

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F212897

**LESTER L. SOUTHERLAND,
EMPLOYEE**

CLAIMANT

**TURNER DAIRIES, INC.,
EMPLOYER**

RESPONDENT

**TRAVELERS INDEMNITY
CO. OF ILLINOIS,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 12, 2004

Hearing conducted October 5, 2004, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

The claimant proceeding pro se; and

Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's contention that he suffered a compensable heart attack arising out of and in the course of his employment.

Specifically, the claimant contended that on November 1, 2002, he inhaled noxious fumes, while performing employment services arising out of and in the course of his employment, which caused him to suffer a compensable heart attack. He requested associated benefits, including reasonably necessary medical and related expenses and temporary total disability benefits from the date of injury until a date to be determined. Other possible issues were reserved.

The respondents contended that the claimant did not sustain a compensable injury or heart attack within the meaning of Ark. Code Ann. §11-9-102(4)(A) or Ark. Code Ann. §11-9-114. Specifically, they contended that the claimant had a history of heart disease and approximately thirty

years of smoking cigarettes which contributed to his condition so that an accident at work was not the major cause of any physical harm he may have suffered.

At the hearing, the claimant was again advised that he has the right to represent himself in this matter, but that he has the burden of proving his case and he should consult or retain an attorney who practices workers' compensation law to assist him in presenting his case.

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 November 1, 2002, when the claimant's average weekly wage was \$490.00.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury or disease arising out of and in the course of his employment, within the meaning of the Act.

DISCUSSION

The claimant, 71 years of age at the time of the hearing, had worked for the respondent employer as a milk pasteurizer operator for a period of about twelve years ending in 1982, after which he retired for about a month and then returned to help train others and continued to work for an additional 7½ years.

He stated that his job involved running raw milk through a machine that pasteurized it for bottling purposes and that cleaning up as you go was part of the job, including washing tanks using strong chemicals. He testified that two barrels of chemicals were used, one for washing the tanks and one for sanitizing things.

On the day of the incident the sanitizer, a chemical known as Matrixx, was low and he was using a pump to move the remainder from one barrel into another. He described the barrel as a one-piece fifty gallon barrel, made of solid plastic with a couple of ½ inch holes in the top. A hose with a handle on it went into one of the holes so that there is a hose going into the barrel and then a hose for an outlet. He explained that the barrel was about waist high on him and that he stood over it and pumped the Matrixx from one barrel into the next for about five minutes on this occasion. He stated that although this was a new chemical, he had performed this operation from four times a week to maybe once every two or three weeks.

He stated that during this process he began to feel sick at his stomach and stopped in order to go and throw up. Martin Schaechtel, the shift supervisor, came over and finished the job. At the hearing, Mr. Schaechtel testified that the chemical was strong but did not cause him to get sick. After Mr. Schaechtel took over, the claimant filled out an accident report and went home. He testified that he did not think it was going to amount to anything, but after two or three days, although he really did not hurt anywhere, he was just sick and was unable to eat or drink. He then sought medical attention and was diagnosed as having a myocardial infarction for which he received appropriate care, including surgery. He now contends that his condition should be considered a compensable injury or disease and that he should be awarded benefits as stated above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Ark. Code Ann. §11-9-102(4)(A) defines a compensable injury and specifically includes heart or cardiovascular injury, accident, or disease as set out in Ark. Code Ann. §11-9-114. That section provides:

11-9-114. Heart or lung injury or illness.

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

Thus, the Act implicitly recognizes that the development of cardiovascular or coronary disease and related problems such as myocardial infarction is the result of several factors, one of which may be the job while others may be related to the claimant's heredity, lifestyle, habits, such as smoking, general health, age, and use of substances such as Vioxx. The fact that the employment may have a causal connection to the claimant's myocardial infarction is not in itself sufficient for his condition to be compensable.

For example, Ark. Code Ann. §11-9-114(a) requires that an accident be the major cause of the claimant's physical harm. The next section requires that an injury or disease is not compensable unless it is the result of extraordinary and unusual exertion or that some unusual and unpredicted incident was the major cause of physical harm.

Here, the claimant's testimony indicates that the level of exertion involved in the incident was not extraordinary or unusual but was consistent with the employment activity that had occurred on a regular basis in the past. Moreover, the record fails to show that an accident or an unusual and unpredicted incident was the major cause of the claimant's physical harm. In the case of cardiovascular or coronary disease and a myocardial infarction in a gentleman of the claimant's age with a long history of smoking, some indication of alcohol abuse, and the use of Vioxx, recently removed from the market by the FDA, the issue of major cause is one which needs the support of clear medical opinion, which is lacking in this record. This does not mean that the incident at work had no bearing on the claimant's health problems nor does it suggest that the employer was handling this new chemical in a proper manner at the time of the incident. See, Claimant's Exhibit 3

concerning an OSHA inspection report. However, it would be necessary, impermissibly, to engage in conjecture and speculation on behalf of the claimant to conclude that the proof has risen to the requirements of the statute concerning his condition.

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