

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609532

KIMMLEY JOHNSON, EMPLOYEE

CLAIMANT

WEYERHAEUSER, SELF-INSURED, EMPLOYER

RESPONDENT

**OPINION FILED MAY 25, 2007**

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on February 28, 2007, at El Dorado, Union County, Arkansas.

Claimant represented by HON. KENNETH A. HARPER, Attorney at Law, of Monticello, Arkansas.

Respondents represented by HON. JUDY R. WILBUR, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On February 28, 2007, the above-captioned claim came on for a hearing at El dorado, Arkansas. A pre-hearing conference was conducted on November 29, 2006, and a Prehearing Order was filed on December 4, 2006. Subject to any modifications made at the full hearing, a copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record without objection.

At the full hearing, the parties agreed to the following stipulations.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee relationship existed at all relevant times, including March and April of 2006.
- 3) The claimant's TTD rate is \$327.00 per week, and her average weekly wage was \$490.13.

- 4) The claimant received short term disability benefits for 19 weeks at \$226.26 per week.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Compensability.
- 2) If compensability is overcome, it must be determined if claimant is entitled to associated medical benefits, TTD benefits from 3/20/06, to a date yet to be determined, and attorney fees.
- 3) Notice defense.
- 4) A.C.A. §11-9-411 offset.

The claimant contended that she sustained a compensable injury to her health and lungs and is entitled to medical benefits (both past and future), TTD benefits from 3/20/06 to a date to be determined, and attorney's fees.

Respondents contended the claimant did not sustain a compensable injury while in the respondents' employ. That claimant failed to give notice of her injury to respondents, and should compensability be overcome, respondents contend they would have no liability prior to September 7, 2006. Respondents contended entitlement to an offset for short term disability benefits paid to claimant pursuant to A.C.A. §11-9-411/

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with

A.C.A. §11-9-704.

- 1) The Ark. Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties and recited herein are hereby accepted as fact.
- 3) Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury while employed by the respondent.

### **DISCUSSION**

The claimant testified she began working for the respondent/employer in October of 2005, and that her job required her to clean up the sawdust inside the mill. The claimant testified that the sawdust would be in the air and that during her employment she would inhale the sawdust.

The claimant testified that in October of 2005, she started breaking out in hives. The claimant also testified that she started having "breathing problems" due to her employment with the respondent. (T. pg. 19, lines 13-21) The claimant testified that she related her breathing problems to her work conditions, and because the chemicals in the wood or the wood treatment would be in the air she was breathing at work. (T. pg. 21 & 22)

The claimant testified that due to her breathing problems she initially went to see Dr. Smith, who prescribed her Avelox, Lexapro and Advair. The claimant testified she also treated with Dr. Abshire and Dr. Butler, who both gave her prescriptions. The

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claimant testified that Dr. Smith took her off work due to her conditions. Claimant contends that she suffered a compensable lung injury due to her employment conditions. She seeks payment of temporary total disability benefits, medical benefits and attorney's fees.

Pursuant to Ark. Code Ann. §11-9-114, a respiratory injury or illness is compensable only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm. Moreover, under Ark. Code Ann. §11-9-601 (e)(1)( A), an "occupational disease" is defined as any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury. Furthermore, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence. A.C.A. §11-0-701(e)(1)(B).

Ordinary diseases of life to which the general public is exposed are not compensable. A.C.A. §11-9-601(e)(3) (Repl. 2002) The occupational disease must be "due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his employment. " Ark. Code Ann. §11-9-601(g)(1)(A) (Repl. 2002). However, 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). 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., Supra.*

The claimant has testified that her "breathing problems" are primarily because she is breathing rapidly. (T. pg 40, lines 17-23) The claimant has indicated her employment caused her to break out in hives, and that she coughed up blood. My review of the medical records do not show any reports indicating the claimant coughed up blood. There must be some causal connection between the claimant's condition and her employment; however, I find the claimant has failed to prove any causal connection.

The claimant, by her own testimony, admitted to having a problem with hives as early as 1999 and continuing through the present. Although her testimony is the hives were "different" when she worked for the respondent. I find nothing in the medical records to corroborate her testimony. The claimant testified that as late as April of 2006, she was still relating her condition to something other than work.

Q. And this was your visit to him in April of 2006, and you still were relating it to something other than work. Is that fair?

A. Yes, ma'am. (T. pg. 36, lines 22-25)

I found the claimant's testimony to be very inconsistent with regard to her condition in May of 2005. It's undisputed the claimant did not work for the respondents in May of 2005; however, her AR-C form listed her symptoms began in May of 2005.

Q. And one thing we need to clarify, on the AR-C form that was completed and submitted, you came to my office, is that correct?

A. Yes, sir.

Q. Who completed the form? Was it somebody in my office?

A. Yes sir. It was Rhonda White.

Q. One of my secretaries did?

A. Yes, sir.

Q. You didn't complete the form, did you?

A. No, sir.

Q. And on that it's got May of 2005 as your onset date, correct?

A. Yes, sir.

Q. You weren't working at Weyerhaeuser in May of 2005, were you?

A. No, sir.

Q. Did you tell Rhonda White May of '05?

A. No, sir.

Q. Did you have any reason to tell her May of '05?

A. No, sir.

Q. You weren't having these problems in May of '05, were you?

A. No, sir. (T. pgs. 31 & 32, lines 14-25 & 1-13)

Even though the claimant testified she wasn't having problems in May of 2005, the medical records indicate otherwise. The claimant then admitted on cross-examination she was, in fact, having sinusitis in May of 2005.

Q. And also, in May of 2005 you were treated for, and these records are in my exhibit and probably in your's as well, but you were treated for allergies and sinusitis?

A. Yes, ma'am. (T. pg. 42, lines 12-16)

The diagnosis for sinusitis in May of 2005 is highly relevant, because sinusitis is the primary diagnosis of the claimant after she began working for the respondents. (CIX-3, pgs. 9 & 13) (RX-2, pg 14)

The medical records clearly show the claimant had sinusitis on 5/9/05 (RX-2, pg. 8), and then shows where Dr. Smith took the claimant off work on 5/18/05 due to "medical illness." (CIX-3, pg. 18) It is clear to this examiner that the claimant's conditions all pre-existed her employment with the respondents, and that claimant has failed to show any causal link whatsoever, between her condition and her employment with the respondents. After reviewing all the evidence in this case impartially, without giving the benefit of the doubt to either party, I find the claimant has failed to meet her

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burden of proving by a preponderance of the evidence that she suffered compensable lung injuries while working for the respondent. As such, issues 2, 3 and 4, outlined herein, are rendered moot.

**ORDER**

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury while employed by the respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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S. DALE DOUTHIT  
Administrative Law Judge