

BEFORE THE ARKANSAS WORKER'S COMPENSATION COMMISSION

CLAIM NO. F500528

TIM SWEENEY, EMPLOYEE	CLAIMANT
AMERICAN RAILCAR INDUSTRIES, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 5, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On May 17, 2005, a prehearing conference was conducted in this claim, from which a Prehearing Order fo the same day was filed. The Prehearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issue. The Prehearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Tim Sweeney, the claimant; Dean Inman; Kevin Hawes; Tom Hazelwood; Jerry Powers; Doug Smith; and Edward Sullivan, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Tim Sweeney, the claimant, with a date of birth of January 23, 1959, is a high school

graduate with one and one-half years of college education, commended his employment with respondent on April 20, 2004. Claimant asserts that he discharged duties as a sandblasting laborer for three weeks before being moved to the preparation of painting and later filled a painting position slot on July 19, 2004. Claimant performed the painting duties for respondent until the end of November 2004, when the night shift ended and he was transferred to days. Claimant denies that he experienced either physical limitations or restriction prior to his employment with respondents.

Claimant's testimony reflects that his job duties as a painter in the employment of respondent:

When painting, I would spray on tracts one and two - the gunnison and hopper-type cars - do exterior spraying on those. (T. 26)

Regarding the basis of his claimed injury of December 20, 2004, claimant testified:

The morning of the 20th, I was working what is called an out-man position that was assisting the sprayers - there were some that were there - for the record, some of the witnesses out there - that were working with me that morning. They'd be inside the car, suited up in other words, with a protective suit, air line - and they were applying a liner, which is a Carbitrol 992. I was on the outside of the car. When they would paint the - complete the top portion of the tank, they would drop their walk boards down to start the lower section of it. I would clean all debris - the walk board - strips - things like that - any trip hazard - keep their hoses from getting tangled - and then once they completed that, I would have to take off a protective coating over light fixtures and recovered the hatches when debris could not fall into the freshly applied surface. (T. 27).

Claimant asserts that there are no air lines available for the out-man, and as a consequence he did not have protective equipment. Claimant maintains that while not inside of the tank

he was in the tank area where the liner was being applied. In describing the ventilation in the area where he discharged his employment duties on December 20, 2004, claimant's testimony reflects:

There are floor vents - as far as the - I'm not an engineer - I have - though, as far as the inside - the filter medium inside of a grate in the floor that would be beneath the railcar - we would have to periodically take the flooring up in the plant areas because of the amount of over-spray being present in the area - and that added to the fact I was never provided, trained in the use of, or medically, quantitatively or qualitatively fit-tested for a respiratory mask that would have possibly protected me for the exposure. (T. 28)

Claimant acknowledges that presence of an outside fan that pulled the "excess fumes and things" out of the work area. In working the day shift, claimant's testimony reflects that they reported for work at 5:00 a.m. and until the amount of cars were completed, 3:00 to 4:00 p.m.

Claimant asserts that he sustained a respiratory injury as a result of his employment duties on December 20, 2004. Claimant testified that at approximately 11:45 a.m. on December 20, 2004, he experienced an inability to breathe. Claimant explained:

I make my way to the front office. Mr. Kevin Hawes and was actually in front of Robbie Gatlin's office. Mr. Kevin Hawes was there. I explained to him that I could not catch my breath. At that time, the first responder from ARI had administered oxygen - put an oxygen mask on me. I really am not aware of how long that I was wearing the mask. All I know is I'd seen that I'd made - I was feeling better and I had made a recovery of some sort and everyone - all the bosses went to lunch, with the exception of Jimmy. I believe his last name is Leach. They had told me - I say they - Robbie Gatlin and that after lunch they would find me. . .

He [Robbie Gatlin] was a superintendent - or is a superintendent in the paint department. Kevin Hawes would be my immediate supervisor and he was - to the best of my

knowledge, he was the man in charge of the painters. (T.30)

Despite his seeming recover following the administering of oxygen, claimant's testimony reflects that he relapse or recurrence:

They were just going to have some light-duty for me the remainder to the day. They told me to get something to eat and they'd have some light-duty for me the remainder of the day. However, about 20 minutes after this, the shortness of breath occurred again, at which time I went to Jimmy Leach and told him what was happening, used the phone in his office, and called my wife to come and get me. I had my vehicle there. I told her never mind, I was just going to drive to the hospital and get took care of, at which time I drive to the emergency room - well, actually, I met my wife on the way up there and she continued the rest of the drive for me to the emergency room, at which point I was treated and admitted into the hospital for a two-day period. (T. 30-31)

Claimant's work place was in Paragould. Claimant, who resided in Walnut Ridge, drove to the emergency room of Lawrence Memorial Hospital in Walnut Ridge. Claimant maintains that prior to departing the plant he informed supervisory personnel of respondent of his need and intentions to obtain medical treatment attributed to his breathing difficulties:

Your honor, I did to Jimmy Leach. I asked him specifically who would be the provider that I needed to go see. He said anybody would take their insurance, was what he hold me. (T. 32).

Claimant asserts that he relayed a history of his injury to the attending emergency room medical personnel at the time he was seen on December 20, 2004. Regarding the medical treatment provided during his admission, claimant testified:

. . . I had several up - what they call up-drafts, Albutero, and Preditid (phonetic) - I can't pronounce them. It's like a steroid-type of inhalant. Also, they would check my oxygen - what they call 0-2 level- during - after I would perform

walking and just simple exertion-type exercises to see what the amount of oxygen in my blood was and whether it would be safe to be released. (T.32).

Claimant asserts that he was provided with restricted release to return to work upon his discharge on December 24, 2004. The release prohibited work activities which exposed the claimant to chemicals. Claimant submitted the restricted release to supervisory personnel on December 28, 2004. Claimant added that Tom Hazelwood and Robbie Gatlin were in the office at the time. Claimant was provided work duties by respondent within the restrictions. Claimant was transferred to vinyl assembly area and his supervisor was instructed that claimant should not be exposed to paint. Claimant testified that he worked the day shift in the vinyl assembly area for approximately two weeks and was then returned to the night shift. Claimant worked the night shift in the vinyl assembly for an additional week.

Claimant ceased working for respondent on January 28, 2005. Regarding the afore, the testimony of the claimant reflects:

That was - I'd finally - I'd been after the supervisors in the front office about a raise that I thought was due to me back in October, and I never got a straight answer from them. They kept telling me - The only answer I would get was they would check into it. On that day, I finally got an answer from the human resources department that it was not coming to me.

And that, coupled with the fact that the safety personnel at ARI told me that I had to prove my injury before - that they would not file a workman's comp claim - that I decided I was not going to - I served by relationship with them - the organization. (T.34-35).

The testimony of the claimant reflects that he was physically able to perform his assigned job duties following his release to restricted duties:

I would work, yes, sir. It would sometimes be a few hours, sometimes overtime. It just - I was able to - I wasn't 100% , as far as my - I still had - I'd have to him my ventilator five and six times an evening, which I was only suppose to hit three times a day, just to make it through the shift and at the time, the only reason I was keeping the employment up there was for the fact that I had hospitalization and I knew I would no longer be able to get it without - having a pre-existing condition - that no medical provider - or no insurance company would even cover me. (T. 35).

Claimant's testimony reflects that he wrote in his resignation letter that he would not work for a company that would not pay or fix someone that the had injured.

Claimant testified that when he was admitted to the hospital on December 20, 2004, his wife provided the care of his group health care carrier to hospital personnel. Claimant noted that 80% of the bill were paid by group healthcare provider, that he was responsible for the remaining 20% with his annual \$250.00 annual deductible.

Claimant testified regarding the constraints place on him by respondent with respect to the filing of a workers' compensation claim growing out of the incident:

Your Honor, on the 28th [December] when I came up to the plant and was instructed to go to the human resources, at the time, I spoke with Jerry Powers and showed him the note I had from my physician saying that I could try to work if I'd stay a way from the descending - I don't have it exactly - he said Exposure to the chemicals or something - y'all have that . . .

He told me that anything could have caused that. I could have had a heart attached or anything and that it would be illegal for him to file a workman's compensation claim on the incident, as which I was totally stunned. At that time, I considered it a challenge to me when he said I had to prove it, and so, at that point, I began working to the best of my ability to prove it. (T. 38).

The testimony of the claimant reflects that he has not worked since last working for respondent on January 28, 2005. Claimant asserts that his respiratory problems, which he attributes to his exposure in the employment of respondent, is ongoing and require continued medical treatment testified:

. . . I would truly hope to make a recovery. That's all I want is to get fixed or to get my medical taken care of. (T. 39).

Claimant's testimony reflects that he last saw a physician regarding his respiratory complaint on June 14, 2005, by Dr. Michael Langley.

The testimony of the claimant reflects that prior to his employment by respondent, he worked for a company called Tech Finity, doing network writing and pre-wiring estimates for computer cable, which is located in Little Rock. Claimant acknowledged that he continues to do consulting work for Tech Finity upon request noting that he never resigned from there. Later, claimant characterized his employment arrangement as "self-employed".

The claimant's testimony reflects that he is in need of medical treatment attributable to the December 20, 2004, accident/exposure. Regarding his ability to work since the incident, claimant testified:

I can perform pretty much. I've got a lot of - as far as, you know, I'm strong and able to do things - the problem being, I become easily winded and once that occurs, then I start getting real forgetful because of, I guess the lack of oxygen getting to my brain. I find myself just - I can't hardly finish a task without forgetting what I'm doing.

It does not - I'm not getting any better. As far as my breathing, I still have difficulties almost on a daily basis. I would love - I'd kill to be able to sleep through the night - one night - without waking up, gasping for air. (T.41)

Claimant acknowledged that during his July 13, 2005, deposition he relayed that his symptoms on December 20, 2004, were shortness of breath and some coughing. Claimant denies having previously experienced similar symptoms. Claimant denied telling medical personnel on December 20, 2004, that he had previously experienced similar symptoms. Claimant concedes that in the weeks preceding the December 20, 2004, emergency room visit that he had a cough; however, denies any shortness of breath. Claimant testified:

I had a cough beginning about the time they put me on out-man duties. That would have been - I had an unproductive type of cough. (T.44)

Claimant disputes the accuracy of the December 20, 2004, report of the emergency room physician, Dr. Spencer with respect to the history and physical contained therein. Claimant acknowledged that he smoked prior to December 20, 2004, and was still smoking as of that date. Claimant did note, regarding the accuracy of the emergency room medical records:

I don't know - if you're talking about that record on when I was in the emergency room, it also said on there that I'd been hospitalized on the 4th of July for pneumonia, which was inaccurate.

I don't know where they got the information on that because I was not speaking to them. I had a mask on and was laid out in a chair. (T.46)

Regarding the addendums in the medical records, claimant testified that he noticed errors in the medical reports and inquired of Dr. Spencer about the source of the information. Claimant asserts that any changes made were not at his request but to ensure accuracy.

Claimant's responses to questions regarding smoking are evasive, at best. A nurse's entry in the emergency room records reflected of the claimant, a history of one pack per day

and that he had not smoked any in two weeks. Claimant responded that he did not recall saying the afore. Claimant was asked if he had ever been told not to smoke, and responded:

I've had things wrote down from doctors. I've had discussions with them. As far as any time, I've always approached them. Any time I would want to quit smoking or anything like that, I might have asked them for what - for one point - and example - Dr. Lancaster - I asked him about a drug called Wellbutrin - did they have - what kind of success rate on that, but, as far as them telling me orally, I don't recall that. (T.48)

While the claimant concedes that the physician orders/instructions provided on December 20, 2004, listed no smoking, he denies that the afore was verbally communicated; nevertheless, claimant acknowledged being offered Nicoderm patches and declining same.

Claimant noted that he smoked prior to commencing his employment with respondent and that he took a pre-employment physical which showed his pulmonary and respiratory function at "over 100%" of predicted for a man" of his age, height, and weight. Claimant testified that pulmonary tests since his employment have resulted in abnormal findings.

Claimant stressed that on December 20, 2004, he was assigned the job duties of "out-man." Claimant added that he is not aware of a duty/job called "booth cleanup." The testimony of the claimant further reflects:

We clean the booths. Normally, it's everybody on the shift, cleans them at one time - pulls the paper out, cleans the filter elements - it's not normally a duty just one person does. (T.51)

Although claimant denies that he had pneumonia in July, 2004, he acknowledged that in September, 2004, he was seen by Dr. Lancaster for pneumonia-like problems:

I had seen Dr. Lancaster in September, at which time I had

some tests run where they were going to see if there was any clinical evidence of pneumonia. (T.52)

Claimant acknowledged that the contents of an October 5, 2004, report reflecting that he was being followed up for pneumonia and anemia, and that he was wanting to stop smoking. Claimant also acknowledged seeing the December 20, 2004, x-ray report reflecting the results of probably bronchitis or pneumonia.

Claimant's testimony reflects that the only safety equipment provided to him on December 20, 2004, by respondent was safety glasses. Claimant testified:

I said - and stated for the record - I was never issued nor trained in the proper use and cleaning or qualitively or quantatively fit-tested for a full respiratory device. (T.54)

When questioned regarding his July 13, 2005, deposition testimony and the lack of avilability of safety equipment for the entire week that he worked inclusive of the December 20, 2004, date, claimant responded:

That would be - the only thing they've provided - and it really wasn't provided - there was a half-mask respiratory hanging on a hook in there. It was an old, nasty-looking thing - no telling you when the date of the cartridges being replaced - that would be what was furnished to the out-man. (T.55)

Claimant later conceded:

I had - wore the respirator in the period when they would spray - while the actual guns were spraying. I would take it off when I changed light bags and when I carried trash - the contaminated paper - out of the smasher. (T.55)

Claimant acknowledged that he has not gotten any further medical treatment relative to the December 20, 2004, shortness of breath incident other than the emergency room visit. Claimant testified that he does have medication that he takes, however. Claimant applied

for Social Security disability within seven to ten days of leaving the employment of respondent. Claimant acknowledged that he is receiving unemployment benefits.

Claimant asserts that a residual of his exposure to chemicals in his employment with respondent is the adverse effect on his concentration. Claimant testified that he is actively pursuing employment at this time. Claimant testified that the reason that he applied for Social Security disability was due to the fact that his breathing is about half of what it was when he started his employment with respondent.

Mr. Doug Smith, a six-year employee of respondent, testified that on the morning of December 20, 2004, he discharged employment duties in the interior spray booth, Tract 1. Mr. Smith further testified that claimant worked as his “out-man” on that day. Regarding whether the claimant performed booth cleanup on December 20, 2004, Mr. Smith testified:

Uh - it's been some time - I can't recall for sure, but usually cleanup is done after we run production for the day. (T.102)

Mr. Eddie Sullivan testified that he discharged employment duties of spraying inside the hoppers on December 20, 2004. Mr. Sullivan acknowledged that claimant has discharged the duties of out-man on Track 1.

Mr. Dean Inman, a ten-year employee of respondent, has held the position of senior human resources manager for seven years. Mr. Inman acknowledged that respondent does not have a time clock on premises, and as such, employees sign their time cards. The document signed by the employee also reflects the job performed in addition to the amount of time worked. Details from the time cards are then gathered by the accounting department of respondent and imputed into a computer which generates a printout.

Mr. Inman acknowledged that the employee handbook of respondent provides that if an employee is away from work for over six (6) days, before they return to work, respondent will ask them to take another physical and a drug test. Regarding the change in the claimant's job duties upon his return to work following the December 20, 2004, emergency room visit, Mr. Inman testified:

I would say that we would do everything in our power to keep an employee gainfully employed, if we could. If the person were doing their job and their doctor said, don't put him in that circumstance again, it's not good for them potentially, then what we would do is we would look for another job that employee could do that did not put him in the same circumstances. We would have accommodated an employee's needs. Yes, we do that. (T.75)

Mr. Inman testified that he could not find paperwork that reflects that the claimant was fit-tested qualitative or quantitative for a respirator device by respondent. (T.76)

Mr. Kevin Hawes, a four-year employee of respondent, discharged the duties of a Pint Technician Supervisor. Mr. Hawes was the claimant's direct supervisor during the pertinent time period of this claim. Mr. Hawes asserts that on December 20, 2004, claimant was working as a booth cleanup. In distinguishing the duties of booth cleanup from out-man position, the testimony of Mr. Hawes reflects:

Out-man position - what it is, is you have three or four guys inside painting, and the out-man position - what he does - he pulls boards, pulls paper, and pulls lights. He primarily watches for the guys inside the hoppers.

Paint booth cleanup - pretty much exactly what it says. It's paint booth cleaning up. You're picking up paper, tar paper, changing filters, or some of that nature like that. (T.79)

Mr. Hawes noted that at the time the booth cleanup work is being done there is no actual

paint being sprayed in the booth. Further, the testimony of Mr. Hawes reflects that protective equipment is issued to personnel performing the out-man position, which includes respirator, hard hat, glasses, gloves, and paint suits. Mr. Hawes described the paint suits as tie-pack paint suits, which are the same as the painters inside the cars use.

Mr. Hawes testified regarding his contact with the claimant on December 20, 2004:

Well, when Mr. Sweeney come up to the office and talked to Tom and I, he had his respirator and a paint suit on. He had the respirator in his hand and had his paint suit - he had the paint suit on. (T.80)

Mr. Hawes also testified that the claimant had safety glasses and hard hat at the time of his contact with him.

Mr. Hawes disputes claimant's assertion that the week prior to December 20, 2004, he was only furnished with safety glasses, in terms of protective equipment, in the discharge of his employment duties. Mr. Hawes asserts that if he had observed an employee in the plant only wearing safety glasses the employee would be written up, "cause he knew he was suppose to be wearing his suit and his respirator." (T.81)

In describing the ventilation system in place at the work site of respondent, Mr. Hawes testified:

In the interior booth, our ventilation system is right up under the cars. They pull the cars over this pit and our ventilation system pulls from up under the car. What that does is, you have men go up inside and they spray, and as they're spraying, you have the exhaust that's pulling the fumes out up underneath the cars.

Well, anything that - what they're spraying in there - everything is concentrated right there in that area. There's not many fumes on the outside of the car. Actually, where the

out-man is, very little paint gets out there. Most paint - it's an open hopper and most paint when you spray it, it just falls right down in that ventilation area. (T.81-82)

Mr. Hawes noted that the out-man would be on the outside of the car that was being sprayed where very few fumes would be located.

Mr. Hawes' testimony reflects, with respect to the complaints relayed by the claimant on December 20, 2004:

Well, he came up to the office and - he come up to the office and he talked to Tom - Tom Hazelwood, and he said he was having problems breathing. Tom Hazelwood and myself called the first responders. They sat him down. They gave him a breathing apparatus. They gave him oxygen, and they asked him if he was okay, and he said he was all right. Once we called the first responders, they took over - took over from there.

And that was it. He just said he was having problems breathing. But, he also said he was - he said it was coming from - he said he thought it was coming from his bout that he had with pneumonia a while back. (T.82-83)

Mr. Hawes testified that based on the claimant's comments they concluded that his difficulties breathing was the product of pneumonia. Mr. Hawes denies that the claimant, at any point, attributed his complaint to being work-related or some sort of chemical exposure. While Mr. Hawes asserts that the claimant was not performing out-man duties on the morning of December 20, 2004, he was unable to identify any other individual that was doing the job.

Mr. Tom Hazelwood, a ten-year employee of respondent, testified that he current holds the position of Coatings Manager. Mr. Hazelwood testified that he first became aware that the claimant was having breathing difficulties on December 20, 2004, around lunch time

when the claimant came in and reported his complaints. Mr. Hazelwood's testimony reflects:

He came up and said I'm having a hard time breathing, and I called some first responders to put some oxygen on him, and to have them to help him start breathing better, and then after they got through, and he started breathing, and I asked him if he felt all right, and he said he thought he was having another attack of pneumonia like he had had prior, a few months before that.

And I asked him if he felt like going home, he could go ahead and go home, and I would let his supervisor and them know that I sent him home. That way he could go to the doctor and get checked out. (T.92)

Mr. Hazelwood denies that the claimant relayed that his breathing complaint was work-related.

Mr. Hazelwood acknowledged that on December 28, 2004, he directed the claimant to go to the Human Resources office. Regarding the time of the day that he directed the claimant to go to Home Resources, Mr. Hazelwood testified:

I don't know what time you came in, but when you came in, you told me that you had a doctor's statement saying that you couldn't work around coatings and I, right then, sent you over to see Safety or HR, at that time. (T.94)

Mr. Hazelwood acknowledged that he was not aware of the claimant having breathing difficulties prior to December 20, 2004; however, added that claimant had previously worked on nights and that he was superintendent on days at the time.

Mr. Jerald L. Powers, a two-year employee of respondent, performs the job duties of Safety Administrator for respondent. Mr. Powers denies that he informed the claimant that it would be illegal for him to file a workers' compensation claim. Mr. Powers' testimony reflects regarding his communication with the claimant relative to the claim:

....No, the claimant was not accepted, and that he would have to process it because he went to a physician on his own, without contacting anyone. (T.98)

Mr. Powers testified regarding his discussion with the claimant on December 28, 2004:

No, sir. I said we could not process your claim until it was evaluated and that we feel if we processed a claim simply on what you said, that it could be a fraudulent claim. It would be illegal for us to do that. That's why I put you in with Steve Williams, the HR Manager, to explain the same thing to you - that because you had went to the doctor on your own - no contact with us - we had no knowledge of what happened - and that's why we could not pay your hospital bill, which is what you kept asking - who is going to pay this, and that was the main question you had. (T.99)

Mr. Powers further testified that he informed the claimant that he could not return to work until he was seen by his family physician and released to return to work without restrictions.

Mr. Powers testified that the procedure for reporting work injuries is for the employee to notify his group leader, superintendent, and one of the manager's staff.

Respondents obtained the deposition of the claimant on July 13, 2005. In his deposition, claimant testified that he had smoked off and on since he was a teenager. Claimant noted that the last time he quit smoking was in the winter of 2004. Further, the testimony of the claimant reflects that he enjoyed good health prior to his employment with respondent. Claimant noted that with the exception of seeing a physician in either 1996 or 1998, he had not required medical treatment since he was a teenager.

When questioned regarding the date of his exposure to chemicals at his work place, claimant's testimony reflects:

Probably daily. I don't know what the exact date. I know I was overcome by fumes and unable to breath December 20th,

2004. (RX. #5, p.25)

Claimant testified regarding his job assignment and duties on December 20, 2004:

It was – I was an out-man on track 1 assisting interior liner sprayers.

Physically watching them that they did not get into trouble inside the interior of the railroad car, make sure the hoses, airlines and such stayed secure, picking up debris and things in the area that might be a trip hazard, changing out – uh, gathering up paper that they use to mask off areas that they did not want paint – painted, changing the bags that protected the lighting fixtures from over spraying. Basically, it was removing all materials that they prepared car prior to painting, after the paint was applied. I keep calling it paint. It was actually a lining and gathering up the paper and the debris from – that was thrown out from the interiors as the workers uncovered it. (RX #5, p.26-27)

Regarding the onset of his difficulties on December 20, 2004, claimant's testimony reflects:

Okay. When was I exposed? I'm not a physician. All I know is approximately noon it was – I was so overcome I could not breathe unassisted. I was gasping for breath. Went up to the paint supervisor, Kevin Hawes, and explained that I could not breathe. Just a few minutes after 12:00. (RX #5, p.27)

Claimant denied ever previously experiencing symptoms of shortness of breathe or coughing prior to his employment by respondents. Claimant described other symptoms experienced on December 20, 2004, which he attributes to his exposure:

I had hives, a rash around where my gloves ended and around my collar area, above my eyes the redness and hives, which were noted by the emergency room and my attending physician in the hospital.

Dizziness. I guess it's a lack of total awareness of what was going on around me.

I had an unproductive cough. Could not seem to – it seemed

like I had to cough but nothing would cough up. (RX #5, p.28-29)

As far as a specific incident is concerned, claimant testified, with respect to the onset of his symptoms on December 20, 2004:

I noticed I had been working everything was fine, and I guess the last car we were painting it was as I was climbing down off the top of it. I noticed I was getting light-headed, and I rested at the bottom, and I noticed I was having a problem catching my breath.

That would be within just a few seconds of me leaving, so right at the onset of the problem. (RX #5, p.29)

Claimant assessed his complaint as a chemical irritant that induced an asthma attack or an allergic reaction.

Claimant noted that he had only been working on the job where he suffered the reaction about one week. Claimant described his job duties prior to the afore job assignment:

Um, let's see. I had been at it right at a week. Prior to that I would have a paint hood on with an airline and you spray cars where I couldn't be exposed. I would have protective gear on. (RX #5, p.32)

Claimant maintains that on December 20, 2004, he did not have protective gear on because he had not been issued any. Claimant further asserted during the deposition that he worked the entire week leading up to December 20, 2004, without any protective gear. Claimant noted that he had an onset of an unproductive cough when he began doing the out-man job. Claimant added that there had been a change in the lining (the chemical applied inside the car) being used while performing the out-man position, and attributes this adverse reaction to same.

Regarding the change in product used by respondents, claimant's testimony reflects:

The manufacturer had sent a different batch. From 990, it would to Carbo-Garb 992. (RX #5, p.34)

Claimant's testimony reflects with his prior use of the product and duration of exposure:

It seemed like I had done it once or twice just maybe like one car as needed prior to that. Never for an entire day or for days on end. Never for an entire shift. (RX #5, p.34)

Claimant identified the chemical that he suspects produced his adverse reaction as Carbo-Garb Part A & B 992.

Claimant testified that medical bills incurred relative to his emergency room visit of December 20, 2004, as well as other medical bills associated with the December 20, 2004, complaint were filed on his group health insurance, which was obtained through his employment with respondent. Further, the testimony of the claimant reflects that any balance not paid by the health care carrier was charged off in bankruptcy. The health care carrier was Great West. Claimant is currently in bankruptcy. (RX #5, p.37)

During his July 13, 2005, deposition, claimant asserted his rationale for filing the present workers' compensation claim:

...And that's not the issue I filed this claim on. The issue I filed this on is the fact that I'm now diagnosed with a condition I did not have prior to working for them, and my insurance and costs and quality of life are directly affected from this. (RX #5, p.39)

Claimant maintains that his treating physician, Dr. Clay Spencer, has diagnosed his condition as COPD, chronic obstructive pulmonary disease.

The testimony of the claimant reflects that he last worked for respondents on January

3, 2005:

It was Monday. I worked about a half a day. They put me doing light duties out of the paint department Monday and Tuesday. Wednesday I went back and started spraying on a car on track 1. Their safety man pulled me off and said I could no longer spray for ARI without unconditional release from my physician. They pulled in final assembly. I was exposed to welding and cutting on the train cars that had the same lining. It was directly affecting my breathing up there. They also reneged on their – they had been promising me a raise since November that never came through. I went and had Robbie Gatlin, the night supervisor, checking on it after about a week or two. I finally get the word from them that I was not getting my raise, and I came to the option at that time they certainly weren't going to pay for hurting me and did not care about my safety as I thought. I turned them into OSHA and got them three other violations in addition to their violations they were cited for in the paint department in the final assembly area, which they're probably another \$11,000 and something in fines for their lack of – (RX #5, p.45)

Claimant noted that he filed Social Security disability benefits in January, 2005, “right about the time I quit.” (RX #5, p.48)

The medical in the record reflects that the claimant underwent, and successfully passed a pre-employment on April 16, 2004, under the directions of Dr. Mack Shotts. An April, 2004, document to Mr. Jerry Powers from Dr. Shotts reflects:

It is my opinion based on the results of the pulmonary function test and physical exam, Tim Sweeney may wear a respirator while working at ARI. (CX #1, A3)

As a consequence of the pre-employment physical, claimant commenced his employment with respondents with no restrictions.

Claimant was seen at the emergency room of Lawrence Memorial Hospital on December 20, 2004, with a chief complaint of shortness of breath. The nurse's note of the

emergency room report reflects:

works involving paint, states “just can’t get my breath”, pt. reports redness, O pain in lungs, c/o Chest tightness, non-productive cough x 1 wk, suddenly worse today, pt. very SOB, states new job at work & wondering if poss. allergy to liner. (CX #1, A2-1)

The emergency room report also reflects a history on the part of the claimant of smoking one (1) pack of cigarettes per day, however none in two weeks. The clinical impression of the claimant’s complaint, as reflected in the emergency room report, was that of dyspnea-acute, COPD-acute exacerbation, and asthmatic bronchitis. (CX #1, A2-2)

Claimant was seen by Dr. Clay Spencer during his December 20, 2004, emergency room visit. The December 22, 2004, Discharge Summary of Lawrence Memorial Hospital relative to the claimant reflects, in pertinent part:

COURSE IN HOSPITAL: Mr. Sweeney is a 45-YO white male who had been admitted back in July for pneumonia but otherwise was not aware of any previous lung disease who presented to the hospital ER from work after developing a relative acute onset of shortness of breath and wheezing and had a rash on his neck and arms. He works painting railcars and states that he had been exposed to some fumes while spraying a liner for a railcar, which this is a relatively new substance that he has been exposed to over the last couple of weeks. He was found to have a pulse ox 85% on room air, and a chest x-ray which showed some heavy lung markings in his right middle lobe, which is clinically consistent with some element of bronchitis. He was admitted to the hospital and given IV Solu-Medrol and IV Levaquin and oxygen 2 liters by nasal cannula and Albuterol and Atrovent updrafts. Over the next couple of days he remained afebrile. His vital signs were all normal and he did improve. 12/21/04, he was noted to have a pulse ox of 93 while at rest on room air and down to 90% while ambulating, however, he was still relatively short of breath with activity and he was wheezing quite heavily. This morning on the day of discharge, he reports feeling

better, though he is still wheezing. He has had heavy cough and had some mild heartburn type symptoms. Otherwise, he denies any chest pain, nausea, vomiting, or abdominal pain. No lower extremity edema. (CX #1, A3-1)

The Discharge Summary also reflects the results of the claimant's physical examination at the time of discharge:

....He is alert and oriented and cooperative with the exam. His neck is supple with no lymphadenopathy. His rash on his neck and hands have cleared significantly.... His lungs show wheezing throughout with fair air movement....

Discharge Neds: Bactrim DS 1 po bid for 10 days, Prednisone 10mg 4 po q day for 4 days, 3 po q days, 2 po q day for 4 days, and 1 po q day for 4 days. Combivent MDI 2 puffs 4 times daily and Albuterol MDI 2 puffs every 4-6 hours as needed for shortness of breath. Guaifenesin/Codeine 1 teaspoon every 4-6 hours as needed for cough. He was also instructed to stop smoking, and he has been offered nicotine patch which he has refused. I will discuss this with him further on his next follow-up visit. I have recommended that he stay off work until his follow-up visit as well, and he is to follow-up with me in the clinic in one week. (CX #1, A3-2)

Dr. Spencer made three (3) addendums to the December 22, 2004, Discharge Summary at the request of the claimant. The first addendum reflects that the claimant relayed that he was mistaken regarding a hospitalization in July, 2004. Further, there are no medical records of a July hospitalization. Two February 12, 2005, addendums are reflected. One of the afore reflects:

I again note that I warned Mr. Sweeney that I could not go back and change any of his previous medical record, but that I would make an addendum for the sake of accuracy. Please note in the hospital course, in the first line where I stated that he had been admitted in July of 04 for his pneumonia, that was not correct, he had not been admitted to the hospital for pneumonia, but he had been seen by Dr. Lancaster in

September for what was felt to have been a pneumonia and was treated with Doxycycline. In the fourth or fifth line down, again where I noted that he was exposed to fumes while spraying liner for a railcar, again note that he was not actually spraying the liner but was in the booth working while the liner was being sprayed. (CX #1, A3-2)

On December 28, 2004, claimant was seen by Dr. Clay Spencer at Lawrence County Family Clinic. A release to return to work authored by Dr. Spencer relative to the claimant reflects:

Was Hospitalized 12/20/04 – 12/22/04 for respiratory illness, likely at least partially related to chemical exposure, possible allergic. He will be ready to return to work 1/3/04 [5]. He needs to avoid occupational requiring similar respiratory exposure. (CX #1, A4)

Medical records submitted by respondents reflects that the claimant was seen by Dr. Charles D. Davidson at Lawrence County Family Clinic on May 5, 2004, with complaints of difficulty swallowing and a sore throat for two (2) days. (RX #1, p.1) Claimant was again seen at Lawrence County Family Clinic on September 17, 2004, by Dr. Ted S. Lancaster, his family physician. The September 17, 2004, progress note reflects that claimant's chief complaint was "tired - stress - (work)" and that claimant wanted to stop smoking. Other entries noted in the record during the afore visit were, "no cough but some SOB & R chest pain" (RX #1, p.2A) Claimant was directed to remain off work for three days by Dr. Lancaster on September 17, 2004. (RX #1, p.2B)

Claimant was seen in followup by Dr. Lancaster on September 28, 2004, and October 5, 2004. The progress note regarding the visits reflects, "FU pneumonia anemia wants to stop smoking." (RX #1, p.3) Following the afore, there is no evidence that claimant sought

or obtained medical treatment again until the December 20, 2004, emergency room visit to Lawrence Memorial Hospital with a chief complaint of shortness of breath. The History and Physical relative to the December 20, 2004, emergency room visit of the claimant reflects, in pertinent part:

...Mr. Sweeney is a 45-YO white male who is generally relatively healthy other than a heavy history of smoking. He was hospitalized in July for pneumonia and had improved. He began wheezing a couple of weeks ago and took some of his Doxycycline left over from a previous infection and began feeling better, and then a couple of days ago he began having increasing cough and shortness of breath. While at work today, he states he was exposed to fumes while spraying on a liner for a railcar, which is his occupation. He began experiencing acute worsening shortness of breath and irritation of his eyes and breaking out in hives around his neck and forearms. He has only been using this particular liner for the last couple of weeks. He was then placed on oxygen and brought to the ER....

PHYSICAL EXAMINATION: He is a thin, white male who is in mild respiratory distress....

SKIN: He does have some excoriations about his wrists and hands, which he related to this rash, which came up today. He also has some maculopapular lesions on his posterior neck that are non-tender, and there is no exudate or vesiculation of these areas.

IMPRESSION:

- 1. COPD EXACERBATION. THERE IS ALSO PROBABLY SOME COMPONENT OF REACTIVE AIRWAY DISEASE RELATED TO THIS RECENT INDUSTRIAL EXPOSURE GIVEN THIS ACUTE ONSET AND COINCIDENT EXPOSURE.**
- 2. CONTACT DERMATITIS VERSUS URTICARIA. THIS IS ALSO LIKELY**

**RELATED TO HIS RECENT EXPOSURE TO
THE FUMES OF THIS NEW CHEMICAL HE
HAS BEEN WORKING WITH.**

3. TOBACCO ABUSE. (RX #1, p.4-6)

Claimant ceased his employment with respondents on or about January 18, 2005. On June 14, 2005, claimant was seen by Dr. Michael Langley, who he described as respondents' designated physician. In his June 14, 2005, Progress Notes, Dr. Langley assessed the claimant's complaints as asthma and sleep disturbance. Dr. Langley concluded that the claimant was released with no limitation on standing, walking, sitting, and that he able to lift, carry, push or pull objects. (RX #1, p.24-25)

On or about January 28, 2005, claimant completed a resignation form to respondents. The reason given by the claimant for his resignation from the employment of respondents was that he did not receive raises as he was told at the time of hire and that respondents refused to reimburse him for the hospital stay which claimant attributed to being injured at work. (RX #4, p.1)

The Arkansas Employment Security Department notice of agency determination records reflect that the claimant quit on June 18, 2005, because of personal illness. (CX #1, B) Claimant testified, and the record reflects, that he received \$231.00 per week in unemployment benefits. (RX #3)

The record also contains Carboline Co. Material Safety Data Sheets relative to Carboguard 992 Part A. The MSDS notes that inhalation to overexposure will be irritating to mucous membranes, that contact may cause skin irritation. The MSDS also reflects that inhalation may cause allergic respiratory reaction. (CX #1, E10-17)

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and applicable case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 20, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On December 20, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$275.00/\$207.00, for temporary total/permanent partial disability benefits.
4. On December 20, 2004, the claimant sustained an inhalation injury arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the period December 21, 2004, continuing through January 3, 2005.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 20, 2004.
7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

The primary issue before the Commission is the compensability of the claimant's of entitlement to workers' compensation benefits as a result of having been exposed to chemicals in his workplace. Claimant asserts that as a result of his exposure to chemical

fumes within the course and scope of his employment, he required medical treatment and was rendered incapacitated from engaging in gainful employment for a period of time. Claimant seeks corresponding workers' compensation benefits as a result of the afore. Respondents deny the compensability of the claimant's claim.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. The Arkansas Workers' Compensation Commission has held that conditions caused by the inhalation of fumes are occupational diseases and subject to the provisions of Ark. Code Ann. §11-9-601(e)(1)(A) (Repl. 2002).

An occupational disease is defined as any disease resulting in disability or death that arises out of or in the course of an occupation or employment. Prior to the enactment of Act 1281 of 2001, the burden of proof was clear and convincing evidence in order for a claimant to prove a compensable occupational injury. 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. *Osmose 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).

In the instant claim, claimant commended his employment with respondents on April 20, 2004, as a sand-blasting laborer. After performing the afore job for a period of three (3) weeks, claimant was moved to the preparation for painting until a slot opened in the paint spraying department a month later. Claimant performed the sprayer job duties for a period

of two (2) weeks prior to July 19, 2004. Claimant discharged duties as a sprayer on the night shift until approximately October/November, 2004, when he was placed on the day shift.

Claimant underwent a pre-employment physical, which included a pulmonary function test, at the time of his employment by respondents and was deemed capable of wearing a respirator while working. It is not disputed that claimant has been a smoker for well over twenty (20) years. There is medical in the record which reflects that claimant sought or required medical treatment for respiratory complaints prior to his employment by respondents. In September and October, 2004, claimant experienced pneumonia-like symptoms for which he received medical treatment.

There is no evidence in the record to reflect that the claimant was fit-tested for a respiratory device by respondents. While asserting that the claimant would have been one of the very few who would have slipped through the cracks, Mr. Dean Inman, Senior Human Resources Manager, conceded that he could not find paperwork evidencing that the claimant was fit-tested.

Contrary to the assertions of respondents, the credible evidence reflects that on December 20, 2004, claimant performed the job duties of the out-man position, which consisted of assisting the sprayers who were actually inside the railcar hoppers applying the liner, Carbogard 992. Mr. Doug Smith, a six-year employee of respondent, corroborated the testimony of the claimant with regards to the claimant's job as his out-man on December 20, 2004.

There is not a dispute that liner being applied on December 20, 2004, was Carbogard 992. The Material Safety Data Sheet regarding the afore reflects the type of symptom that

could be experienced from overexposure inhalation of fumes from the product. (CX #1, E11-17) The symptoms experienced by the claimant on December 20, 2004, mirror those reflected in the MSDS.

A review of the medical records relative to medical treatment received by the claimant on December 20, 2004, at the emergency room of Lawrence Memorial Hospital reflects a history consistent with the claimant's testimony regarding the onset of symptoms and a nexus of the symptoms to his employment activities. Further, the medical evidence reflects that the claimant presented with symptoms of shortness of breath, irritation of his eyes, and hives around his neck and forearms. Claimant was admitted to the hospital overnight following the December 20, 2004, emergency room visit. Further, claimant's condition was diagnosed as COPD exacerbation, asthmatic bronchitis, and urticaria by the attending physician, Dr. Clay Spencer, following his examination of the claimant. Claimant treated with Dr. Spencer following his December 21, 2004, hospital discharge.

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. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). On December 20, 2004, claimant discharged employment duties which placed him in close proximity to fumes from liner material being applied to the railcar hopper. The produce used in applying the liner, Carboguard 992, as reflected in the MSDS, when overexposed, produced the same symptoms suffered by the claimant, as reflected in the medical records. The claimant required medical treatment following his exposure to the fumes at work. Further, the medical evidence reflects objective findings, as defined by Ark. Code Ann. §11-9-102(16), establishing the

injury. The claimant has sustained his burden of proof, by a preponderance of the evidence, that he suffered an occupational disease arising out of and in the course of his employment on December 20, 2004. Respondents have controverted this claim in its entirety.

Ark. Code Ann. §11-9-508(a) mandates that employers provide such medical services as may be reasonably necessary in connection with the employee's injury. In the instant claim, the evidence preponderates that respondents were aware of the claimant's December 20, 2004, injury. Claimant received emergency treatment from first responders after reporting his complaints to appropriated supervisory personnel. Claimant sought further medical treatment at the emergency room of Lawrence Memorial Hospital in Walnut Ridge, Arkansas. Claimant resides in Walnut Ridge. Respondent is located in Paragould. The medical reflects that after obtaining further medical treatment at the emergency room, claimant was admitted overnight. The claimant's condition improved with the medical treatment provided in the hospital such that he was discharged on December 21, 2004. Nonetheless, claimant was directed to followup with his treating physician after his discharge. The evidence preponderates that the medical treatment rendered to the claimant at Lawrence Memorial Hospital and under the care of the treating physician at Lawrence County Family Clinic, as well as referrals therefrom, was reasonably necessary medical treatment in connection to the injury received by the claimant on December 20, 2004. Respondents have controverted this claim in its entirety.

Claimant remained off work relative to the compensable injury of December 20, 2004, until January 3, 2005. Claimant returned to the employment of respondents on January 3, 2005, and discharged assigned job duties until he terminated his employment on

or about January 18, 2005, due to a dispute regarding an increase in his hourly wage rate. Entitlement to temporary total disability benefits for an unscheduled injury is contingent upon a showing that the claimant is completely incapacitated from earning wages and remains within his healing period. *Arkansas State Highway Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Ark. Code Ann. §11-9-501(a) provides that once disability extends beyond seven (7) days, excluding the date of injury, compensation shall commence on the ninth (9) day.

AWARD

Respondents are herein ordered and directed to pay all reasonable and necessary medical, hospital, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable occupational disease injury of December 20, 2004. Respondents may claim credit for sums heretofore paid regarding the afore, pursuant to Ark. Code Ann. §11-9-411.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge