

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206422

JOSEPH KINARD, EMPLOYEE	CLAIMANT
LION OIL CO., EMPLOYER	RESPONDENT
ZURICH AMERICAN INS. CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 12, 2004

Hearing before Administrative Law Judge J. Mark White on November 20, 2003, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Robert L. Depper, Jr., Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 20, 2003, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on June 9, 2003, and a Prehearing Conference Order was entered that same day. A copy of the June 9, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed between the parties on April 8, 2002; that the claimant earned sufficient wages to entitle him to the maximum compensation rates; that the claimant has received group health and short-term disability benefits for this injury, and that the respondents are entitled to an offset for all such benefits paid, per Ark. Code Ann. § 11-9-411, if this claim is found to be compensable; and that the claimant was off from work from June 1, 2002, to July 10, 2002, due to his hospitalization.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury for which he is entitled to indemnity and medical benefits; and attorney's fees.

The claimant contends that he suffered a compensable injury for which reasonable and necessary medical expenses should be paid and for which he is entitled to temporary total disability benefits.

Respondents contend that the claimant did not sustain a compensable injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK.

CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The causation opinion given by Dr. Neal Beaton on November 7, 2003, was stated within a reasonable degree of medical certainty.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on April 8, 2002.
5. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant is employed as an operator assistant for a refinery operated by the respondent-employer. On April 8, 2002, he was atop a furnace some 20 or 25 feet in the air when he noticed an abnormal smell. He saw a "black haze ... boiling out of the top of" a nearby piece of equipment about 100 feet away and moving toward him. The equipment, a dryer, was undergoing maintenance, and the maintenance crew had flooded it with water to cool it down. He testified that within minutes of

seeing and smelling the black haze, he began to feel nauseous. He finished his shift that day, although later in the day he was also exposed to gasoline vapors from a pipe leak being repaired. He returned to work the next day, but he continued to experience nausea and tightness in his chest. The day after that, April 10, he called in sick and did not report to work. He testified that he was unable to breathe, that he was hurting in his chest and experiencing flu-like symptoms.

Several other employees of the refinery testified and corroborated the claimant's account of a black haze emanating from the dryer and drifting in the claimant's direction. They also corroborated the claimant's account of his exposure to gasoline vapors from a pipe leak, and they testified that the claimant complained of nausea on April 8, 2002.

The claimant sought treatment from his personal physician, Dr. J. Douglas Owens, on April 15, 2002. Dr. Owens noted no objective findings of injury and assessed the claimant with "transient dyspnea" and "probable bronchitis." He prescribed medication and instructed the claimant to return if his symptoms persisted.

The respondents sent the claimant to see Dr. Richard E. Dietzer on May 28, 2002. Dr. Dietzer made no specific diagnosis and noted a variety of possible causes for the claimant's problems. He instructed the claimant to limit additional exposure

to noxious and irritant gases, prescribed medication, and planned future pulmonary function tests to be compared with tests taken by the respondent-employer prior to the work incident.

The claimant admitted himself into Baptist Hospital in Little Rock on May 31, 2002, complaining of severe chest pain. He described the pain as a “gripping pain in his chest with tightness and searing pain. He said it felt like someone was sitting on him.” Chest x-rays revealed an enlarged heart, and a subsequent CT scan revealed a pericardial effusion (otherwise known as pericarditis, defined by *Dorland’s Illustrated Medical Dictionary*, 29th ed., as an inflammation of the fibroserous sac that surrounds the heart). A subsequent echocardiogram confirmed the presence of a pericardial effusion. The claimant underwent thoracic surgery to drain the effusion, and a lung biopsy was performed at the same time to aid in diagnosis of the claimant’s pulmonary difficulties. Upon discharge from the hospital, the claimant’s “primary diagnosis” was identified as pericarditis, with a “secondary diagnosis” of “status post lung biopsy.” Nothing in the record causally connects this pericarditis with the claimant’s work incident, and the parties agreed at the hearing that the pericarditis was not at issue herein.

The claimant recovered well from both procedures, and Dr. Neal Beaton released him back to work as of July 8, 2002. The claimant has continued to work

full-duty since that time, though he testified that he continues to experience shortness of breath and chest pain.

It should be noted that one of the listed witnesses, Gary Stratton, did not appear to testify because his father had passed away the day before the hearing. The parties were given 21 days from the date of the hearing to either schedule a second hearing to take Mr. Stratton's testimony, or to submit a transcript of a deposition of Mr. Stratton. No request for a second hearing was received by the Commission, nor was any deposition transcript received.

II. Adjudication

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place

of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

I found the claimant to be a credible witness in that he exhibited a credible demeanor, and his testimony was plausible, internally consistent, and consistent with the documentary evidence. The claimant credibly testified he began to experience adverse symptoms within minutes of his exposure to the mysterious black cloud. The claimant's co-workers corroborated the claimant's account of the black cloud.

The respondents sent the claimant to see Dr. Dietzer on May 28, 2003. Dr. Dietzer noted that the claimant had inhaled toxic fumes including benzene and platformate. Though Dr. Dietzer made no specific diagnosis of the cause of the claimant's symptoms, he identified his "impression" as, "Status post chemical inhalation, unknown petrochemicals including benzene and platformate, possibly with pyrolysis compounds as well which may have induced a picture of bronchiolitis obliterans, which could explain the restrictive defect." Bronchiolitis obliterans is defined by *Dorland's Illustrated Medical Dictionary*, 29th ed., as a usually chronic inflammation of the bronchioles of the lung.

When the claimant admitted himself into the hospital on May 31, 2002, Dr. Beaton evaluated him and, like Dr. Dietzer, offered no specific diagnosis. Again like Dr. Dietzer, in his "impression" Dr. Beaton noted, "Other possibilities to explain his symptoms following exposure would include bronchiolitis obliterans or asthma." The pathology report for the samples taken during the claimant's lung biopsy revealed "mild cellular bronchiolitis with smooth muscle hyperplasia." The report also noted, "The smooth muscle hyperplasia of bronchiolar tissue could be constrictive in nature."

In a follow-up visit on June 27, 2002, Dr. Beaton gave his impression as:

Bronchiolitis. His lung biopsy showed evidence of smooth muscle hyperplasia and he presumably had a bronchiolitis. This may have been due to chemical exposure. He had a sudden illness that began with exposure to chemicals at work. We did a spirometry today and his vital capacity is normal at 90% of predicted. However, he is a young, healthy person and I would have expected his spirometry to be even better than this, even though it is technically normal. He has had yearly spirometries at his place of work, and I want to obtain these for comparison. This would allow me to determine if he is back to his baseline or whether he may have actually had some damage to his lungs from a work exposure.

The claimant introduced into evidence a letter from Dr. Beaton dated November 7, 2003, which read:

Mr. Kinard is a patient whom I have seen since he had

an episode of inhalation exposure back in April 2002. His initial spirometry that I have from June 2002 showed vital capacity of about 87% of predicted. This would be within normal limits although I do not know what his pre-exposure vital capacity was. His most recent pulmonary function tests show moderate restrictive lung disease. This is consistent with pulmonary scarring from an inhalation exposure. Given his documented exposure history, the best explanation for his loss of pulmonary function is that this is the result of the inhalation exposure in April 2002.

It is true that “medical opinions addressing compensability must be stated within a reasonable degree of medical certainty.” ARK. CODE ANN. § 11-9-102 (16)(B). Admittedly, the earlier statements by Drs. Beaton and Dietzer fail to meet this standard, because of their use of terms such as “may” and “possible”. *See, e.g., Frances v. Gaylord Container Corporation*, 341 Ark. 527, 20 S.W.3d 280 (2000). However, Dr. Beaton’s most recent opinion, that the claimant’s work incident is “the best explanation” for his illness, does meet the reasonable certainty standard. 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, it is stated within a reasonable degree of medical certainty and may be called upon to support a claim of compensability. *Howell v. Scroll Technologies*, 343 Ark. 297, 35 S.W.3d 800 (2001). The record reveals no other possible cause of the claimant’s bronchiolitis and subsequent loss of pulmonary function, and Dr. Beaton’s opinion is sufficiently clear to remove any

reason for this trier of fact to have to guess at the cause of this injury. I therefore find that Dr. Beaton's causation opinion of November 7, 2003, is stated within a reasonable degree of medical certainty.

Causal connection is generally a matter of inference. *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991). Given the pre- and post-diagnosis opinions of the claimant's physicians; the objective findings of the claimant's lung biopsy; his credible testimony as to the work incident, his inhalation exposure and his rapid onset of symptoms; and the short period of time between his work incident and the final diagnosis of bronchiolitis; I find that the claimant has proven by a preponderance of the evidence a causal connection between his work incident of April 8, 2002, and his bronchiolitis and subsequent loss of pulmonary function. I note that I would reach this same finding even if the medical opinions were excluded for not being stated within a reasonable degree of medical certainty. When a claimant's disability arises soon after an accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, there is no substantial evidence to sustain a refusal to award compensation. *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001). As established by the present claimant's credible testimony and the medical evidence, his illness and need for treatment

developed immediately after the work incident and are logically attributable to it. There is nothing in the record to suggest any other explanation for the claimant's condition. Admittedly, the claimant testified that he once experienced nausea and chest tightness after welding some galvanized sheet metal. However, this incident took place more than ten years prior to the work incident at issue, and nothing in the medical record suggests that the claimant's bronchiolitis is in any way connected to this other incident in the distant past.

An injury arises out of one's employment when a causal connection between work conditions and the injury is apparent to the rational mind. *City of El Dorado v. Sartor*, 21 Ark. App. 143,729 S.W.2d 430 (1987). Given the above discussion, and given the claimant's credible account of when, where and how his work incident occurred, I find that the claimant has proven by a preponderance of the evidence that his injury arose out of and in the course of his employment; that his injury was caused by a specific incident and is identifiable by time and place of occurrence; and that his injury caused internal physical harm to the body requiring medical services. The pathology report identifying bronchiolitis in the claimant's lung constitutes an objective finding sufficient to establish with medical evidence the existence and extent of the claimant's injury. The claimant has proven all of the elements of compensability by a preponderance of the evidence. I therefore find that the

claimant has proven by a preponderance of the evidence that he sustained a compensable injury on April 8, 2002.

AWARD

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on April 8, 2002.

The respondents are hereby directed and ordered to pay for all outstanding medical and related treatment for the claimant's compensable injury, and the respondents remain liable for continued reasonably necessary medical treatment.

The claimant's attorney, Mr. Robert L. Depper, Jr., is hereby awarded the maximum statutory attorney's fee on any indemnity benefits owed and controverted, pursuant to ARK. CODE ANN. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge