

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F502927**

**BETTY S. SCHRAND, EMPLOYEE**

**CLAIMANT**

**ARAMARK HEALTHCARE SUPPORT  
SERVICES, EMPLOYER**

**RESPONDENT**

**INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA/SPECIALTY RISK SERVICES,  
CARRIER/TPA**

**RESPONDENT**

**OPINION FILED JUNE 15, 2006**

A hearing in this case was conducted on December 19, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held in this claim on September 20, 2005. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations. Two of these stipulations are listed in the Prehearing Order and were confirmed at the hearing; the parties agreed to the third stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on January 19, 2005 and at all other relevant times.
2. Respondents controvert this claim.

3. Claimant's average weekly wage was \$320.00 a week based on forty hours a week on the average, with a payment of \$8.00 an hour.

At the December 19, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. In light of the parties' stipulation concerning Claimant's average weekly wage, further consideration of the fourth issue listed in the Prehearing Order is not necessary. The parties then agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable inhalation injury on January 19, 2005.
2. On what date did Respondents receive notice of this claim?
3. Whether Claimant is entitled to medical benefits.
4. Whether Claimant is entitled to temporary total disability benefits.
5. Whether Claimant is entitled to an attorney's fee.

### **POST-HEARING BRIEFS**

At the conclusion of the December 19, 2005 hearing, the parties were allowed thirty (30) days to submit post-hearing briefs. Both parties took advantage of this opportunity. Therefore, the following items will be blue-backed and made a part of the record:

1. Respondents' January 16, 2006 Post-Hearing Brief; and
2. Claimant's January 17, 2006 Post-Hearing Brief.

### **DISCUSSION**

#### **A. Compensability**

Claimant has a history of respiratory disorders. She smoked approximately one

pack of cigarettes a day for about thirty years; she's had bronchitis "off and on all" her life. In February of 1999 Claimant presented to Dr. Scott Kuykendall complaining of an increasing cough, congestion, and shortness of breath. In a discharge summary dated February 20, 1999, Dr. Kuykendall observed that Claimant has "a fairly severe bronchitis" as well as chronic obstructive pulmonary disease. Dr. Lee Tackett examined Claimant on February 27, 1999. He noted "wheezing" and a "quarter size patch of pneumonia in her right base with some atelectasis in her left lower lung."

At the time of the hearing, Claimant was 57 years of age. In March of 2004 she began working for the Respondent employer; at the time of the incident, she worked as a cook in a hospital kitchen operated by the Respondent employer.

For a few days prior to January 19, 2005, Claimant apparently experienced some difficulty breathing. Dr. John Holston's January 24, 2005 note records that Claimant "had been doing reasonably well up until about two weeks ago when she began having episodes of what sounds like bronchitis with cough, possibly some low grade fever, and mucopurulent sputum production." This corroborates the testimony of Carrie Bryant, another employee of the Respondent employer, who described Claimant's condition in the "days prior to" January 19, 2005.

Q. How was she doing?

A. She had been sick before then, but I don't know what time frame.

Q. Sick in what way?

A. I think she had bronchitis.

Q. Did she complain to you about that and say to you, "I have bronchitis"?

A. Yes. We were very close.

Q. Okay. What sort of symptoms was she complaining about from bronchitis?

A. Coughing, shortness of breath, not feeling well.

Thus, Claimant demonstrated symptoms of respiratory distress in the days prior to January 19, 2005.

Claimant described what happened on January 19, 2005.

That week, the 19th, was supposed to have been my day off. I was asked to come in anyway because the gas was to be shut off to the ovens so our meat could be fixed that day. Carrie and Charles [Peoples, Claimant's supervisor] both asked me to come in, which wasn't unusual. Every time somebody didn't show up or couldn't do it, it was me. I said okay, that I would do it.

So I came in and they shut the gas off around 10:00 o'clock. That's when Charles decided he was going to smoke port butt and beef briskets in the oven right there in our work area.

....

[Charles] gets some dish towels and wets them. After he puts the charcoal in the oven with the lighter fluid and gets it going, then he adds right away probably about a 50-pound bag of charcoal and 25-pound of wood chips.

....

[W]e kept complaining. [Charles] propped the [oven] door open with wet towels, and then the towels caught on fire. He was in the office. So I grabbed the towels and ran to the sink to put them out, and one of the others ran and told him. He came over there and laughed about it. When we complained, he said, "It sounds like a personal problem to me."

....

Smoke is rolling out all over the kitchen over there. We did have a vent-a-hood over the top, but it is not adequate for that kitchen.

Claimant's duties required her to use the stove above the oven in question. Thus, she was directly exposed to the smoke from the oven. She testified that "[a]t the beginning of the day, I was fine; but after about an hour of inhaling all that smoke, I was nauseated and sick

and I was coughing.”

Nina Jo Taylor reported to work in the kitchen the following day. Claimant took Taylor over to the stove and reported what had happened; “[s]he opened up the thing, and there was still red coals in the bottom of the oven.” Taylor recalled that Claimant “was out of breath, and she was really upset.” Taylor testified that this was not Claimant’s physical condition prior to the incident and that Claimant did not need to use oxygen prior to the incident as she did afterwards.

Although her condition worsened, Claimant worked on January 20th, had the 21st off, and returned to work on the 22nd. After lunch time on the 22nd, Claimant obtained Bryant’s permission to go home and go to bed. However, when she arrived home, her family made the decision to take her to the emergency room. Claimant then began a course of treatment for her pulmonary difficulties.

While Claimant ascribes her need for treatment to her smoke inhalation in January of 2005, the first time this history appears in the medical records is in a pulmonary consultation note dated April 5, 2005. Thus, Claimant’s emergency room history and physical note dated January 22, 2005; internal medicine consultation report dated January 24, 2005; discharge summary dated January 28, 2005; and subsequent medical records all fail to mention Claimant’s alleged smoke inhalation, until the April 5, 2005 record.

Claimant underwent some studies after the incident. Although Dr. Gary Sherwood’s January 22, 2005 emergency room history and physical note makes reference to a chest x-ray depicting “an emphysematous-appearing chest without any acute infiltrates,” that is not reflected in the January 22, 2005 radiology report. That report observes that “[t]he lungs are clear.... No radiographic evidence of acute cardiopulmonary disease.” The

internal medicine consultation report dated January 24, 2005 records that a number of laboratory tests were normal and that a chest x-ray “[r]eported as negative for pulmonary disease.” A radiology report dated January 24, 2005 again notes that Claimant’s “[l]ungs are clear.... No active disease.”

Claimant initially submitted her medical bills to her group health insurance carrier. A group disability insurance attending physician’s statement is in the record; it is signed by Dr. Dan Davidson and was completed on February 2, 2005. His primary clinical diagnosis is bronchitis. When asked to indicate whether Claimant’s condition is a work related injury or illness, Dr. Davidson checked “No” on the last page of the statement. In another note dated February 4, 2005, Dr. Davidson assessed Claimant with end-stage COPD and severe bronchitis.

After continuing treatment for her condition, including treatment for pneumonia, Claimant did present for a pulmonary consultation on April 5, 2005. Brooke Seago, a nurse, recorded Claimant’s statement “that in January of this year she inhaled some smoke in the kitchen where she works, which exacerbated her COPD.” The note records an impression of “probable significant COPD that was recently exacerbated by recent smoke inhalation.” Claimant underwent a pulmonary function analysis on that same date; her inability to perform well is noted on the analysis, as were the “[e]xtended rests required between efforts due to shortness of breath.”

Claimant did not dispute that her workers’ compensation claim was filed on March 16, 2005. She testified that she filed this claim after a representative of her group health insurance carrier suggested that she do so. Bryant testified that she handled insurance and workers’ compensation claims; with regard to the January 19, 2005 incident and

Claimant, she recalled:

Q. Nobody came to you complaining of any health problems on January 19th?

A. No, sir.

Q. On January 20th, did anybody come to you complaining about any specific health problems?

A. No, sir.

Q. And you said that Ms. Schrand did become ill later that weekend?

A. Yes, sir. I was the one that lived in town, so I got all the phone calls.

Q. Tell me about that phone call.

A. She called and said she was very, very sick and needed to leave. I told her to please go home, that we would take care of whoever would cook the food for dinner.

Q. Did she give you any information during that conversation as to what her specific problems were?

A. No, sir.

Q. Did she give you any indication or tell you anything during that conversation about what may have caused her symptoms?

A. No, sir.

Q. During that conversation, did she say, "I believe this is related to the incident the other day when Charles was smoking meat"?

A. No, sir.

Q. You said you learned that six to eight weeks later?

A. Yes, sir.

Q. Okay. There was some testimony by Ms. Schrand and her daughter that the claim was filed on or about March 16, 2005.

A. Yes, sir.

Bryant remembered that the other employees thought it was strange to be cooking the meat in the oven, but that no one else became sick. She agreed that the Claimant is an honest and straightforward individual and called her “a wonderful employee.”

Claimant’s daughter, Sharon Watkins, also worked in the hospital kitchen on January 19, 2005, and recalled that her mother was “just coughing and choking, and we was all complaining.” Claimant “got the worst of it because she stood right over the stove the whole time.” She noted that her mother did not have to use oxygen prior to this incident. Concerning the absence of any reference to smoke inhalation in the early medical records, Watkins recalled:

Q. When they took the history at the hospital [on January 22, 2005], were you aware that there’s no mention of any incident involving this meat smoking?

A. At that time, yes, because it never came to me.

Q. Nobody even thought about relating her problems to the smoking incident at that time; did they?

A. No. I mean, I never thought about it until the doctor made a comment to me that her lungs looked like she had been in a house fire.

Q. Okay. Are you the one who suggested to your mother that this could possibly be related to the smoking incident?

A. Well, when he said that, then it clicked.

Q. How long was that after this initial hospitalization?

A. It wasn’t very long.

Watkins confirmed that her mother has had bronchitis over the years.

Claimant must prove that she sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, she must prove that her injury

is one “arising out of and in the course of employment...” Id. “Arising out of the employment” refers to the origin or cause of the accident while the phrase “in the course of the employment” refers to the time, place, and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, \_\_\_ (1985). Claimant must sustain her burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant failed to sustain her burden of proving by a preponderance of the evidence that her alleged inhalation injury arose out of and in the course of her employment on January 19, 2005. Claimant has a history of respiratory distress; several of the symptoms she displayed in the days prior to January 19, 2005 are identical to the symptoms she displayed afterwards. Initially, Claimant did not relate her need for treatment to the smoke inhalation: she presented her medical bills to her group health insurance carrier, and for two and one-half months after the incident the medical records fail to report a history of smoke inhalation. Two studies taken within a week of the incident report that Claimant’s lungs were clear. Claimant waited approximately two months before she brought a workers’ compensation claim. Indeed, Dr. Davidson opined that Claimant’s post-incident problems were not work related. In light of the foregoing, it is difficult to conclude that Claimant’s injury arose out of and in the course of her employment.

## **B. Remaining Issues**

It is not necessary to determine when Claimant gave notice of her claim, or to

discuss her request for medical benefits, temporary total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of her alleged injury, she failed to establish the compensability of her claim, and compensation must be denied. Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. §§ 11-9-102(4)(F)(i), - 715.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on January 19, 2005 and at all other relevant times.
3. Respondents controvert this claim.
4. Claimant's average weekly wage was \$320.00 a week based on forty hours a week on the average, with a payment of \$8.00 an hour.
5. Claimant did not sustain her burden of proving by a preponderance of the evidence that her alleged smoke inhalation incident is a compensable injury, because the record does not establish that her alleged injury arose out of and in the course of her employment. The symptoms she experienced a few days prior to the incident are similar to the symptoms she experienced afterwards; no medical records report the smoke inhalation incident as a possible cause for two and one-half months after the incident; Claimant presented her medical bills to her group health insurance carrier; Claimant did not present a workers' compensation claim for approximately two months; and her initial studies reported that her lungs were clear following the incident.
6. Because Claimant failed to prove any compensable injury, it is not necessary to

discuss the remaining issues in this case.

**ORDER**

Claimant failed to sustain her burden of proving that she suffered a compensable injury. Therefore, the above claim is denied and dismissed.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III  
Administrative Law Judge

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