exposure to chemical fumes at work. By April of 2002, his respiratory difficulties had become particularly severe, to the point where he felt he could no longer work.

The first recorded episode of respiratory difficulties noted in the medical evidence, was in 1994. On June 1, 1994, he was seen by Dr. Timothy Yawn, a family practitioner. At that time, the claimant was complaining of chest congestion and productive cough, which he indicated as being present for the previous five months. The claimant also related a history that in December of 1993, he was in Columbia, South America (mistakenly recorded as Columbia, Missouri, by Dr. Yawn), where he had contracted some type of virus. On physical examination, Dr. Yawn noted mild reddening (erythema) in the claimant's throat and bilateral rhonchi involving the claimant's lungs. Otherwise, his physical examination was noted to be unremarkable and chest x-rays were interpreted as normal. Dr. Yawn made a diagnosis of acute bronchitis, provided appropriate medication, and released the claimant to return on as needed basis.

The medical record shows a second episode of respiratory difficulties in 1995. At that time, the claimant was seen by a Dr. Jon A. Sexton, a pulmonologist. Dr. Sexton recorded a history of respiratory complaints, including chronic coughing, aggravated by the inhalation of plastic fumes at work and by various other substances. On physical examination, Dr. Sexton observed redness or erythema which he indicated to be "consistent with mild rhinitis". He further observed that chest x-rays showed hyperinflation of the claimant's lungs which he felt to be consistent with obstructive lung disease. He diagnosed the claimant's difficulties as a chronic cough that was "most likely related to some chronic bronchitis or some mild recurrent cough variant asthma". He prescribed appropriate medication and directed the claimant to return in three weeks.

On May 23, 1995, the claimant was again seen by Dr. Sexton. At that time, Dr. Sexton noted that the claimant's symptoms were better and gave a diagnosis of:

"Probable cough variant asthma with home and work triggers."

He switched the claimant's medication and instructed him to return in three months. There is no indication that the claimant kept his follow up appointment.

The medical record next shows that the claimant sought medical treatment for respiratory difficulties in March of 1999. On March 9, 1999, the claimant was seen by Dr. Stephen Goss, a family practitioner. However, it appears that the primary purpose of this visit was a general physical examination, in order to allow Dr. Goss to become the claimant's regular family physician. During this physical, Dr. Goss also noted that the claimant was complaining of respiratory difficulties, including a chronic productive cough, that continued throughout most of the day. Dr. Goss also notes the history of the claimant's stay in Columbia, South America. On physical examination Dr. Goss noted no objective abnormalities involving the claimant's throat or lungs and lung sounds were also indicated as normal. Dr. Goss diagnosed only a mild chronic cough, stating:

"I think probably just some mild upper airway irritation, perhaps from his work place."

There is no indication that the claimant sought any further medical services for respiratory difficulties until February 20, 2002. On that date, he saw a Dr. Karen Farst, apparently an associate of Dr. Goss. Again, it appears that the primary purpose of this visit was to perform a treadmill stress test. However, the claimant also complained of worsening respiratory problems, in the form of a productive morning cough. Dr. Farst stated that the claimant had previously been tested for allergies and had "PFT's that were negative for asthma". However, the medical record does not contain the actual results of any such tests, or even support Dr. Farst's statement that these tests were given. Dr. Farst's physical examination noted no wheezing or abnormal lung sounds. She diagnosed the claimant's difficulties as being in the form of chronic bronchitis. She further stated that the claimant was exposed to some chemicals at work, but that she was not sure if these chemicals were respiratory irritants. She placed the claimant on anticholinergic medication. She also recommended a CT scan of his lungs, if his symptoms did not improve in two to three weeks. A handwritten note indicates that the claimant called in her office on March 4, 2002, and complained that his cough was no better. At that time, the claimant's

medication was changed and mention was again made of the advisability of a CT scan. No additional reports from Dr. Farst or Dr. Goss have been introduced, nor is there any indication that this CT scan was ever performed.

The claimant was next seen for his respiratory difficulties by Dr. Kyle Hardy, a pulmonologist. This initial evaluation was performed on the basis of a referral from Dr. Farst. Dr. Hardy's initial evaluation occurred on April 22, 2002. Dr. Hardy noted that at that time, the claimant's chief complaints were dyspnea, shortness of breath, and a chronic cough. He recorded a history that these complaints had been present for approximately six years, but had become significantly worse over the past six months with the claimant now experiencing shortness of breath, even while at rest. He further recorded that the claimant had noticed these complaints to be related to being around scented polymers at work and that the claimant had been around this substance for the past six years. On physical examination, Dr. Hardy observed "expiratory wheezes" throughout both lungs. A spirometry test, was interpreted by Dr. Hardy as showing abnormalities consistent with moderate obstructive lung disease. He diagnosed the claimant's respiratory difficulties as:

"Asthma, likely occupational. His asthma seems to be triggered by exposures in his work place.

Allergic rhinitis, also likely due to work place exposure."

Dr. Hardy recommended treatment with various medications and a change in the claimant's employment position to avoid any work related chemical exposures. He referred the claimant to the asthma clinic at Mercy Health and directed him to return for follow up in two months.

The claimant's next visit with Dr. Hardy was on May 29, 2002. At that time Dr. Hardy observed that the claimant had been off work since his initial visit. He recorded a history that the claimant's wheezing had improved, but that his shortness of breath and chronic cough had continued. However, on that date, Dr. Hardy's physical examination was

unremarkable and no abnormal lung sounds were detected. The claimant was directed to return for follow up in two months.

The claimant returned to Dr. Hardy on July 5, 2002. At that time, he reported that he had experienced no improvement in any of his symptoms and that he continued to have chronic coughing, wheezing, and shortness of breath. He also reported that he had now developed new complaints, in the form of cramping in his hands and feet, together with nausea. Dr. Hardy's physical examination, on that date, remained essentially negative, and, again, no abnormal lung sounds were noted.

On September 30, 2002, Dr. Hardy authorized a narrative report to claimant's attorney, wherein he stated:

"It is my feeling that this patient most likely has occupational asthma, which seems to be triggered by exposures in his work place. It is also possible he might have gastroesophageal reflux contributing to his symptoms."

He noted that the claimant was last seen on July 5, 2002, and was to return for follow in October or November.

The claimant appears to have last seen Dr. Hardy on October 7, 2002. At that time, Dr. Hardy states that the claimant reported no improvement in any of his symptoms, even though he had not worked since April of 2002. Again, Dr. Hardy's physical examination of claimant's lungs was essentially normal. Dr. Hardy restated his diagnosis of asthma, which he opined to be "probably" occupationally induced. However, he recommended a repeat of the claimant's spirometry, and that a possible methacholine challenge test to confirm his diagnosis.

Although the claimant submitted various off work slips, dated November 1, 2002, November 21, 2002, and January 6, 2003, there were no medical reports or records from Dr. Hardy to show that the claimant was actually seen on any of these dates. In fact, the records show that the claimant was not seen at the scheduled visit on December 4, 2002.

The material safety data sheets on four of the chemical compounds used by the respondent in its manufacturing process (polyethylene homopolymer, polyethylene hexene copolymer, polyethylene butene copolymer, and a modified polyolefin), have been introduced by the claimant. The warning labels for the first three of these chemical compounds note that the fumes produced by these compounds, when heated, may cause nausea and irritation of the respiratory tract. The warning sheet for the final chemical compound notes:

“Fumes from hot processing may be toxic, irritating, and/or corrosive. Contact with molten material may cause thermal burns. Exposure to dust may cause eye irritation. Repeated inhalation of fumes can cause adverse effects to kidney, liver, and cardiovascular system.”

The claimant has also tendered a document which appears to be a document compiled by St. Mary’s Asthma Center, which sets out various factors concerning “occupational asthma”. These include such things as the nature and cause of occupational asthma, the symptoms it exhibits, the course it commonly takes, and the methods of treatment. It further sets out the methods used to diagnose the presence of such a condition. This document was admitted without objection, and has become part of the medical record.

I find that the greater weight of the credible evidence shows that the claimant was exposed to chemical fumes in his work environment that were lung irritants and could logically cause respiratory complaints, including “occupational asthma.” The greater weight of the evidence, specifically the medical evidence, objectively establishes that by April of 2002, the claimant was suffering asthma.

In reaching this latter decision, I recognize that Dr. Farst, in her office notation of February 20, 2002, recites that the claimant had been tested for this condition, and that the tests were negative. However, as previously noted both the results and even the performance of such testing is not shown by the medical evidence presented. Such test

results would also be in conflict with physical examinations and other testing performed both prior and subsequent to Dr. Farst's February 20, 2002 office notation.

However, this begs the real issue in this case. The question is not whether the claimant's employment related exposure to chemical fumes could have played a causal role in development of his asthma. Rather, the question is whether the claimant's employments related exposure to these chemical fumes or lung irritants was the probable or likely cause of the development of his current asthmatic difficulties. As recognized by Dr. Sexton, a multitude of lung irritants can cause the development of asthma and precipitate asthmatic attacks. The only evidence to directly connect the claimant's employment related exposure to lung irritants with the development and progression of his asthma, is the claimant's own testimony that there was a relationship between his employment related exposure to lung irritants and the development and progression of his asthmatic symptoms. Unfortunately, testing to conclusively establish or refute this causal relationship (i.e. pulmonary function tests performed before and after employment related exposures and challenge tests using the various work related chemicals), were not performed (see Claimant's Exhibit No. 1, page 24).

Case law unquestionably provides that the testimony of a party is never considered uncontradicted. However, this does not mean that it can be arbitrarily disregarded. If the testimony of a party is credible, it may be sufficient, alone, to prove any fact that it is legally competent to address. There is no doubt that the claimant's testimony would be legally competent to prove the existence of a close temporal relationship between the onset or worsening of his asthmatic symptoms and his exposure to the various chemical fumes in his work place.

After consideration of all the evidence presented, I find the claimant's testimony, in this regard, to be credible. His testimony coincides with the histories he related to his various treating physicians. It is also important to note that on two of the three occasions

when the claimant sought medical treatment specifically for respiratory difficulties (in May of 1995 and April of 2002), the record shows that he was working in an employment position that placed him in closer proximity to the actual source of the chemical fumes, and when these difficulties appeared to peak in early 2002, he was unquestionably working in more close proximity to the source of these fumes.

The medical evidence clearly shows that the claimant's difficulties first developed or substantially increased whenever he was exposed to these chemicals at work, then in the expert medical opinion of Dr. Hardy, the claimant's most recent episode of asthmatic difficulties were "probably" or "most likely" caused by his employment related exposure to these chemical fumes. As this temporal relationship has been proven by the greater weight of the credible evidence, the expert medical opinion of Dr. Hardy is not based upon any mistake of material fact or of facts not proven. Dr. Hardy is a highly competent pulmonologist with particular expertise in the area of medicine associated with the development and progression of asthma and the triggering of asthmatic attacks. His opinion is clearly entitled to substantial weight and credit.

In summary, the claimant has proven by the greater weight of the credible evidence that his employment related exposure to chemical fumes, which are known lung irritants, was the "probable" or "most likely" cause of his most recent asthmatic difficulties. This is sufficient to prove the necessary causal relationship as required by Ark. Code Ann. §11-9-601(e)(1)(B). This also satisfies the first definitional requirement of Ark. Code Ann. §11-9-601(e)(1)(A), that this disease arose out of and occurred in the course of his employment with the respondent, and the requirement of Ark. Code Ann. §11-9-601(g)(a)(A), that his occupational disease is due to the nature of the employment in which the hazards of the disease actually exists and are characteristic thereof and peculiar to the trade, occupational, process, or employment and actually occurred "in the employment".

However, the claimant must still prove the second definitional requirement of Ark. Code Ann. §11-9-601(e)(1)(A), that his “occupational disease” resulted in “disability”. The term “disability” is defined by Ark. Code Ann. §11-9-102(8) as the “incapacity” because of the compensable injury or disease to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury or disease. Neither of these subdivisions make any distinction between “temporary” or “permanent” disability.

Both the claimant’s testimony and the medical evidence show that his occupational asthma has (at least temporarily) prevented him from continuing to perform the position he held for the last several months of his employment with the respondent, and may have (at least temporarily) prevented him from continuing in his thirty year period of employment for this respondent in any capacity. Based upon the claimant’s age, education, and prior work experience, it is highly unlikely that he could obtain employment in the open job market at wages equal to or greater than those he was receiving from the respondent in May of 2002.

I find this evidence to be sufficient to prove that in May of 2002, the claimant experienced, at least temporarily, the incapacity because of his occupational disease to earn, in the same or any other employment, the wages he was receiving from the respondent at that time. Thus, the claimant has proven he has (at least temporarily) experienced some degree of “disability”. This satisfies the second and final definitional requirement of Ark. Code Ann. §11-9-601(e)(1)(A). This also satisfies the requirement that he must experience “”disablement” within one year after his last employment related exposure to the disease, Ark. Code Ann. §11-9-601(g)(1)(B).

Finally, occupational asthma in no way would be considered a contagious or infectious disease, within the meaning of Ark. Code Ann. §11-9-601(e)(2). Nor, would occupational asthma be considered an “ordinary disease of life to which the general public

is exposed” within the meaning of Ark. Code Ann. §11-9-601(g)(3). Thus, these two subdivisions of Ark. Code Ann. §11-9-601 would not be applicable to the present claim.

Therefore, I find that the claimant has proven all of the requirements necessary to establish that he has experienced a compensable “occupational disease”, in the form of occupational asthma, while employed by this respondent. Thus, it becomes necessary to determine the nature and extent of the benefits to which he is currently entitled for this compensable occupational disease.

II. LIABILITY AS BETWEEN CARRIERS

As I have found that the present claim represents a claim made under the occupational disease section of the Act, the liability of the two carriers in this case are controlled by the provision of the Act dealing with occupational disease. Ark. Code Ann. §11-9-601(f)(1) provides:

“Where compensation is payable for an occupational disease, the employer, and whose employment the employee was last injuriously exposed to the hazards of the disease and the carrier, if any, on the risk when the employee was last injuriously exposed under the employer shall be liable.”

Under the facts in this case, the claimant’s last injurious exposure to the work related chemical fumes occurred in either April or May of 2002. Based upon the stipulations, the Insurance Company-State of Pennsylvania provided workers’ compensation coverage for the respondent employer at that time. Thus, this carrier is solely liable for any benefits payable as a result of the claimant’s compensable occupational disease. Lumbermen’s Casualty Company would have no liability for any benefits attributable to the claimant’s compensable occupational disease and should be dismissed from this claim, Employer’s Liability Assurance Corporation v. Employers’ Mutual Liability Insurance Company, 232 Ark. 113, 334 S.W. 2nd 701(1960).

III. BENEFITS

Curiously, Ark. Code Ann. §11-9-601 et seq. does not expressly address liability for the expense of medical services necessitated by a compensable occupational disease. However, Ark. Code Ann. §11-9-603(a)(1) does provide that “except as otherwise provided in this subchapter”, the determination of claims shall be the same as in cases of accidental injury. Thus, historically, a claimant’s entitlement to the payment of expense incurred for medical services necessitated by a compensable occupational disease has been held to be controlled by the provisions and requirements of Ark. Code Ann. §11-9-508 which (even more curiously) is expressly directed only to compensable injuries.

Thus, in order to be entitled to the payment of any of the particular expenses he has incurred for medical services, the claimant must prove by the greater weight of the credible evidence that these medical services were “reasonably necessary” for this compensable occupational disease. In order to constitute “reasonably necessary medical services” these disputed medical services must be necessitated by or connected with the claimant’s compensable occupational disease and must have had a reasonable expectation of accomplishing the purpose or goal for which they were intended, at the time they were rendered.

After consideration of all the evidence presented, it is my opinion that the medical services rendered to the claimant by and at the direction of Dr. Hardy, on and after April 22, 2002, for his occupational asthma satisfies both of these two requirements. Clearly, these services were necessitated by and connected with the claimant’s compensable occupational disease. These services were of a type and nature common recognized by the general medical community as being appropriate to either accurately evaluate the nature and extent of the disease, to reduce or stabilize the actual physical damage being caused by the disease, or to alleviate the various symptoms produced by the disease. These medical services are not limited to those rendered by Dr. Hardy, himself, but also

extend to services rendered at his direction by St. Mary's Asthma Center and the Speech and Hearing Clinic of the University of Arkansas.

The record indicates that some, if not all, of these expense have been paid under a policy of group insurance maintained by the claimant through the respondent. Pursuant to Ark. Code Ann. §11-9-411, the respondent would be entitled to credit for any payments made by this group provider, but would remain ultimately liable for these expenses. The respondent is also obligated to reserve an amount necessary to satisfy the lien conferred on the group carrier by the provisions of the foregoing subsection for a period of five years.

The remaining benefits in dispute take the form of either temporary total disability or permanent total disability. Although the claimant contended at the time of the prehearing conference, that he was entitled to either temporary total or permanent total disability benefits beginning on April 22, 2002, his testimony reveals that he did not actually cease work for the respondent until May 6, 2002. Thus, he would not be entitled to either temporary total or permanent total disability benefits accruing prior to May 7, 2002.

In order to be entitled to either temporary total disability benefits or permanent total disability benefit, the claimant must prove by the greater weight of the credible evidence that his compensable occupational disease has rendered him totally disabled from performing any form of regular gainful employment, for which he would otherwise be qualified. After consideration of the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his compensable occupational disease has rendered him totally disabled, either temporarily or permanently.

Essentially, the only substantial evidence offered by the claimant to prove a total incapacity to work or earn wages, in any type of employment, is his own testimony. He testified that in his opinion he was not able to work, in any capacity, and had not been able to work, in any capacity, since he ceased employment with the respondent on May 6, 2002. When asked the basis for this opinion, he gave a rather cryptic answer of

“psychologic, physical, and emotional” (T.39). He then indicated that his chronic cough was one of the factors preventing him from working. He stated that his cough increased if he raised his blood pressure or heart rate by engaging in any physical activities, such as walking. He also indicated that his shortness of breath caused him to become easily exhausted with any physical activity. He stated that his chronic coughing and shortness of breath made him self conscious and caused him to become embarrassed, when it was observed by other people. He believed that people took these problems as a sign of weakness.

I have no doubt that the claimant has convinced himself that he is now totally disabled from performing any form of regular gainful employment. However, I simply do not believe that this opinion is supported by the other evidence presented. Although the claimant testified that his symptoms and difficulties had not substantially changed, since he ceased employment with this respondent, he was apparently capable of performing his assigned job tasks through May 6, 2002, even with his various symptoms and limitations. Obviously, the claimant’s activities of daily life involve some physical activity. I would note that because of the claimant’s belief that he cannot work, he has made absolutely no attempt to seek or perform any type of employment. Thus, he has effectively made it impossible to test his conclusion.

Most importantly, the medical evidence presented does not support either the claimant’s opinion that he is unable to work at any type of employment. In fact, it does not even support the presence of physical restrictions and limitations of the magnitude he describes. It was obviously the opinion of Dr. Hardy, when he initially evaluated the claimant on April 22, 2002, that the claimant was capable of performing regular gainful employment. The only restriction he imposed was the claimant not be placed in an employment environment that would further aggravate his compensable occupational asthma or precipitate an asthmatic attack. He indicates that the claimant would be capable

of regular gainful employment, so long as it did not expose him to further irritation of his lungs. There is no evidence that the claimant's condition has actually worsened after his initial evaluation.

Although the claimant has testified that his physical condition has not improved since he terminated his employment, the medical evidence shows otherwise. Subsequent physical examination performed on the claimant revealed that the claimant's wheezing and abnormal lung sounds were no longer present. These physical examinations also failed to show any continued redness or irritation involving the lining of the claimant's throat. The medical evidence does not indicate any objective findings to support any organic etiology sufficient to explain a chronic cough of the magnitude described by the claimant. Spirometry testing performed on the claimant by Dr. Hardy on April 22, 2002, while revealing findings indicative of moderate obstructive lung disease, did not show deficiencies sufficient to explain respiratory symptoms of the magnitude described by the claimant.

In reaching this decision, I am aware that the claimant apparently received several "off work slips" purportedly authored by Dr. Hardy in November of 2002 and January of 2003. However, there is no evidence that Dr. Hardy actually saw or evaluated the claimant at the time these slips were given. In fact, there is no evidence to explain on what basis or for what reason Dr. Hardy provided these slips, except possibly that the claimant requested them. Absent evidence of the basis or reasoning as to why Dr. Hardy had change his previous opinion and now believed that the claimant was incapable of performing any type of work, these slips would not represent expert medical opinion sufficient to support a finding that the claimant had now been rendered physically incapable of performing any type of regular gainful employment, as a result of his compensable occupational disease.

Solely in regard to the issue of the claimant's entitlement to permanent total disability benefits, I would note that there is no evidence to support a determination of any specific degree of permanent physical impairment attributable to the claimant's compensable occupational disease (particularly one that would be supported by "objective findings"). Absent the ability to assess a finding of a specific percentage of permanent physical impairment no compensation can be awarded for permanent "disability", including permanent total disability, Wal Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W. 3rd 727(2000).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the claimant, Glad Manufacturing Company, and the Insurance Company-State of Pennsylvania.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to the weekly compensation benefits of \$386.00 for total disability and \$290.00 for permanent partial disability.
4. During his employment with this respondent, the claimant developed a compensable occupational disease, in the form of occupational asthma. Specifically, the greater weight of the credible evidence proves the existence of a causal relationship between the claimant's exposure to certain air borne lung irritants in his employment environment and his progressive development of asthma. As the result of this employment related exposure to lung irritants, the claimant's asthmatic condition ultimately resulted in some degree of "disability" in May of 2002. The development of this disability (at least temporarily) occurred within one year of the claimant's last

employment related injurious exposure to these lung irritants. The claimant's compensable occupational asthma does not constitute a contagious or infectious disease or an ordinary disease of life to which the general public is exposed.

5. At the time of the claimant's last employment related injurious exposure, workers' compensation coverage was being provided to the respondent employer by the Insurance Company-State of Pennsylvania.
6. The medical services rendered the claimant by and at the direction of Dr. Kyle Hardy for the claimant's occupational asthma constitute reasonably necessary medical services for the claimant's compensable occupational disease. Pursuant to the provisions of Ark. Code Ann. §11-9-508, the respondents Glad Manufacturing and the Insurance Company-State of Pennsylvania are ultimately liable for the expense of these medical services.
7. Some or all of the foregoing medical services have been paid under a group policy of insurance. Pursuant to Ark. Code Ann. §11-9-411, the respondents, Glad Manufacturing Company and the Insurance Company-State of Pennsylvania, are entitled to credit for any payments made by this group carrier. However, these respondents are obligated to reserve an amount sufficient to satisfy the lien afforded the group carrier by the provisions of Ark. Code Ann. §11-9-411 for a period not to exceed five years. The respondents are liable to the claimant for any co-pay or out-of-pocket expenses which he may have incurred for any of these expenses.
8. The claimant has failed to prove by the greater weight of the credible evidence that his compensable occupational disease has rendered him totally disabled, either temporarily or permanently. Thus, he would not be entitled to either temporary total disability benefits or permanent total

disability benefits.

9. All respondents have denied that the claimant experienced a compensable injury or occupational disease and have controverted his entitlement to any benefits under the Arkansas Workers' Compensation Act.
10. As no controverted compensation payable to the claimant has been awarded, no fee can be awarded to the claimant's attorney, at this time.

ORDER

The respondents shall be liable for the expenses incurred by the claimant for reasonably necessary medical services provided him for his compensable occupational disease subject by and at the direction of Dr. Kyle Hardy, subject to the medical fee schedule established by this Commission. Pursuant to Ark. Code Ann. §11-9-411, the respondents are entitled to "credit" for any of these expenses paid under a policy of group insurance maintained by the claimant through the respondent. However, pursuant to this subsection, the respondents shall reserve an amount equal to this credit to satisfy any lien conferred by this subsection on the group carrier for a period not to exceed five years. If, upon the expiration of this five year period, no release or final Court Order of Distribution has been obtained, the respondents shall tender this amount to the Death and Permanent Total Disability trust Fund.

For the reasons heretofore set forth in this Opinion, the claimant's request for temporary total or permanent total disability benefits must be and hereby is denied.

For the reasons heretofore set forth in this Opinion, any claims against the respondent, Lumbermen's Casualty Company, must be and hereby are denied and dismissed.

For the reasons heretofore set forth in this Opinion, no fee can be awarded to the claimant's attorney, at this time.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge