

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405963

MARVIN A. BURNETT, EMPLOYEE CLAIMANT

SCOTT TRACTOR CO., EMPLOYER RESPONDENT

ARGONAUT INSURANCE CO., CARRIER RESPONDENT

OPINION FILED JUNE 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on March 24, 2006 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE ROBERT R. CORTINEZ, SR., Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-114.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties have agreed to the following stipulations: An employer-employee-carrier relationship on May 27, 2004 at which time the claimant was earning

sufficient wages to be entitled to a compensation rate of \$453.00/\$340.00 in the event this claim is found to be compensable. Some benefits have been paid by Blue Cross/Blue Shield.

The claimant contends he received an aggravation of a preexisting condition on May 27, 2004 when he inhaled a herbicide while performing his job duties. He seeks payment of medical expenses, temporary total disability benefits from May 27, 2004 to July 12, 2004 and attorney's fees.

The respondents contend there is no causal connection between the claimant's symptoms and his employment. The claimant suffers from a long history of respiratory ailments (chronic obstructive pulmonary disorder, coronary artery disease, asthma, allergies, sinus infections), necessitating medical treatment just days before this incident. Additionally, the claimant has performed this same job for 27-28 years and Dr. Campbell has opined that the herbicide was not an irritant.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. The claimant's objection to the relevancy of some of the respondents' exhibits, medical records predating the injury, was overruled. Since the respondents' defense centers around the claimant's preexisting condition, those records are indeed relevant to a review of this claim.

The claimant, age 49 (D.O.B. September 12, 1956), has an eleventh grade education and training as a farm equipment repairman. He began work for the

respondent-employer in 1995. The claimant's health history includes asthma, allergies, diabetes, sleep apnea with sinus congestion, and acid reflux disease. The claimant also has heart disease, suffering a heart attack at the age of 38, and vascular disease, requiring balloon angioplasty in his legs in 1999.

On May 27, 2004, the claimant made a service call to a farm, located the malfunctioning tractor, and started the engine to determine the cause of the problem. The tractor was outfitted with a herbicide sprayer. When the claimant walked around the tractor, a substance was inadvertently released from several nozzles on the spray rig and the wind carried the substance to the claimant's face. Immediately, he began gasping for breath. The claimant used his asthma inhaler to no avail.

The claimant drove back to his employer's business, reported the incident, and was assisted to his family doctor's office by his brother. Dr. Whipple treated the claimant's breathing difficulty but expressed concern over the stress this incident might have on the claimant's heart disease. The claimant saw his cardiologist, Dr. Alshami and his pulmonary specialist, Dr. Clyde Campbell, who gave the claimant an injection that provided relief.

Dr. Campbell excused the claimant from work until May when the claimant began working part-time. He resumed full time duty in August. In January, 2005 the claimant broke his ankle at work and received workers' compensation benefits. The claimant returned to work for thirty days before he was laid off in May. He then

applied for unemployment (ESD) benefits.

On cross-examination, Attorney Frye emphasized the similarity in the claimant's symptoms after the incident with those symptoms the claimant suffered on prior occasions. In various medical records, the claimant has complained of shortness of breath, chest pain, racing heart, light headedness and fatigue. The claimant explained that sometimes sinus congestion, coronary artery disease, asthma, and acid reflux disease produce similar symptoms. The claimant also explained that exposure to pollen, any strong fumes (like diesel exhaust) or mold irritates his asthma. However, the claimant emphasized the incident with the spray rig caused the most severe symptoms he had ever experienced.

The claimant does not know what chemical was in the spray rig. He took a herbicide label off a container at a different farm to Dr. Campbell for his review. Dr. Campbell opined that this particular herbicide would not have caused his symptoms. The claimant stated that the chemical in the spray rig burned his skin (small red specks) but there is no mention of this in the medical records. Interestingly, a report form (p. 4-6 of the claimant's exhibit) indicates a co-worker was sent to finish the job after the claimant became ill and the chemical blistered the co-worker's face. The co-worker is not identified in the report and was not called as a witness.

MEDICAL EVIDENCE

The claimant has been treated for this injury by his family practitioner, Dr. Whipple, a pulmonary specialist, Dr. Campbell and a cardiologist, Dr. Alshami.

The medical records begin in 1994, referring back to sinus surgery in the 1980's. Despite treatment, the claimant has been plagued by chronic chest and sinus congestion, bronchitis, sleep apnea, shortness of breath, angina, and severe allergies. Reports do indicate, however, that his respiratory problems are aggravated by inhalants:

Dr. Campbell's report of 4-4-01:

Although his symptoms wax and wane he has never been able to identify things that aggravate his breathing. He does feel a little bit more short of breath when it is very hot and humid and on exposure to some pungent odors like Purex or certain perfumes.

Dr. Campbell's report of 3-11-02:

He is having a fair amount of trouble at work. His shop stays close (sic) up in the wintertime and frequently co-workers will crank up a diesel engine or bring in a dusty combined (sic) and either one causes acute distress so that he needs to use his rescue bronchodilator (sic) and get out of the area for awhile.

Dr. Campbell's report of 3-11-03:

He did have a flare about 2 weeks ago. He was working in a shop and apparently an oil type furnace was cranked up and was not vented properly and a lot of smoke backed up in the room. Two other non asthmatic individuals had pretty severe coughing fits.

Dr. Campbell's report of 9-15-03:

About 2-3 weeks back he got really covered in dust from a combine while working on a tractor in the same field. He has been considerably worse since then. He had a lot of congestion and nasal drainage, coughing and wheezing.

The claimant saw his family physician for sinus trouble just a few days before the incident at work.

Dr. Whipple's report of 5-10-04:

cc: "I feel miserable. I can't breathe" c/o sinus problems with congestion and drainage down back of throat.

After the incident at work on May 27, 2004, the claimant saw his physicians, giving a history of injury consistent with his testimony:

Dr. Whipple's report of 5-27-04:

cc: "I can't breathe." States he woke up this a.m. and felt great until his work sent him out spraying chemicals this a.m. c/o his Combivent inhaler did not seem to help at the time.

HPI: This 47 y/o wm, with hx. of severe allergies and sinusitis and asthma, was working with some chemicals this morning and once he got a whiff of them he began to feel his airway tighten and close up. His usual inhalers did not relieve his severe bronchospasm which led to anxiety and a feeling of tightness around his chest.

Dr. Campbell's report of 5-27-04:

He had a severe episode at work this morning. He was on a service call working on a tractor in a barn. It had a chemical spray tank that was supposedly cleaned out but it had residue all over the place. It is not clear to him just exactly what set this off but he developed severe distress... He has been in to see Dr. Alshami today and was told that he had increased fluid around his heart... the exposure to the dust, chemicals and whatnot really cause him a lot of trouble (at work).

Despite the claimant's testimony to the contrary, the medical records indicate the doctor did indeed review information concerning the relevant herbicide and could not causally relate these chemicals to the claimant's asthma.

Dr. Campbell's report of 8-30-04:

He has gotten the names of the chemicals in the tank of the tractor he was working on when he had trouble. One if (sic) Facet 75 DF and the other is Commit 3 ME. He

had the MSDS on the Facet and it apparently is not much of a respiratory irritant, although it does have a little Caloin in it.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

It is the claimant's burden to prove a causal connection between the work-related accident and the later disabling injury. Lybrand v. Arkansas Oak Flooring Co., 266 Ark. 946, 588 S.W.2d 449 (Ark. App. 1979). Objective medical evidence is not always necessary if there is a preponderance of non-medical evidence. Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.2d 375 (2002).

The determination of whether the causal connection exists is a question of fact for the Commission to determine based on the evidence of record and the credibility of the witnesses. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998), Ellison v. Therma-Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

The evidence of record shows the claimant has a long history of upper respiratory conditions. On May 27, 2004 the claimant suffered an asthma attack while at work. The claimant later took information about a herbicide to his pulmonologist. According to the claimant's doctor, the chemicals inhaled by the claimant would not aggravate asthma. Accordingly, I find the claimant has not proven a causal connection between his employment and his injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employment relationship existed between the parties on May 27, 2004.
2. Based on the medical records of Dr. Campbell, the claimant was not exposed to a herbicide that aggravated the claimant's preexisting asthma. The claimant has therefore failed to prove a causal connection between his employment and his medical condition.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge