

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109913 & F109912

HERMAN E. BURGESS,  
EMPLOYEE

CLAIMANT

UNIMIN CORPORATION,  
EMPLOYER

RESPONDENT

AIG INSURANCE, CARRIER  
(NATIONAL UNION)

RESPONDENT NO. 1

ZURICH AMERICAN INS. CO., CARRIER

RESPONDENT NO. 2

**OPINION FILED JULY 2, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 was represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE LEE MULDROW, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on May 5, 2004 in Mountain Home, Arkansas. An amended prehearing order was entered in this case on February 27, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties

either in the prehearing conference or during the course of the hearing and are hereby accepted:

1. Prior to July 18, 1988, claimant was an employee of Silica Products. Unimin purchased the assets of Silica Products on July 18, 1988, and the claimant became an employee of Unimin on that date.

2. The respondent National Union went on the risk on August 1, 1988.

3. The respondent National Union went off the risk on July 31, 1994.

4. Zurich American Insurance came on the risk on August 1, 1994, and remained on the risk until claimant terminated his employment on September 30, 1996.

5. The claimant last worked at Unimin on September 30, 1996.

6. When the claimant last worked for Unimin in 1996, his salary was approximately \$27,000 per year. The claimant's wages would entitle him to the maximum compensation rates in effect in 1996.

7. No benefits have been paid on the silicosis claim. This matter is fully controverted by all respondents.

8. The parties stipulate that the claimant has in fact developed silicosis.

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

Claimant:

1. The claimant has paid out of pocket to White River Medical Center, Jim Lytle, M.D.(retired), Dennis Davidson, M.D. The claimant's Medicare and Medipak insurance paid the remaining bills.

2. Attorney's fees.

3. The claimant's breathing difficulties were worsening, and we are requesting reasonable and necessary medical treatment for his condition. He has been placed on oxygen by Louis Campos, MD after his lung collapsed. The issue is compensability only. The claimant reserves any specific issues regarding medical or indemnity benefits.

Respondent No. 1:

1. Compensability.

2. Determination of what carrier has liability if claimant is determined to have sustained a compensable injury or an occupational disease arising out of and in the course of his employment with Unimin.

Respondent No. 2:

1. Zurich American Insurance Company ("respondent no. 2") came on the risk on August 1, 1994, and claimant retired from Unimin on September 30, 1996.

2. Issues include the question whether the claimant sustained an accidental injury arising out of and in the course of his employment at any time respondent no. 2 was on the risk.

3. Whether claimant can present a compensable silicosis claim for a condition which developed while respondent no. 2 was on the risk.

4. Whether claimant was "injuriously exposed" at any time respondent no. 2 was on the risk.

5. Whether claimant can satisfy the compensability requirements outlined in Ark. Code Ann. § 11-9-601-603.

6. Whether claimant has silicosis.

7. Whether claimant's alleged job injury/condition is supported by objective medical evidence.

8. Whether claimant can establish compensability by clear and convincing evidence.

9. Whether claimant's injury/condition is barred by the Statute of Limitations.

10. Whether claimant's current difficulties

(silicosis) are causally related to "medical only" claims occurring in 1994 or 1996.

The record consists of the transcript of the May 5, 2004 hearing and the exhibits contained therein.

#### **DISCUSSION**

**1. Burden of Proof, Compensability, Last Injurious Exposure, Objective Medical Findings, Ark. Code Ann. § 11-9-114, Ark. Code Ann. § 11-9-601 et seq., notice, 1994/1996 Medical Only Claims.**

As I advised the attorneys at the hearing, although the Arkansas courts have apparently not addressed the issue yet, the Full Commission has previously interpreted that the amendment of Act 1281 of 2001, which changed the burden of proof in Arkansas Code Annotated § 11-9-601(e)(1)(B) from clear and convincing evidence to a preponderance of the evidence, apply retroactively to existing claims for occupational diseases. See John Sikes v. Georgia-Pacific Corporation, Full Workers' Compensation Commission, Opinion filed July 7, 2003 (F000657).

In the present case, the claimant's proof has persuaded me by a preponderance of the credible evidence that his silicosis arose out of and in the course of his employment with Unimin and Silica Products, that Unimin Corporation was his employer and Zurich American Insurance was Unimin's workers' compensation insurance carrier when the claimant

was last injuriously exposed in his employment on September 30, 1996, and that the silicosis condition is established by objective medical findings.

In concluding that a preponderance of the evidence establishes that the claimant's silicosis arose out of and in the course of his employment with Unimin and Silica Products, I find highly persuasive the claimant's testimony that he worked at the site for 43 years, that he wore a respirator in the dusty areas, but that he would also three or four times per day breathe dust without a respirator, and that breathing dust would cause him to cough. I also find credible the claimant's testimony that he could take off his respirator mask and see caked silica on the inside of the mask (indicating to me that the filter did not remove all of the dust from the air that the claimant breathed). I likewise accord great weight to Dr. Campos' March 23, 2004 opinion that the claimant's lung condition rose out of 43 years of exposure as an employee for Silica Products and then Unimin Incorporated, as well as Dr. Campos' 2004 opinion in a "Physician's and Surgeon's Report" that "work exposure has caused silicosis". I further note that the claimant's lung abnormalities are documented by various objective diagnostic tests in the record, including a 1988 chest x-ray indicative of granulomatous calcifications,

linear fibrotic densities and apical pleural thickening, a 1995 chest CT scan indicative of old fibrotic changes, and a 1999 chest x-ray indicative of chronic changes.

With regard to when the claimant was last injuriously exposed at work, I find credible the claimant's testimony that in the last couple of years he worked, he averaged wearing a respirator two to two and one-half hours per day. In light of the claimant's testimony indicating that he wore a respirator up to two to two and one-half hours per day at the time he stopped working, in light of the claimant's testimony that he observed caked dust inside his respirator, and in light of the exposure that he experienced while not wearing a respirator, I find that the claimant's last injurious exposure in his employment occurred on his last day of work, so that pursuant to Ark. Code Ann. § 11-9-601(f)(1), Unimin Corporation and Zurich American Insurance would be the appropriate employer and carrier liable for compensation for the claimant's occupational disease, if any employer and carrier are liable for compensation under the circumstances presented in the present case.

To the extent that both respondents argued in their prehearing contentions that the provisions of Ark. Code Ann. § 11-9-114 applied to this claim, I note that the parties have stipulated that the claimant sustained silicosis, and I

note that the claimant sustained gradual onset silicosis in the nature of an occupational disease, and not as a result of a cardiovascular, coronary, pulmonary, respiratory, or cerebral vascular accident or myocardial infarction, for which the provisions of Ark. Code Ann. § 11-9-114 would apply. Absent any citation to legal authority, and absent any intuitively obvious argument to the contrary, I find that the Arkansas General Assembly in Act 796 of 1993 did not intend to supercede or add to the requirements of Ark. Code Ann. § 11-9-601 et seq. for determining the compensability of a gradual onset silicosis occupational disease by enacting Ark. Code Ann. § 11-9-114. Therefore, I find that Ark. Code Ann. § 11-9-114 has no application to the circumstances presented in the present case.

With regard to the respondents' reference to Arkansas Code Ann. § 11-9-602(b) in respondent no. 1's prehearing contentions, I find that a preponderance of the evidence, i.e., Dr. Campos' March 23, 2004 written opinion, establishes that the claimant's condition became disabling in the fall of 2000. The claimant's testimony regarding his exposure persuades me that he was injuriously exposed to silica dust during the entire period of his employment, which ended on September 30, 1996. I therefore find that the claimant has established by a preponderance of the

evidence that he was exposed to the inhalation of silica dust over a period of not less than five years during the ten years immediately proceeding his date of disablement in 2000. Therefore the presumption against compensability contained in Ark. Code Ann. § 11-9-602(b) does not arise based on the facts presented in the present case.

To the extent that the respondents assert a defense for the failure to give timely written notice under Ark. Code Ann. § 11-9-603(a)(2)(A), I find credible the claimant's testimony that he was never made aware that his condition was silicosis prior to a discussion with Dr. Lane which appears to have occurred on or about April 24, 2001. The authority of the Commission to excuse the failure to give notice applies both to Ark. Code Ann. § 11-9-701 and 11-9-603. Quality Serv. Railcar v. Williams, 36 Ark. App. 29, 820 S.W.2d 278(1991). In the present case, I do not glean from the documentary evidence any reports of any medical treatment the claimant received after speaking with Dr. Lane on approximately April 24, 2001 until after his attorney filed a Form AR-C providing notice to the Commission and the employer on or about August 30, 2001. I find that these are appropriate circumstances for excusing notice until August 30, 2001.

Finally, the parties presented no credible evidence regarding the nature and extent of any 1994 or 1996 "medical only claims". There is currently no dispute that the claimant's current condition is silicosis, and there is no dispute that the respondents have provided no benefits for that silicosis. Under these circumstances, the record fails to establish any causal relationship between the claimant's silicosis and any 1994 or 1996 medical only claims. Likewise to the extent raised as a prehearing issue by respondent no. 2, the record does not indicate that the claimant ever sustained an "accidental injury" to his lung involving silica exposure while respondent no. 2 was on the risk. Instead, the condition at issue was an occupational disease - silicosis.

**2. Statute of Limitations and Constitutional Challenge to Arkansas Code Ann. § 11-9-601(g).**

Arkansas Code Ann. § 11-9-702(a)(2)(A) provides in relevant part that a claim for compensation for disability on account of silicosis must be filed with the Commission within one year after the date of disablement, and the disablement must occur "within three (3) years from the date of the last injurious exposure to the hazard of silicosis".... In the present case, there has never been any dispute that the claimant's last work-related injurious

exposure to silica dust could not conceivably have occurred after his date of retirement on September 30, 1996, and that the present claim was not filed until almost 5 years thereafter, on or after August 30, 2001. Nevertheless, even though the claimant's last injurious exposure as an employee occurred on September 30, 1996, the claimant's attorney appeared to argue at the hearing that the claimant's last injurious exposure, within the meaning of Section 702(a)(2)(A), did not in fact occur until 2000, because until that year claimant lived within one-half mile of the work site and breathed silica dust blowing from the site and blowing off of trucks traveling down the road in front of claimant's house. One of the respondents' attorneys indicated at the close of the hearing that the claimant's attorney's argument in this regard must fail because all authority indicates that Section 702(a)(2)(A) has been interpreted to refer only to injurious exposures occurring at work. For my part, I was unable to discover in my legal research any cases, published or unpublished, which have interpreted the language "last injurious exposure" in Section 702(a)(2)(A), so as to explain whether or not that term refers only to work related exposures, or whether, as the claimant seems to argue, non-work related exposures after retirement might also count toward "the last injurious

exposure" so as to toll the running of the three year limitations period.

In considering the alternative statutory interpretations of the term "last injurious exposure" in Section 702(a)(2)(A) offered by the claimant and by the respondents, I am constrained to point out that Ark. Code Ann. § 11-9-601(g)(1)(B) uses the same term ("the last injurious exposure"), and Section 601(g)(1)(B) makes clear that the law concerns itself with disablement following the last injurious exposure "in the employment". Interpreting Section 702(a)(2)(A) in light of the language in Section 601(g)(1)(B), I interpret that Section 702(a)(2)(A) refers only to injurious exposure that occurs in the employment, and any exposure the claimant experienced to silica dust after his retirement will not act to toll the running of the three year limitations period contained in Section 702(a)(2)(A). Because the claimant's disablement in the present case occurred more than three years after his retirement and last injurious exposure in the employment of Unimin Corporation, I find that the present claim was not timely filed within the provisions of Ark. Code Ann. § 11-9-702(a)(2)(A).

In reaching this conclusion, I note that the claimant in his prehearing contentions indicated that he is

challenging the constitutionality of Ark. Code Ann. § 11-9-601(g). However, I see no indication anywhere in the record or in the Commission file indicating that the claimant ever notified the Arkansas Attorney General's office regarding his proposed constitutional challenge. I also note that the claimant at no point ever clarified the nature of his constitutional challenge, nor did he present any evidence at the hearing which was stated to be in support of any constitutional challenge. Under these circumstances, I find that the claimant has abandoned any constitutional challenge to Ark. Code Ann. § 11-9-601(g). I further note that the Arkansas Court of Appeals appears to have already addressed the constitutionality of the provisions in question in Hamilton v. Jeffrey Stone Co., 25 Ark. App. 66, 752 S.W.2d 288, review denied, 297 Ark. 24, 759 S.W.2d 792 (1998).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Prior to July 18, 1988, claimant was an employee of Silica Products. Unimin purchased the assets of Silica Products on July 18, 1988, and the claimant became an employee of Unimin on that date.

2. The respondent National Union went on the risk on August 1, 1988.

3. The respondent National Union went off the risk on July 31, 1994.

4. Zurich American Insurance came on the risk on August 1, 1994, and remained on the risk until claimant terminated his employment on September 30, 1996.

5. The claimant last worked at Unimin on September 30, 1996.

6. When the claimant last worked for Unimin in 1996, his salary was approximately \$27,000 per year. The claimant's wages would entitle him to the maximum compensation rates in effect in 1996.

7. No benefits have been paid on the silicosis claim. This matter is fully controverted by all respondents.

8. The claimant has proven by a preponderance of the evidence that he developed silicosis arising out of his employment with Silica Products and Unimin Corporation. The claimant's silicosis condition is also established by objective medical findings.

9. The respondent employer Unimin Corporation, and the respondent carrier Zurich-American Insurance Company, were the employer and carrier at the time the claimant experienced his last injurious exposure to the hazards of silicosis in his employment on September 30, 1996.

10. The claimant's failure to give written notice prior to August 30, 2001 is excused under the circumstances presented in this case.

11. Because the claimant's disablement occurred more than 3 years from the date of his last injurious exposure to the hazards of silicosis from his employment, I find that the present claim is barred by the applicable Statute of Limitations in Ark. Code Ann. § 11-9-702(a)(2)(A).

12. I find that the claimant has abandoned his constitutional challenge to Ark. Code Ann. § 11-9-601(g), and I point out that a prior constitutional challenge was considered and rejected by the Arkansas Court of Appeals in Hamilton v. Jeffrey Stone Co., 25 Ark. App. 66, 752 S.W.2d 288, review denied, 297 Ark. 24, 759 S.W.2d 792 (1998).

**ORDER**

For the reasons discussed herein, I find that this claim must be, and hereby is, denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge