

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408635

ANTHONY C. FOOTS, EMPLOYEE

CLAIMANT

**TREFILARBED ARKANSAS, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED OCTOBER 19, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on July 21, 2006 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE SHEILA CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM M. "SHANE" BRIDGFORTH, Attorney at Law, Pine Bluff, 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 compensable injuries pursuant to Ark. Code Ann. §11-9-102 and §11-9-601. All other issues are reserved.

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 preponderates in favor of the claimant on the issue of some medical expenses.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on August 3, 2004 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$453.00/\$340.00, in the event this claim is found to be compensable. Some medical expenses have been paid by Blue Cross Blue Shield-Health Advantage.

The claimant contends he inhaled toxic fumes while working on August 3,

2004 which aggravated an undiagnosed preexisting respiratory problem, causing him to black out and fall injuring his back. The claimant seeks payment of medical expenses, temporary total disability benefits from August 4, 2004 to a date yet to be determined and attorney's fees.

Respondents contend the claimant did not suffer an on-the-job injury. The plant was inspected by OSHA and no abnormalities were found. There are no objective findings to substantiate either a back injury or a respiratory condition. The claimant blacked out at work due to his preexisting medical problems including hypertension, heart disease, and obstructive airway disease.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with Dr. Christopher John's deposition taken January 27, 2006.

The following witnesses testified at the hearing: the claimant and safety manager, Mike Barrett. Mr. Barrett testified the claimant asked to be removed from the area with chemicals and he was accommodated. At the time the claimant blacked out, he was working in an area with no chemicals. Mr. Barrett also stated the claimant never reported a back injury. Mr. Barrett explained the plant passed an OSHA inspection, and a copy of that report is included in the exhibits.

The claimant, age 36 (D.O.B. July 29, 1970) has worked for the respondent-employer since 1997 as a maintenance technician repairing and servicing equipment. He worked in a chemical environment and wore a respirator, (Tr. p. 6-9).

About four weeks prior to the accident, the claimant began experiencing fatigue, nausea and shortness of breath. He asked his supervisor to change departments so he would not be subjected to chemical fumes, (Tr. p. 19, 20).

On August 3, 2004 the claimant blacked out at work and fell, (Tr. p. 14, 20-22, 26). His employer sent him to the emergency room at Jefferson Regional Medical Center. It was the claimant's understanding that he suffered from carbon monoxide poisoning. In an effort to identify the source of the problem, he had his vehicle and home furnace checked but no leak was found. The claimant was excused from work for three days.

The claimant was treated by Dr. Redmon and pulmonologist, Dr. John for reactive airway disease triggered by inhalation of strong odors such as perfume, chemicals, or bleach, (Tr. p. 11, 15).

The claimant returned to work August 11, 2004 and filed a complaint with OSHA. He was then suspended for three days for insubordination before his employment was terminated August 31, 2004. The claimant filed for unemployment benefits but his claim was denied. After a ten week waiting period he drew \$320.00-\$340.00 weekly for six months. The claimant filed for Social Security Disability benefits and was denied. He now runs his own construction company which he started in August, 2005.

The claimant has also litigated, unsuccessfully, complaints against the respondent-employer for violations of his civil rights, the Family and Medical Leave Act, the Americans with Disabilities Act, and he filed two EEOC claims.

MEDICAL EVIDENCE

_____The claimant saw Dr. L. T. Alexander on November 18, 1997 for a spirometry (breathing) test and was diagnosed with a mild obstruction, (p. 10 of the claimant's exhibits). If there was any follow-up on this diagnosis, it was not introduced into evidence.

The claimant saw Dr. Redmon on February 4, 2004 about five months prior to the incident at work on August 3, 2004. He complained of chest pain, left hand and arm numbness and shortness of breath for two months in duration. He informed the doctor that over the last year his respiratory problems made him intolerant of inhalants such as smoke and chemicals. The doctor suspected asthma, treated him for gastric reflux, and ordered a stress test and lab work. The diagnostic testing was unremarkable.

The claimant was taken by ambulance to the emergency room on August 3, 2004. A discharge report shows the claimant was excused from work for three days and advised to have his home furnace and car exhaust checked for a carbon monoxide leak. A statement from A-1 Muffler dated August 6, 2004 indicates no leak was found in the claimant's car.

The claimant then saw Dr. Redmon complaining of shortness of breath related to chemical exposure at work. Dr. Redmon issued work restrictions, excusing the claimant from using a respirator at work, and referred him to a pulmonologist.

Dr. Redmon's report of 8-10-04:

Mr. Fouts is in continuing to complain of problems with SOB, which he says is brought on by all the chemicals he is exposed to (sic) work, and having to wear a respirator. He says he had an episode a few weeks ago where he had a syncopal episode while he was wearing the respiratory (sic). They took him to the ER, and he states that he had some carbon monoxide in his system, but I don't have any record of that. He is convinced that he has been exposed to noxious chemicals and has had a severe decline in his health secondary to both the chemicals and the respiratory (sic).

I asked Mr. Fouts if he was wearing a respirator, and he said he wore one sometimes, but sometimes it just got too hot.

The claimant saw pulmonologist, Dr. Christopher John in October 2004. He

was diagnosed with Reactive Airway Disease (RAD) and advised to avoid exposure to inhalants (dust and chemicals) and to extreme temperatures (heat and cold). Dr. John commented in a letter dated November 18, 2004, "The purpose (of these restrictions) would be to prevent further increase in airway reactivity. There is no guarantee, however, that by avoiding these substances that you would not develop further problems with your breathing."

In his deposition, Dr. John testified he treated the claimant from September 2004 to October 2005. The claimant complained of shortness of breath since January, 2004 with a sensitivity to strong odors and nausea. The symptoms developed gradually and the claimant attributed his problems to his work environment since he was not a smoker and had no preexisting lung disease. The claimant experienced the symptoms both at rest and during exertion.

In determining causation, Dr. John noted the claimant had an enlarged heart due to hypertension and was moderately overweight. He conducted additional testing to rule out sleep apnea, ischemic heart disease, and reactive airway disease (RAD). After investigation, Dr. John prescribed medication for hypertension, asthma and RAD and referred the claimant to a cardiologist. Dr. John explained that RAD can be caused by infection, asthma, exposure to industrial pollutants and strong fumes or an allergic reaction.

The only mention of a back problem is found in Dr. Redmon's report of July 16, 2004. The claimant complained of pain, one month in duration. Dr. Redmon added, "He doesn't know of anything that brought that on." X-rays of the spine were unremarkable and the claimant was diagnosed with musculoskeletal back pain.

DOCUMENTARY EVIDENCE

The OSHA inspector investigated the building's ventilation system, chemical exposure, especially carbon monoxide, and the heat the employees were exposed to while working. The inspector found no violations.

FINDINGS AND CONCLUSIONS

The evidence of record shows the claimant has a history of respiratory problems dating back to 1997. He also has some cardiac and gastric problems that have contributed to his symptoms. The claimant works in a hazardous chemical environment requiring the use of a respirator, which he does not wear consistently.

As I interpret the medical records, the claimant's respiratory symptoms are actually two different problems:

- a specific incident on August 3, 2004 diagnosed as carbon monoxide poisoning governed by Ark. Code Ann. §11-9-102

and

- a gradual development of reactive airway disease governed by Ark. Code Ann. §11-9-601

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. Under the Act, the claimant has the burden of proving the following requirements by a preponderance of the evidence of record:

1. An injury arising out of and in the course of employment
2. An injury causing internal or external harm to the body, requiring medical services or resulting in disability or death
3. An injury established by objective medical findings
4. (a) An injury caused by a specific event identifiable by time and place of occurrence

or

5. (b) A gradual injury, caused by rapid and repetitive motion, which is the major cause of the disability or need for medical treatment.

The carbon monoxide poisoning was diagnosed with a blood test, an objective finding. The exposure caused the claimant to lose consciousness, and therefore produced bodily harm which required medical treatment and produced disability as the claimant was taken off work for three days. Even though there was no OSHA violation, the exposure was too much for the claimant's system to handle in view of his compromised respiratory system and his failure to use his respirator consistently. The claimant's condition developed while he was at work and there is no other logical explanation for this injury. Therefore, I find the injury arose in the course and scope of employment.

Accordingly, I find the claimant's carbon monoxide poisoning was causally related to his work. However, the award is limited to costs associated with the ambulance and emergency room visit. The claimant was excused from work only three days and therefore is not entitled to any temporary total disability benefits or attorney's fees.

Assuming arguendo, that the carbon monoxide poisoning is not compensable, the respondents would still be liable for the ambulance and emergency room visit pursuant to Southern Hospitalities d/b/a Quality Inn v. Britain, 54 Ark. App. 318, 925 S.W. 2d 810 (1996).

The evidence of record also shows the claimant never reported a work-related back injury to either his employer or his physician. The only diagnostic testing conducted, an x-ray, showed no objective evidence of an injury. Therefore, I find the claimant has failed to prove by a preponderance of the evidence of record that he

sustained a compensable back injury pursuant to Ark. Code Ann. §11-9-102.

The claimant's other respiratory ailments, asthma and/or RAD, are governed by Ark. Code Ann. §11-9-601, the statute for occupational diseases. In order to prove a compensable injury, the claimant must prove by a preponderance of the credible evidence of record that

- 1) the disease arose out of and in the course of his employment
- 2) the disease is causally related to the employment
- 3) the disease is not an ordinary disease of life to which the general public is exposed
- 4) the disease is due to the nature of the employment and the hazards of the disease are peculiar to the employment

In the case at bar, the claimant's respiratory condition is diagnosed by a breathing test which produces objective data, DeQueen Sand & Gravel Co. v. Cox, ___ Ark. App. ___, ___ S.W.3d ___ (2006). However, the pulmonologist cannot causally relate the claimant's condition to his work, explaining that asthma and RAD have several causative agents. Accordingly, I find the claimant has failed to prove a causal connection between his respiratory condition and his employment.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 3, 2004.
2. The claimant has proven by a preponderance of the credible evidence of record that he sustained carbon monoxide poisoning caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay expenses associated with the ambulance and emergency room treatment.
4. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable back injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
5. The claimant has failed to prove by a preponderance of the evidence that he developed a compensable occupational disease as defined by Ark. Code Ann. §11-9-601.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge