

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305003

WILSON T. RING,
EMPLOYEE

CLAIMANT

STONE & SONS MONUMENT,
EMPLOYER

RESPONDENT

TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 5, 2004

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

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

The respondents were represented by HONORABLE ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 7, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on September 19, 2003. 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 order or at the start of the hearing and are hereby accepted:

1. The claimant sustained a compensable foot injury in April 1999.

2. The respondents have not accepted responsibility for any lung injury alleged by claimant.

3. The claimant's average weekly wage was \$320.00 in 1999 and \$350.00 when he last worked at Stone & Sons Monument.

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

1. Compensability of a gradual onset lung injury.
2. Permanent and total disability compensation or wage loss benefits.
3. Controversion.
4. Attorneys fees.

DISCUSSION

1. Chronic Obstructive Pulmonary Disease (COPD)

Mr. Ring went to work at Mr. Stone's monument business on or about August 17, 1975. He last worked there on or about March 5, 2001, the day before one of his surgeries for his admittedly compensable foot injury.

According to Mr. Stone, Mr. Ring engaged principally in sandblasting, accounting for approximately 20 to 25 percent

of his time at work. The sandblasting occurred in an enclosed area of approximately 480 cubic feet with air ventilation supplied by a one horse power fan rated at 2300 cubic feet per minute free air. The sandblasting operation used a material pronounced "blastite" instead of sand. Mr. Ring would stand in the doorway while the monument blasting occurred, and Mr. Ring wore disposable SAS Safety Systems fiber masks purchased at an automotive store while sandblasting. Mr. Stone did not know at the hearing whether the masks were cotton or fiberglass. The only way to determine whether the masks were working was whether the masks were changing color.

While sandblasting was in progress and Mr. Ring was standing in the doorway, he was exposed only to "bounce back" material through crevices and strips. The greater exposure occurred when he re-entered the room and used compressed air to blow down the cart.

The claimant seeks benefits for his diagnosed chronic obstructive pulmonary disease which he asserts was caused by his years of exposure to dust, as described above.

As a threshold matter, I find that the compensability of an allegedly work related gradual onset chronic obstructive pulmonary disease is determined pursuant to Ark.

Code Ann. § 11-9-601 et seq, and not under the newer provisions of Ark. Code Ann. § 11-9-102(4) (A) (i) or Ark. Code Ann. § 11-9-114. In reaching this conclusion, I note that the Arkansas Courts have long recognized the difference between occupational diseases and occupational injuries, and although not necessarily determinative, the Courts have recognized that occupational diseases are generally gradual rather than sudden in onset. Hancock v. Modern Industrial Laundry, 46 Ark. App. 186, 878 S.W.2d 416 (1994). Notably, Section 102(4) (A) (i) and Section 114 refer only to conditions that are "accidental" or caused by an "accident". By comparison, Section 601(e) (1) (A) defines occupational disease as "any disease...". There appears to be little question that prior to the amendments of Act 796 of 1993, gradual onset chronic obstructive pulmonary disease was characterized as an occupational disease. Jenkins v. Halstead Industries, 17 Ark. App. 197, 706 S.W.2d 191 (1986). Absent any specific indication that the General Assembly in Act 796 of 1993 intended that Section 601 et seq no longer apply to gradual onset chronic obstructive pulmonary disease, I find that this claim is governed by the provisions of Section 601 et seq.

The Full Commission recently summarized in Raymond D. Ryan v. Staffmark, Full Workers' Compensation Commission, Opinion filed November 10, 2003 (F111364) various aspects of the applicable law:

An "occupational disease" is any disease resulting in disability or death that arises out of or in the course of an occupation or employment of the employee. Ark. Code Ann. § 11-9-601(e)(1)(A) (Repl. 2002). Prior to the enactment of Act 1281 of 2001, the burden of proof was clear and convincing evidence in order for the claimant to prove he/she has a compensable occupational injury. However, Act 1281 changes [sic] the burden to a preponderance of the evidence. Ark. Code Ann. § 11-9-601(e)(1)(B) (Repl. 2002).

Ordinary diseases of life to which the general public is exposed are not compensable. Ark. Code Ann. § 11-9-601(e)(3) (Repl. 2002). The occupational disease must be "due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his employment." Ark. Code Ann. § 11-9-601(g)(1)(A) (Repl. 2002). However, a disease may be considered compensable although the general public may contract the disease if the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments. Osrose Wood Preserving v. Jones, 40 Ark. App. 190, 843 S.W.2d 875 (1992); Sanyo Mfg. Corp. v. Leisure, 12 Ark. App. 274, 675 S.W.2d 841 (1984). To constitute an occupational disease, there must be a recognizable link between the nature of the job and an increased risk in contracting the disease. Sanyo Mfg. Corp., supra.

In addition, although the Arkansas Courts have not yet addressed the issue, a majority of the Commissioners have previously interpreted that the change in burden of proof contained in Act 1281 applies retroactive. Alvin Lansdell v. Georgia-Pacific Corporation, Full Workers' Compensation Commission, Opinion filed September 3, 2003 (F007360); John Sikes v. Georgia-Pacific Corporation, Full Workers' Compensation Commission, Opinion filed July 7, 2003 (F000657).

In the present case, the only physician to render a medical opinion in the record on causation is Dr. Campos, the claimant's treating physician. I find that Dr. Campos' opinion dated April 30, 2002 represents a preponderance of the evidence on the question addressed therein, and I therefore find that the claimant has established by a preponderance of the evidence that his COPD is directly related to his 27 years of exposure to the dust from sandblasting monuments for the same employer.

In reaching that conclusion, I note that the respondents take issue with Dr. Campos' opinion because Dr. Campos is not a pulmonary specialist. The respondents also question whether the claimant's condition is supported by objective medical findings. For my part, I am aware of no

requirement that a medical opinion on causation be rendered only by specialists. Dr. Campos' opinion is stated within a reasonable degree of medical certainty, and I see no indication that Dr. Campos' opinion is based on any material mistake of fact.

Furthermore, I note that the impression of Dr. Bond, the roentgenologist who performed the claimant's February 26, 2002 x-rays also indicated chronic obstructive pulmonary disease. His x-ray reports also appear to contain a number of objective findings including, but not limited to, granuloma and interstitial infiltrate. I accord Dr. Campos' opinion, rendered after multiple x-rays and on the same day as the claimant's chest CT, significant evidentiary weight.

Likewise, the testimony of both Mr. Stone and Mr. Ring establishes by a preponderance of the evidence that exposure to the sandblasting dust which caused the claimant's COPD was routinely required in Mr. Ring's work. In light of the nature of the job and the disease that it caused, the claimant has established that by a preponderance of the evidence the nature of the employment exposed him to a greater risk of COPD than the risk experienced by the general public or by workers in other employments, who are not routinely subject to working in high dust areas.

For all of the foregoing reasons, I find that Mr. Ring has established by a preponderance of the evidence the compensability of his COPD, and I find that the respondents are liable for reasonably necessary medical treatment for that condition.

2. Permanent And Total Disability Compensation or Wage Loss Benefits

The claimant's foot injury is a scheduled injury. Compensation for disability for a scheduled injury is subject to the provisions of Ark. Code Ann. § 11-9-521. The claimant's COPD is an unscheduled condition. Compensation for disability for unscheduled injuries is subject to the provisions of Ark. Code Ann. § 11-9-522. The claimant asserts that he is permanently and totally disabled as a result of his foot injury alone, or as a result of his foot injury and his COPD. However, I find that I am precluded from awarding him wage loss benefits for either condition for the following reasons.

A. COPD

With regard to the COPD, I note that in order to be entitled to any wage loss benefits in excess of permanent physical impairment, a claimant must first prove that he sustained a compensable permanent physical impairment as a

result of a work-related injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

In the present case, there is no permanent anatomical impairment rating in the record assigned by any physician for the claimant's COPD. However, the Commission need not rely solely on ratings assigned by physicians and may assess its own rating using the AMA Guides to the Evaluation of Permanent Impairment, 4th Ed. See Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

For my part, I am aware of methods for assigning impairment for respiratory conditions pursuant to chapter 5 of the 4th edition of the AMA Guides, having myself worked on the Full Commission staff when the Full Commission rendered its unpublished decision which was later affirmed in Emerson Electric v. Gaston, 75 Ark. App 232, 58 S.W.3d 848 (2001). See also Excelsior Hotel v. Squires, _____ Ark. App _____, 15 S.W.3d 823 (9-3-2003).

In the present case, I find no appropriate criteria in the record on which I may assign the claimant an impairment rating. Because the claimant has failed to establish a compensable anatomical impairment caused by his COPD, I am precluded from awarding wage loss benefits for that condition.

B. Foot Injury

The claimant does have an admittedly compensable impairment rating for his foot injury. However, as a general rule, permanency benefits for a scheduled injury are limited to the schedule contained in Ark. Code Ann. § 11-9-521(a). One exception to the general rule is when a claimant makes a claim for permanent and total disability caused by a scheduled injury. However, Act 796 of 1993 has changed the prerequisite for establishing a claim for permanent and total disability caused by a scheduled injury. Although the Arkansas Courts and the Full Commission have yet to address this issue in any published opinions, the Full Commission has on at least one occasion in a published order noted relevant amendments regarding scheduled injuries. See Melvin Breed v. Rockline Industries, Full Workers' Compensation Commission, Order filed April 30, 2001 (E802791 and E809897).

Ark. Code Ann § 11-9-521, as amended by Act 796 of 1993, states in relevant part:

(g) Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b).

Arkansas Code Annotated § 11-9-519 states in relevant part:

(b) In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.

Because the claimant in the present case sustained an injury and impairment to only one foot/leg, and not to any two scheduled members, I find that I am precluded from awarding him permanent partial disability benefits in excess of the 10% permanent physical impairment already accepted and paid for his admittedly compensable foot injury.

3. Attorney's Fees

As discussed above, the Full Commission has determined that the portion of Act 1281 of 2001 amending the burden of proof for an occupational disease applies retroactively. However, the Full Commission has also determined that the section of Act 1281 of 2001 amending the attorney's fee schedule in Ark. Code Ann. § 11-9-715 does not apply retroactively. See Gail Sales v. Area Agency on Aging, Full Workers' Compensation Commission, Opinion filed September 24, 2001 (F007770).

Consequently, since there appears to be no dispute between the attorneys that the claimant's claim for COPD predated July of 2001, Mr. Spencer's attorney's fee on the

medical benefits to which the claimant is entitled for his COPD is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). I find that Mr. Spencer is entitled to the maximum statutory attorney's fee allowed by the applicable law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant sustained a compensable foot injury in April 1999.

2. The respondents have not accepted responsibility for any lung injury alleged by claimant.

3. The claimant's average weekly wage was \$320.00 in 1999 and \$350.00 when he last worked at Stone & Sons Monument.

4. The claimant has established by a preponderance of the evidence that he has sustained a compensable gradual onset chronic obstructive pulmonary disease.

5. The claimant has failed to establish by a preponderance of the evidence that he has experienced a compensable permanent anatomical impairment for his chronic obstructive pulmonary disease, therefore the claimant has

also failed to establish that he is entitled to any award of wage loss benefits for that condition.

6. The claimant has failed to establish that he is entitled to any permanent partial disability benefits for his scheduled foot injury in excess of the 10% permanent physical impairment already accepted and paid.

7. The claimant's attorney is entitled to a controverted attorney's fee on the benefits awarded herein for the claimant's chronic obstructive pulmonary disease.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge