

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F308904

**SUSAN J. CALLEY,
EMPLOYEE**

CLAIMANT

**BENTON PUBLIC SCHOOL SYSTEM,
SELF-INSURED EMPLOYER**

RESPONDENT

**ARKANSAS SCHOOL BOARDS ASSOCIATION
WORKERS' COMPENSATION TRUST;
RISK MANAGEMENT RESOURCES,
BENEFITS ADMINISTRATORS**

RESPONDENTS

OPINION FILED SEPTEMBER 3, 2004

Hearing conducted June 30, 2004, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over compensability of the claimant's reactive airways disease compatible asthma.

Specifically, the claimant contended that as a result of her employment she sustained a compensable occupational disease, reactive airway disease compatible asthma, and should receive benefits, pursuant to Ark. Code Ann. §11-9-601 et seq., specifically including reasonably necessary medical and related expenses. Other possible issues were reserved.

The respondents contended that the claimant's condition is neither a compensable injury nor a compensable occupational disease, within the meaning of Ark. Code Ann. §11-9-601 et seq.; that her condition is an ordinary disease to which the general public is exposed and, thus, is not compensable; that her condition is not characteristic of this employment; that there is no causal

connection between the employment and her condition; and that the claimant has not been disabled by her condition.

At the hearing, the respondents added the contention that the claim was barred by the statute of limitations because the claimant had been aware of her condition in 1997 and had not timely filed her claim and, alternatively, that benefits otherwise possibly accruing before August 27, 2003, when notice was given by Form C, are barred for lack of notice. The claimant contended in response, first, that the respondents had waived the defense of the statute of limitations because it was not brought up during the telephone prehearing conference procedure and, second, that the claim was not time barred because it was filed within two years from the last injurious exposure, pursuant to Ark. Code Ann. §11-9-702.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including June 25, 2003, and the claimant's average wage at that time was \$634.10.
3. The preponderance of the evidence fails to show that the claimant suffered a compensable occupational disease within the meaning of Ark. Code Ann. §11-9-601, as a result of this employment.

DISCUSSION

The claimant, 54 years of age at the time of the hearing, testified that she was a non-smoker and a high school graduate who had completed enough hours at Henderson State University for a secretarial sciences degree, except for approximately two hours.

She testified that she had worked for the Benton Public School System as a receptionist and secretary to the superintendent in the administration building for 17½ years, beginning in 1985 and concluding May 14, 2002, but that beginning in the mid-1990's, she began to have symptoms such as congestion, coughing a lot, bronchitis, and pneumonia and that she noticed dust, finer than sand, on her copy machine and elsewhere in the office during this time. She stated that the building was renovated twice while she worked there and that her problems began when they remodeled her office. She also stated that doctors at first advised her that she had adult onset stress related asthma and that she was not advised that her condition was work related until June, 2003, when Dr. Christopher John said that it was related to cockroaches at work.

In his deposition, Dr. John, a physician with a specialty and practice in pulmonology, testified that when he first saw the claimant in June, 2003, she told him that there was a big problem with cockroach infestation in the attics at her employment and, further, that he came to understand that there was a significant problem with cockroach infestation at her work and, apparently, the duct system was full of cockroach feces and remains. Dep. at 5. In July, 2003, the claimant's skin test showed a mildly positive reaction to cockroach antigen. When asked if such a mild reaction was sufficient to have caused the claimant's problems, Dr. John testified that it doesn't tell us that was the case, but that he had drawn an "inference" that it "may be part" of the problem. Dep. at 7 & 8.

Later, after an additional test had confirmed the claimant's diagnosis of asthma, Dr. John indicated in an August 6, 2003, report that the claimant had developed asthma as a result of chronic exposure to cockroach body parts in the form of dust in her work environment. He testified that this was based on the claimant's description of fine dust particles that would come out of the air conditioning vents and end up on her paperwork and he assumed she was getting exposure then. Dep. at 15. He also stated that he was advised by the claimant and her husband that there was six inches of cockroach feces and body parts in the attic. Dep. at 11.

On the other hand, he also testified that, if an inspection of the attic, duct work, and ceiling tiles in the work area of the claimant failed to demonstrate any cockroach feces or dead bodies or powdered cockroaches, that this would cast his opinion into some doubt. Dep. at 23. He also stated that exposure to cockroach feces, body parts, and dust is something that the general public for the most part may well be exposed to. He explained that it is not living cockroaches that are the problem, but the ones that get into the walls and die because they break down and, when the furnace kicks in or the air conditioning comes on, some of that dust gets sucked up into the system and gets sprayed around the house, so that it could occur in one's home. Dep. at 24. He further testified that recently dead cockroaches would not be a problem and that it would "create doubt" as to his opinion if an exterminator were to testify that there was no buildup of dead cockroaches anywhere. Dep. at 25. He further stated that you can precipitate an acute exacerbation of your asthma by stress.

Thereafter, at the hearing, an exterminator did give testimony much like that hypothesized in the deposition questions posed to Dr. John. The exterminator testified that while servicing the administration building during 2002 there was not any indication of a roach problem but, on the other hand, it's "the norm" for every building, including every person's home, that a spider or roach

can be located around the outside of the building. He stated that what he found at the administration building was “just normal circumstances”. Tr. at 80. He stated that he checked the administration building, including the duct work, and there was no evidence of roach fecal matter. He also stated that he checked in areas where there were a lot of people, such as the reception area or break area and checked behind things such as ice boxes and that he found no evidence of roach droppings or egg sacs. He also stated that he saw no indication of roach droppings around the ceiling tiles and that such droppings would be friable only if someone got up there and disturbed them. Tr. at 81. He further testified that if there was a black substance falling from the ceiling it would not be roach droppings, because in order for that to happen, someone would have to get up with something like a putty knife and physically flick it away from where it was stuck. He described roach droppings as having a sticky substance that caused them to just stick there. He also said that there was no indication of piles of roach droppings 6 to 9 inches high and that he saw no piles of roach feces at all. He further testified that there was no indication of dead or dried roach carcasses in the administration building. He also explained that in this area it would be unlikely for cockroaches to be in duct work because of their habit of living close to food and heat sources or organic material, glues, and cardboard materials.

His testimony also tended to show that the large quantity of dead cockroaches that were later found dead in the basement of the building in January, 2004, was not an indication that the entire building was infested with cockroaches. He also agreed that cockroaches would be something the general public was going to be exposed to on a regular basis. Tr. at 95.

Similarly, the supervisor of the Arkansas Occupational Safety & Health Section of the Safety Division of the Arkansas Department of Labor testified that he did an inspection of the

administration building on January 12, 2004, and found no sign of insect infestation in the upper levels or the main level of the building but saw a mass of dead infantile roaches in the basement which he believed had resulted from pest control spraying of the building the previous Friday. On cross-examination, he testified that the building was inspected on a routine basis and that there had not been any indication of any type of insect infestation in the years previous. Tr. at 19. He explained that roaches leave an identifiable feces which he did not see when he inspected. He said that he looked a little harder in the reception area and actually ran his hand above the door casing, on file cabinets, and touched things trying, without success, to find particulate of any kind associated with roaches. Tr. at 20. He also stated that he returned January 28, 2004, and did not a thorough inspection which involved climbing into the ceiling crawl space and taking off air vents as well as looking into cabinets in the kitchen, pulling file cabinets, and going into the crawl space under the building. He stated that there was nothing about the ceiling tiles or the air vents that showed any type of roach infestation problem. He specifically testified that behind the file cabinets he found normal office debris, such as dust, paper fragments, and paper clips, but nothing to indicate a roach infestation. He also stated that there was nothing to indicate roach feces and decaying roach carcasses piled 6 to 8 inches high in the duct work, ceiling tiles, or the building. He also inspected copies of the pest control records and found the respondent employer to be in compliance.

In the recent decision of Long v. Glad Manufacturing Company, Ark. WCC No. F210253 (August 18, 2004), the majority found that the claimant had not proved the occurrence of a compensable occupational disease, occupational asthma, within the meaning of Ark. Code Ann. §11-9-601, primarily because the treating physician had described his condition as “likely occupational asthma” and “possibly occupationally induced asthma.”

Here, Dr. John was even more tentative and also admitted that his opinion would be doubtful if testimony showed no buildup of dead cockroaches in the workplace. His deposition testimony showed that the foundation for his attribution of the claimant's asthma to her employment included chronic exposure to cockroach body parts in the form of dust in her work environment, coming from the air conditioning vents, and associated with an alleged buildup of 6 inches of cockroach feces and body parts in the attic. Even if that had been the case, which the proof failed to show, his testing showed only a mild reaction to cockroach antigen which Dr. John testified did not indicate that the claimant's asthma was caused by exposure by cockroach body parts but was merely the basis for his "inference" that a reaction to cockroach antigen "may be part" of the problem. Thus, the initial medical opinion connecting the claimant's asthma and her employment was tenuous at best and did not meet the standard set by the Commission in the Long case. However, since the doctor's opinion should now be considered doubtful, then it becomes even more apparent that the burden of proof has not been met, especially in light of the failure of the testimony of the claimant's witnesses to show the level of cockroach infestation described by Dr. John as the factual basis for his opinion.

For example, the claimant testified that she had seen cockroaches before the second construction which occurred in 2000. She stated that "we would see them occasionally in the basement." Tr. at 43. She also stated that from the time she worked there, there were roaches and that every old building has a roach. She also stated that she did not see them "very often." She stated when the renovation was done in 2000, "we found them in the file cabinets and they were alive." Tr. at 43. She also stated that she had lived in her home for 25 years and did not of cockroaches there. On cross-examination, she also admitted that what she assumed to be cockroach droppings were never analyzed to see if they were. The medical record and the claimant's testimony

also indicates that she had been diagnosed with adult onset stress related asthma, stress related migraine headaches, sleep apnea, depression, and anxiety.

Angela D. Robins, called by the claimant, testified that she worked from about 2000 until November, 2002, and had no prior respiratory problems but developed such problems during her employment. She also stated that she saw cockroaches, live and dead, on a daily basis, sometimes in her office and sometimes in the superintendent's office. She stated that she was not a smoker and had no cockroaches at her home. However, she stated that she did not see decaying cockroaches or mounds of cockroaches feces, but that she did see dust on her desk on a daily basis.

The claimant's husband also testified that they had no cockroach problem at home, but that he did see granular stuff on desks and machines, and later, powdery stuff, when he was in the claimant's work area.

On the other hand, Kathy King, the employer's payroll bookkeeper, testified that she had worked in that building since December, 1988, until the present and had seen dead bugs occasionally in the basement area but no cockroaches or cockroach feces.

Thus, even without the testimony of the exterminator and the Department of Labor Inspector, the preponderance of the evidence fails to show the kind of problem in the work environment which was the basis for Dr. John's hypotheses that the claimant's asthma came from her employment. The evidence fails to show the level of infestation that Dr. John envisioned and there was no proof that the dust complained of by the claimant was related to cockroaches as opposed to other possible sources. Under these circumstances, as Dr. John acknowledged, a connection with the employment is doubtful and, consequently, the claim should be, respectfully, denied.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully,
denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge