

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F202581

KENNETH PROUD, Employee	CLAIMANT
SHILOH STEEL, Employer	RESPONDENT
AMERICAN HOME ASSURANCE C/O AIG, Carrier	RESPONDENT #1
LEGION INSURANCE CO. c/o ARK. GUARANTY FUND, Carrier	RESPONDENT #2
LIBERTY MUTUAL INSURANCE CO., Carrier	RESPONDENT #3
COMP TRUST OF ARKANSAS, Carrier	RESPONDENT #4
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT #5

OPINION FILED DECEMBER 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

Respondent #2 represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

Respondent #3 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent #4 represented by ROBERT L. HENRY, III, Attorney, Little Rock, Arkansas.

Respondent #5 represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 1, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 4, 2004, and a pre-hearing order was filed on February 6, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers; Compensation Commission has jurisdiction of the within

claim.

2. Respondent #1 was the workers' compensation carrier beginning January 1, 2002, at which time claimant earned an average weekly wage of \$529.45 entitling him to compensation at the weekly rates of \$353.00 for total disability benefits and \$265.00 for permanent partial disability benefits.

3. Respondent #2 was the workers' compensation carrier from January 1, 2001 through December 31, 2001.

4. Respondent #3 was the workers' compensation carrier from 1989 through August 1995 and from January 1, 1997 through December 31, 2000.

5. Respondent #4 had Shiloh Steel as a member of the self-insured program for workers' compensation in the State of Arkansas beginning August 1, 1995 and continuing through December 31, 1996.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability.
2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.
5. Liability for benefits between the workers' compensation carriers.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was diagnosed in October 2001 with COPD and filed his claim for benefits as received by the Commission on June 21, 2002. He has not worked since March 4, 2002. He requests total disability since that date and medical expenses to be apportioned by, between, and among the respective insurance companies for the employer. The claimant would point out that it appears that the claimant's last injurious exposure under A.C.A. §11-9-601 occurred on March 4, 2002."

Respondent #1 contends that the medical evidence is insufficient to prove

compensability under A.C.A. §11-9-102(16). Respondent #1 also contends that the evidence does not show the claimant's exposure to fumes as the major cause of the disability or need for medical treatment; that the evidence does not meet the compensability requirement of A.C.A. §11-9-114. Respondent #1 also contends that if the claim is found compensable liability for benefits should be apportioned among the parties; that the last injurious exposure rule set out at A.C.A. §11-9-601(f) applies only to disease cases and claimant has an injury, not an occupational disease. Finally, respondent #1 contends that if claimant does have an occupational disease then apportionment is proper under A.C.A. §11-9-601(c)(1).

Respondent #2's contentions as set forth in its pre-hearing questionnaire are as follows: "The claimant has an undetermined pulmonary condition. It is not related to his job at Shiloh Steel. The claimant continued to work after the coverage of the Guaranty Fund and the carrier with the last exposure is responsible for any benefits."

Respondent #3's contentions as set forth in its pre-hearing questionnaire are as follows: "Respondent #3 will contend that the claimant did not sustain a compensable injury or compensable occupational disease during the period Respondent #3 provided workers' compensation coverage for Shiloh Steel Fabricators."

Respondent #4 contends that it controverts this claim in its entirety. Respondent #4 contends that if claimant is found to have an occupational disease, then the last injurious exposure occurred in the year 2002. Respondent #4 also contends that claimant's claim is not governed by A.C.A. §11-9-114 because it is not a specific accident as that section has been interpreted.

Respondent #5 also contends that claimant cannot meet his burden of proving by a preponderance of the evidence that he sustained either an accidental injury under A.C.A. §11-9-114 or an occupational disease under A.C.A. §11-9-601. Alternatively, if claimant is found to have a compensable injury, it is Respondent #5's position that it would be an

occupational disease and would be the responsibility of Respondent #1 who had coverage at the time of the last injurious exposure.

From a review of 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 witness and to observe his 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 pre-hearing conference conducted on February 4, 2004, and contained in a pre-hearing order filed February 6, 2004, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that his chronic obstructive pulmonary disease is causally related to his employment with respondent. Therefore, claimant has suffered a compensable injury.

3. Claimant's chronic obstructive pulmonary disease is classified as an occupational disease; therefore, the last injurious exposure rule applies and respondent #1 is liable for payment of compensation benefits.

4. Respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's chronic obstructive pulmonary disease.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

FACTUAL BACKGROUND

The claimant is a 59-year-old man who completed the eleventh grade and took a correspondence course to obtain his high school diploma. Claimant testified that he began smoking in 1963 and smoked approximately a pack a day and sometimes a pack

and a half a day if he went out at night. Claimant continued smoking until 1980. Claimant testified that his wife still smokes, but she does so in a room in the back of their home.

After four years in the Navy claimant began working for the respondent as a welder in 1974. Claimant testified that for the first three or four years as a welder he used welding rods which did not require the use of gas. After that time the respondent began using flux core wire which required the use of gas and produced fumes and smoke. Claimant testified that with the use of flux core wire fans could not be used to blow away fumes because it would affect the quality of the weld.

Claimant testified that he spent approximately 90 percent of his day welding. In addition, virtually all of claimant's welding occurred indoors with very little air circulation. Claimant testified that in approximately 1999 he began wearing a mask under his welding hood after he started noticing that he was coughing up black "stuff" and blowing it out of his nose.

The medical evidence indicates that claimant first complained of shortness of breath to Dr. Kendrick in 1996. In August 2001 claimant again returned to his family physicians complaining of shortness of breath following exertion. As a result of these complaints claimant was referred to Dr. Lazenby, a pulmonologist. Dr. Lazenby ordered a CT scan which revealed that claimant suffered from severe pulmonary emphysema. Dr. Lazenby recommended that the claimant protect his airways from irritants and noted that a special ventilator mask would be important if claimant was to continue working in his current environment. As a result, claimant's job duties changed from being a welder to being a welder's helper.

In March 2002 Dr. Lazenby noted that claimant had a drop in his oxygen level with any significant exertion and Dr. Lazenby recommended that claimant wear oxygen. Dr. Lazenby noted that this would create a danger with claimant's job as a welder and recommended that claimant be allowed to work in an environment where he could wear

his oxygen safely. Respondent did not have a position available for claimant which would allow him to wear the oxygen. Claimant has not worked for respondent or for any other employer since March 2002.

Claimant was subsequently treated and evaluated by Dr. Templeton who took over Dr. Lazenby's practice. In addition, claimant has also undergone an evaluation by Dr. Butler. Both Drs. Templeton and Butler have diagnosed claimant's condition as chronic obstructive pulmonary disease secondary to alpha-1 antitrypsin deficiency.

Claimant has filed this claim contending that he suffered a compensable injury in the form of chronic obstructive pulmonary disease while employed by the respondent. He seeks payment of medical benefits, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

INJURY VS. OCCUPATIONAL DISEASE.

The initial issue for consideration is whether claimant's claim is for an injury or an occupational disease. Respondent #1 contends that claimant's claim is for an injury governed by A.C.A. §11-9-114, not an occupational disease governed by A.C.A. §11-9-601, *et seq.*

I find that claimant's claim is for an occupational disease, not an injury governed by A.C.A. §11-9-114. The courts in Arkansas have held that although the Workers' Compensation Act does not define the distinction between "accidental injury" and "disease," one distinction is that occupational diseases are generally gradual in onset rather than sudden. *Johnson v. Democrat Printing and Lithograph*, 57 Ark. App. 274, 944 S.W. 2d 138 (1997); *Hancock v. Modern Industrial Laundry*, 46 Ark. App. 186, 878 S.W. 2d 416 (1994).

In this particular case, I find no credible evidence indicating that claimant's chronic obstructive pulmonary disease was the result of a sudden onset; instead, the preponderance of the evidence indicates that it resulted from a gradual onset condition. Claimant did not testify as to any specific sudden onset which led to his shortness of breath complaints and his subsequent diagnosis. To the contrary, claimant testified that since working as a welder for the respondent since 1974 he has been exposed to fumes from welding on a daily basis. Claimant testified that it was his belief that this condition was a gradual condition, not a sudden onset. Furthermore, I find nothing in the medical records which would support a finding that claimant's condition is the result of a sudden onset as opposed to a gradual onset.

In summary, I find that the preponderance of the evidence proves that claimant's condition is the result of a gradual onset, not a sudden onset. Therefore, claimant's claim is for an occupational disease, not an accidental injury.

COMPENSABILITY.

Pursuant to A.C.A. §11-9-601(e)(1)(B), claimant has the burden of proving a causal connection between his employment and the occupational disease by a preponderance of the evidence. Prior to 2001 the burden of proof for occupational diseases was clear and convincing evidence. However, Act 1281 of 2001 changed the burden of proof from clear and convincing evidence to a preponderance of the evidence. Although it might be argued that the clear and convincing burden of proof is applicable to this claim, I find no merit to that argument. In *Sikes v. Georgia Pacific Corporation*, Full Commission Opinion filed July 7, 2003 (F000657), the Full Commission found that Act 1281 of 2001 changing the burden of proof from clear and convincing evidence to a preponderance of the evidence is to be applied retroactively.

After reviewing the evidence in this case impartially, without giving the benefit of the

doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that his chronic obstructive pulmonary disease is causally related to his employment with the respondent.

As previously noted, claimant went to work for the respondent as a welder in 1974. After approximately three or four years the respondent required claimant to use a flux core wire which required the use of gas. According to claimant's testimony this process produced fumes and smoke which could not be blown away by circulation because any air circulation would affect the quality of the weld. According to claimant's testimony he was exposed to these fumes and smoke even though he wore a welding hood. Claimant testified that following a day of welding his face would be black from smoke. In addition, claimant testified that he also noticed that he was coughing up black "stuff" and blowing it out of his nose. As a result, claimant requested a mask to wear under his welding hood.

The medical evidence indicates that claimant saw Dr. Kendrick in March 1996 for a complete physical. Dr. Kendrick's medical report of that date indicates that claimant mentioned noticing a shortness of breath which occurred when he walked for some distance.

The next notation occurred when claimant sought medical treatment from his family physician, Dr. Oates, in August 2001. Dr. Oates ordered a chest x-ray which revealed some scarring. Dr. Oates also noted that he would likely get an opinion of a pulmonologist following lung studies. Claimant was eventually referred to Dr. Lazenby, a pulmonologist, and his report of October 9, 2001 states that pulmonary function testing reveals that claimant has a significant air flow obstruction. According to Dr. Lazenby, claimant's smoking history is modest when compared with his degree of air flow obstruction. Dr. Lazenby also stated in his report that the welding smoke sounded like it was an irritant. Dr. Lazenby recommended a CT scan of the claimant's lungs and continued medication.

The CT scan of claimant's lungs was performed on October 16, 2001, and revealed

severe pulmonary emphysema. Based upon these test results, Dr. Lazenby in his report of December 17, 2001, encouraged claimant to protect his airways from irritants. Dr. Lazenby indicated that a special ventilator mask would be important if claimant was to continue working in that environment.

Following this diagnosis claimant's job duties were modified. Instead of working as a welder, claimant worked primarily as a welder's helper. Claimant testified at his deposition that as a welder's helper he was required to hold things while another welder tacked or welded. Claimant also indicated that even being around the smoke as a helper "drained" him. Claimant also testified that for the first three months of 2002 he did perform some small welding jobs. Furthermore, even as a helper, claimant testified that he was exposed to welding fumes up until the time he left respondent's employment in March 2002. Thus, even though claimant's job duties had been modified, he was nevertheless still exposed to welding fumes as a helper.

On March 4, 2002 claimant was again evaluated by Dr. Lazenby. Dr. Lazenby noted that claimant had a drop in his oxygen level with any significant exertion. As a result, he recommended that claimant wear oxygen. Since claimant could not work as a welder with oxygen, Dr. Lazenby recommended that claimant be allowed to work in an environment where he could wear the oxygen safely. As previously noted, respondent did not have such work available for the claimant and he has not worked since that time.

Subsequently, Dr. Templeton took over the practice of Dr. Lazenby. Dr. Templeton in a report of April 10, 2002 diagnosed claimant's condition as chronic obstructive pulmonary disease secondary to alpha-1 antitrypsin deficiency. Dr. Templeton noted that smoking is known to make this condition worse and notes that it is an inherited form of emphysema.

In January 2004 Dr. Templeton was asked whether claimant's exposure as a welder may have accelerated his decline in lung function. Dr. Templeton indicated that the

decline in claimant's lung function was accelerated by his smoking up until 1981. However, Dr. Templeton indicated that he would need to perform an additional investigation to determine whether the welding may have accelerated his lung function decline. The documentary evidence contains no further reports from Dr. Templeton.

Claimant was also evaluated by Dr. Butler, a pulmonary specialist, in Tulsa. In a letter dated May 13, 2004, Dr. Butler stated that he was inclined to believe that claimant's condition was related to a combination of smoking and welding fume exposure. However, Dr. Butler indicated that he wanted to do additional research before stating a final opinion. Finally, on June 10, 2004, Dr. Butler after evaluating the claimant and performing pulmonary testing opined that both smoking and claimant's exposure to industrial smoke constituted exacerbating factors. Dr. Butler went on to indicate that he would relate 64 percent of claimant's reduction in lung function to his exposure to welding fumes and 36 percent to smoking.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that a causal connection exists between his exposure to welding fumes while working for respondent and his chronic obstructive pulmonary disease. Based upon claimant's testimony which I find to be credible, it is clear that claimant was exposed to welding fumes and smoke for a significant period of time during his work for the respondent as a welder since 1974. Although Dr. Templeton stated that he would need to perform an additional investigation to determine whether claimant's exposure to welding fumes may have contributed to his chronic obstructive pulmonary disease, Dr. Butler did state that in his opinion claimant's exposure to the smoke and welding fumes exacerbated claimant's condition. In fact, Dr. Butler indicated that claimant's welding resulted in 64 percent of claimant's reduction in lung function. I find that the opinion of Dr. Butler is credible and entitled to great weight.

In finding that claimant has met his burden of proof, I note that respondent #1

contends that there is insufficient medical evidence in the form of objective findings establishing an injury. I disagree. The record indicates that various pulmonary tests have been performed on the claimant. In addition, Dr. Butler performed a spirometry which revealed a moderate obstructive effect. Pulmonary function testing has been recognized by the court as an objective test. See *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W. 3d 848 (2001). Accordingly, I find that claimant has offered medical evidence supported by objective findings establishing his injury.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of chronic obstructive pulmonary disease as a result of his employment with the respondent.

LIABILITY.

Where compensation is payable for an occupational disease, the carrier on the risk when the employee was last injuriously exposed is liable for compensation benefits. See A.C.A. §11-9-601(f)(1)(Repl. 1996); and *Washington Regional Medical v. Smith*, 75 Ark. App. 246, 58 S.W. 3d 858 (2001).

In this particular case, I find that the carrier on the risk when the claimant was last injuriously exposed was respondent #1. Respondent #1 became the employer's workers' compensation carrier on January 1, 2002. Although claimant had made complaints of shortness of breath following exertion as early as 1996 and had been diagnosed as suffering from emphysema in October 2001, the date that determines liability is not the date when the symptoms of the disease first appear but rather the date when some type of disablement such as cessation of work appears. *Washington Regional v. Smith, i.d.*

In this particular case, after claimant was diagnosed as suffering from emphysema in October 2001, claimant's job duties were changed and he was made a welder's helper. This change in job duties coincided with the beginning of respondent #1's coverage as the

employer's workers' compensation carrier. Even though the claimant was no longer working for the respondent as a welder, claimant did work as a welder's helper. According to claimant's testimony this required him to work around the welders who were creating smoke and fumes. Claimant also testified that he performed a few welding jobs in the first three months of 2002. Finally, according to claimant's testimony he continued to be exposed to welding fumes until his employment was terminated in March 2002.

Thus, although claimant's job duties did change following his diagnosis, claimant continued to be exposed to welding fumes and smoke after respondent #1 became the employer's workers' compensation carrier. This exposure continued until claimant's employment terminated in March 2002. Based upon this evidence, I find that claimant's last injurious exposure occurred while respondent #1 was the workers' compensation carrier. Therefore, respondent #1 is liable for payment of compensation benefits. This includes all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant contends that he is entitled to temporary total disability benefits from the date he last worked for respondent in March 2002 and continuing through a date yet to be determined. Claimant's injury is an unscheduled injury; therefore, in order to be entitled to compensation benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages subsequent to March 2002.

As previously noted, Dr. Lazenby in a report dated March 4, 2002 recommended that claimant wear oxygen with any exertion. Dr. Lazenby noted that this would create a danger with claimant's job as a welder and recommended that claimant be allowed to work in an environment where he could wear the oxygen safely. Respondent did not have work available for claimant and claimant has not worked for respondent or any other employer since that date. However, my review of the evidence in this case indicates that claimant's condition is a permanent condition, not a temporary condition. Therefore, claimant has not been in a healing period. Furthermore, claimant's treating physicians have not opined that he is totally incapacitated from working.

Dr. Templeton, claimant's treating physician on May 8, 2002, completed a physical capacities evaluation. Dr. Templeton indicated that claimant was capable of working an eight-hour day with breaks every two hours. He also indicated that claimant had a 10-pound lifting restriction and imposed various other limitations. However, it is important to note from a review of Dr. Templeton's evaluation that he indicated that claimant had reached maximum medical improvement and noted that claimant's restrictions were permanent in nature.

While claimant has continued to receive medical treatment after May 2002, there is no indication that that treatment is improving claimant's condition. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W. 2d 582 (1982).

In this particular case, claimant was diagnosed as suffering from chronic obstructive pulmonary disease. However, the medical reports do not indicate that any treatment will improve claimant's condition. To the contrary, Dr. Templeton has indicated that claimant has reached maximum medical improvement and that restrictions imposed by him are permanent in nature.

Based upon the evaluation completed by Dr. Templeton dated May 8, 2002, I find that claimant has failed to prove by a preponderance of the evidence that he remains within his healing period or that he suffers a total incapacity to earn wages. Dr. Templeton opined that claimant had reached maximum medical improvement and was of the opinion that claimant could work eight hours per day with certain restrictions. There is insufficient evidence subsequent to that date indicating that claimant re-entered his healing period or that he suffers a total incapacity to earn wages.

APPORTIONMENT.

Respondent #1 contends that in the event claimant did suffer a compensable occupational disease, that benefits should be apportioned pursuant to A.C.A. §11-9-601(c)(1). That subsection states:

Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as the occupational disease, as a causative factor, bears to all the causes of the disability or death.

Based on the circumstances presented in this case, I find that apportionment is not proper. While Dr. Butler did state that 36 percent of the claimant's reduction in lung function was due to smoking, A.C.A. §11-9-601 addresses apportionment with respect to disability or death, not medical benefits. Administrative law judges, the Commission, and the courts are to construe the workers' compensation law strictly. A.C.A. §11-9-704(c)(2). Furthermore, if the workers' compensation statutes are to be liberalized, broadened, or narrowed it must be done by the General Assembly. A.C.A. §11-9-1001.

In this particular case, I have not awarded any disability or death benefits, only payment of medical benefits. Since A.C.A. §11-9-601(c)(1) does not provide for the apportionment of medical benefits, I find that apportionment is not applicable. Therefore, respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable chronic pulmonary disease.

ATTORNEY FEE.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that his chronic obstructive pulmonary disease is a compensable injury which is causally related to his work as a welder for the respondent. Claimant's last injurious exposure occurred while respondent #1 was the workers' compensation carrier; therefore, respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's chronic obstructive pulmonary disease. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in

2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE