BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F406655

DIANA L. CRYTSER, EMPLOYEE	**CLAIMANT**
PILGRIM'S PRIDE, EMPLOYER	**RESPONDENT**
AMERICAN ZURICH INS. CO., CARRIER/TPA	**RESPONDENT**

OPINION FILED JULY 7, 2008

Hearing before Administrative Law Judge O. Milton Fine II on April 8, 2008, in Little Rock, Pulaski County, Arkansas.

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

Respondents represented by Mr. William C. Frye, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 8, 2008, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on February 11, 2008. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. They are the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed at all pertinent times hereto.
3. This claim has been controverted in its entirety.
4. Claimant's average weekly wage was $346.45, giving her a total disability rate of $231.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant sustained a compensable injury.
2. Whether Claimant is entitled to temporary total disability benefits.
3. Whether Claimant is entitled to reasonably necessary medical treatment.
4. Whether Claimant is entitled to a controverted attorney's fee.

Contentions

At the hearing, Claimant amended her contention to reflect a different beginning date for the period she is requesting temporary total disability benefits. Respondents added a contention concerning her entitlement to these benefits. The contentions of the parties are now as follows:

Claimant:

1. Claimant contends that she has sustained injuries in the form of chemical exposure and is entitled to payment of temporary total disability benefits beginning July 12, 2004, and continuing through a date yet to be determined. This claim has been entirely controverted for purposes of attorney's fee.

Respondents:

1. Respondents contend that this claim has been controverted in its entirety.
2. Claimant is not entitled to temporary total disability benefits for the period she was collecting unemployment or was working.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury in the form of contact dermatitis.
4. Claimant has not proven by a preponderance of the evidence that she suffered a compensable injury to her pulmonary system.
5. Claimant has not proven by a preponderance of the evidence that she is entitled to temporary total disability benefits.
6. Because Claimant has not proven that she sustained a compensable injury to her pulmonary system, she has not proven by a preponderance of the evidence that she is entitled to reasonable and necessary treatment for it.

7. Claimant has proven by a preponderance of the evidence that the treatment she has received for her contact dermatitis, as set forth in her medical records in the case, was reasonable and necessary.

8. Claimant has not proven by a preponderance of the evidence that she is entitled to future medical treatment for contact dermatitis.

9. Claimant has not proven by a preponderance of the evidence that she is entitled to a controverted attorney's fee pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002) because no indemnity benefits were awarded.

CASE IN CHIEF

Summary of Evidence

______Three witnesses testified at the hearing: Claimant; Linda Bramlett; and Joseph Prevost. Two witnesses testified by deposition: Dr. Anthonly Giglia and David Davis.

In addition to the prehearing order discussed above, also admitted into evidence in this case were Claimant's Exhibit 1, medical records of Claimant, consisting of a two-page index and 67 numbered pages thereafter; Claimant's Exhibit 2, additional medical records of Claimant, consisting of a one-page index and 18 numbered pages thereafter; Claimant's Exhibit 3, additional medical records plus documents from the Occupational Safety and Health Administration, consisting of one index page and 13 numbered pages thereafter; Claimant's Exhibit 4, additional medical records, consisting of one index page and two numbered pages thereafter; Claimant's Exhibit 5, a printout of e-mails, consisting of ten pages; Respondents' Exhibit 1, medical records of Claimant, consisting of a three-page abstract, a two-page index, and 67 numbered pages thereafter; Respondents' Exhibit 2, off-work slips and non-medical records, consisting of two index pages and 77 numbered

pages thereafter; Respondents' Exhibit 3, laboratory test reports, consisting of a one-page index and 16 numbered pages thereafter; Respondents' Exhibit 4, chlorine test results, chiller log and OLR system log, consisting of a one-page index and 82 numbered pages thereafter; Respondents' Exhibit 5, nurse's notes from Respondent Pilgrim's Pride, consisting of a one-page index and six numbered pages thereafter; Respondents' Exhibit 6, a one-page blueprint; Respondents' Exhibit 7, the transcript of the deposition of Dr. Anthony Giglia taken August 22, 2007, consisting of 51 numbered pages; and Respondents' Exhibit 8, the transcript of the deposition of David Davis taken April 14, 2008, consisting of 97 numbered pages.

Testimony-Hearing

Joseph Prevost. Called by Claimant, Prevost testified that he worked at Respondent Pilgrim's Pride for eight months from 2003 to 2004. Two years before that, he worked there for a six to seven-month period. During his second stint, he was the chief union shop steward and worked various jobs in the picking room. Claimant came to him and stated she was having problems with breathing and with a rash and wanted to file a grievance. A mediation was held, but Prevost left Pilgrim's Pride before the matter was resolved. Prevost observed Claimant's condition at the time and described it as looking like "severe diaper rash, poison ivy." The condition was on her face, and her nose and lips were red and swollen. He stated that all visible parts of her body, including her arms, legs, neck and ears, were affected as well. Prevost felt that the rash was appearing everywhere that steam touched Claimant. Later, Claimant complained of breathing problems and problems with her eyes as well. The source of the steam was the scalder, which created boiling water to remove the skin from the paws of the chickens and to loosen their feathers.

Claimant was the employee on shift three who worked closest to the scalder. The steam rose right in front of her table, and would moisten her clothing. When the doors behind her opened, the draft drew the steam to her. She would have been inhaling it. Claimant stayed in this position throughout her shift, five days a week.

Prevost stated that he was familiar with the chemical Inspexx 100 (hereinafter “Inspexx” or “Inspexx 100"). The plant technician, Jerry Brown, instructed him to wear full safety gear, including a mask and goggles, when handling it. However, the only gear Claimant had was a hair net and rubber gloves. The chemical was originally used to keep down the level of salmonella bacteria in the chillers, where the chickens were cooled. Any overflow simply went down the drain. However, during Claimant’s second period of employment, the system was changed so that the water that overflowed the chillers was recycled and used in the scalders. Chlorine was in this water as well. He stated that Claimant did not present with any problems until this recycling of the chiller water began, despite the fact that the steam from the scalder had been there all along.

With respect to Claimant’s grievance, company officials stated that they did not know why Claimant was breaking out. Her rash was visible to them. Because they were of the opinion that the rash was due to contamination from her house, Prevost assigned her to another job for the first 90 minutes of her shift, away from the steam, and he performed her job instead. He testified that during that period, he did not observe her to have any rash. However, the rash returned within 90 minutes of her resuming her regular duties near the scalder. This was brought to the attention of the plant supervisors. A tester was then used to check the air.

Prevost stated that Claimant did not take any precautions specified in the Material Safety Data Sheet for someone who has come into contact with Inspexx 100. After seeing the doctor, Claimant began wearing a mask to avoid breathing in the steam.

When questioned by Respondents, Prevost stated that he had been at the plant for about three months, around September or October of 2003, when the water containing Inspexx 100 began to be recycled. That was also when Claimant came to him and he noticed the rash. He instructed her to see the plant nurse. Prevost stated that he was not aware that the information submitted to the Occupational Safety and Health Administration (hereinafter "OSHA") indicated that the water recycling began in May 2003, before he came back to work at Pilgrim's Pride.

Prevost stated that infected hair follicles would not explain the rash on the outside of Claimant's nose, along with its presence on other areas of her face. He testified that he observed her to have a rash until the day he left Pilgrim's Pride. However, the only explanation he could offer as to why her medical records from 2003 and 2004 do not reflect a rash was that it cleared up after she went home. Prevost stated that Claimant did not have the rash when she first came to work each day. He testified that she was not the only employee with a rash, but that hers was the worst. However, none of the 10 to 12 employees around Claimant went to the doctor.

Prevost was told that the testing of the air in the area came back negative, that the recycled water "was safe enough to drink." As of the time he left, the company was still trying to locate the source of the rash. He was not aware that Claimant had been moved to various other assignments; but he stated that the scalder was the only area that gave her problems.

When questioned by me, Prevost stated that Claimant worked approximately five feet from the scalder. The nearest employee to her worked five or six feet behind her. Another worker, a re-hanger, was about 20 feet from the scalder. However, the steam only came into contact with these two other employees intermittently, depending on the draft on the building. The steam never enveloped them, as it did Claimant. When he worked her position, Prevost's clothes became soaked due to the steam as well as handling wet chickens. The steam, though, was sufficient to make clothes wringing wet. He compared it to the effect of opening the door to a hot shower.

Prevost stated that he, too, has had rashes; but they were only slight ones on his arms and "never enough to say anything about." He could not attribute it to being near Claimant's area because of the variety of jobs he had. The day he worked Claimant's shift for 90 minutes, Prevost did not develop a rash. However, he observed rashes on the forearms and necks of other workers, including some who worked in an area around 20 feet from the scalder. These rashes appeared similar to Claimant's, but were lighter in color. Prevost testified that on occasion, he examined Claimant when she arrived at work and found no rash, but observed her during her first break to be fully engulfed by a rash.

In follow-up questioning by Claimant, Prevost stated that he conducted this investigation to determine the source of the rash as part of his shop steward duties. No other workers with a rash filed a workers' compensation claim because of the rash, and neither did he. When questioned further by Respondents, he stated that his rash cleared up two hours after he went home and took a shower. Prevost reiterated that he does not know what caused the rash.

Linda Bramlett. Called by Claimant, Bramlett testified that she worked at the plant a total of 25 years, seven of which in a supervisory capacity. Claimant worked under her for three to five years, and she termed her an "[e]xcellent" employee. Bramlett last worked there at the end of 2003. At the time, Claimant's job was to rehang chickens whose feet had come out of the hangers. Bramlett stated that a project was started at Pilgrim's Pride to recycle water whenever possible. The water, which contained whatever came into it off the line, was piped first to the paw chiller, and then from there to the paw scalder. Claimant was in a position where the steam from the scalder was coming up into her face. At the time Bramlett worked there, Claimant did not wear a mask.

According to Bramlett, Inspexx was a relatively new product at the plant. It was not placed into the chillers until 2003. That year, Pilgrim's Pride created a position for a technician who was responsible for introducing the substance into the chilled water; it was also in that year when the recycling of the chiller water began. The water that became the steam that came into contact with Claimant contained both Inspexx 100 and chlorine.

Bramlett testified that Claimant came to her on at least three separate occasions to complain of a rash on her arms, which Bramlett observed. This occurred at the end of the shift. She instructed Claimant to see the plant nurse, and she did. Claimant told Bramlett that she went to the doctor. This occurred after the visits to the plant nurse. Claimant indicated that increased salt in the water was the cause of the rash, but Bramlett stated that the volume of water was too great for that to have been the cause. Bramlett testified that Claimant did not present with a rash prior to the introduction of Inspexx 100.

When questioned by Respondents, Bramlett said that she could not state that the middle of 2003 was when she first noticed Claimant's rash. The rash was initially on her

forearms. Bramlett was not aware that the first time she presented to the plant nurse, she attributed the rash to cutting down cedar trees. She did not recall Claimant missing work, and did not know whether she was a smoker. Bramlett was also unaware of the results of the testing for Inspexx and chlorine. When Inspexx was introduced at the plant, the employees were made aware that the product would be handled by a technician specifically trained to deal with it. Material safety data sheets were provided. Of the two employees in the re-hanging area, Claimant was the only one who complained about a rash.

When questioned by me, Bramlett stated that Claimant's job was to re-hang chickens that had fallen off the line. She described the chiller as a vat containing cold water and an auger moves the chickens through it. The cooling is in preparation for shipment. The water had to be replaced every so often in the vats; the old water was piped to the paw scalder and paw chiller. Claimant's co-worker worked five feet behind her. Because the plant has two production shifts, there was someone working in the same spot as Claimant on another shift.

Diana Crytser. Claimant testified that she is 48 and has an eleventh-grade education. She went to work at the Pilgrim's Pride plant on May 8, 1996, and last worked there July 12, 2004. On July 15, 2004 she was terminated for accumulating 12 points, which she described as being like demerits. The last three points she accumulated were due to absenteeism caused by the fumes at work.

She stated that Prevost and Bramlett described her job location correctly. The first two and a half years of the rehanging job were performed with no problem. However, she later testified that she problems with shortness of breath from the beginning of her

assignment as a re-hanger. This condition grew worse. In September 2003 she started noticing a change: she started having rashes, her eyes, nose, mouth and chest were burning. She stated that she did not report the problem "until I couldn't get it to go away." Claimant stated that she went to the plant nurse on September 4, 11 and 19 of 2003. The nurses told her that they did not know what to do about the rash, but gave her Caladryl and ultimately had her wrap her arms. Claimant testified that the nurses refused to send her to the company doctor, so she went to her primary care physician, Dr. Starnes, on her own. She later saw Dr. Lori Kagy and Dr. Anthony Giglia. She stated that her breathing problems and other symptoms caused her to go to the emergency room at Conway Regional Hospital around February 14, 2004.

Until this point in time, Claimant had not told anyone in management of her physical problems–only the plant nurses. She testified that she first discovered on February 4, 2004 that Inspexx was being used:

> One of the other employees was–it was actually a maintenance man and he was shooing all the steam towards me. Well, I thought he was teasing me because I had my own personal sauna, because you know steam opens your pores. Well, I mentioned something to the other employee behind me that was also re-hanging, and she says, oh, no, that's not what he's talking about. You–that's Inspexx 100 you're breathing in. And I was in shock. I was mad.

Claimant went to the dock and read the product label. She stated that "the overexposure symptoms was [sic] I had."

She stated that she complained to the management about the use of Inspexx, and a meeting was convened on February 27, 2004. Those present included the plant manager, day and night shift superintendents, Prevost, a union representative, and Claimant. However, Claimant stated that nothing changed after the meeting. Ed Shelley,

the day shift superintendent, admitted in the meeting that Inspexx was being used in the paw scalder, but in a concentration so low that the water was even safe enough to drink. The union representative asked David Davis, the safety officer present, about the fact that the MSDS states that Inspexx is not to be mixed with chlorine. He replied that the warning was only against mixing it with concentrated chlorine.

Claimant stated that after February 4, 2004 but before the meeting with management occurred, she attempted to wear a mask while performing her job. But she had to stop doing it because she was unable to see out of her glasses to work. In June 2004, she came down with chemical pneumonitis while working in a different area and had to be off work for three weeks. She was unaware that the company had transferred her to another job in an effort to get rid of her.

Claimant testified that she knew of other persons at the plant who experienced rashes also, but to a lesser degree than she did. She stated that while her complaint prompted a visit to the plant by the Occupational Safety and Health Administration, she was not involved in any way with the agency's inspection of the plant. She is aware, however, that the plant was fined.

Asked about her current condition, Claimant testified that while she no longer has rashes, she is unable to be around airborne chemicals, cleaning supplies, glue, fingernail polish, potpourri, gasoline–any chemical that she can smell. Exposure causes her chest to tighten. Without such exposure, she is able to function normally. She also stated that she is unable to control this with inhalers because the medications themselves cause an allergic reaction. Drs. Kagy and Giglia have diagnosed her as having chemically-induced

asthma, and Respondents have not sent her to a physician who has disputed this. Giglia's office wants to send her to the Denver Asthma Hospital for desensitizing treatment.

With respect to jobs she has held since leaving Pilgrim's Pride, Claimant testified that she washed dishes at a restaurant for eight months, but could not continue because of the chemicals present. This problem also led her to quit work at a school cafeteria after one month. She worked there three days a week, eight hours a day. From there, she has been employed part-time to obtain rocks from creeks and stack them on pallets. She works for two to three days at a time at the job, stacking rock on 24 pallets.

When questioned by Respondents, Claimant stated that she had no problems with asthma prior to the incident at issue. She admitted that she was previously known as "Diana Allender." Claimant admitted that return to work slip in Respondents' Exhibit 1 bearing that name and her signature reflects that she had a diagnosis of asthmatic bronchitis in October 1997. She came down with bronchitis about once a year. Dr. Starnes recommended in 2003 and again in 2004 that she quit smoking. At that time, she was smoking half a pack of cigarettes per day. Previously, she smoked a full pack a day. She admitted that she has smoked for 28 years, and that currently she is smoking three packs a day. Incredibly, she stated that while she is sensitive to a myriad of chemicals, cigarette smoke does not bother her. Dr. Stroud, whom she saw for abscesses in her nose, has recommended that she stop smoking or the problem will continue. The record of Dr. Stroud does not reflect that she told him that she was having shortness of breath. She saw Dr. Starnes in December 2003 for an abscess in her groin area, but could not remember if she presented with a rash at that point. In May 2004, he sent her for a pulmonary function test that was normal. When she saw Dr. Kagy in May 2004, Claimant

stated that her symptoms disappeared after she left work. Her tests were normal at that visit, but Dr. Kagy recommended that she cease smoking. Claimant did not know why her patient history reflected that she had no prior history of asthma. She did not inform Pilgrim's Pride that Dr. Gray indicated in July 2004 that her chemical pneumonitis had resolved. Claimant stated that she has been tested for esophageal reflux; and that her provider wanted to treat it with medication, but Claimant could not afford the medicine. She admitted that she told Dr. Giglia that she would quit smoking when she had a sense of financial security. However, he recommended that she use her tobacco money to instead purchase medicine.

Claimant admitted that as soon as she left Pilgrim's Pride, she began looking for work. She applied for jobs in the meat and gardening departments at Wal-Mart, and sought to become a park ranger or a corrections officer. Claimant explained that she assumed that these positions would not involve chemical exposure. However, she explained her decision to apply at a plastics company was due to her need to care for a child. She stated that she last looked for work two weeks prior to the hearing and did so "[b]ecause I was tired of being hungry." With respect to the jobs she has held, she stated that she was fired from the restaurant when the conditions made her ill. She was able to work as a meter reader, but quit because of the wear and tear on her vehicle.

As for her current physical condition, Claimant testified that she no longer experiences headaches, and burning in her eyes, nose and mouth. She realizes that smoking will aggravate her condition. Claimant has not sought treatment for an asthma attack because she uses her inhaler instead.

Claimant testified that she complained to OSHA about the use of Inspexx at the plant. She was not aware of the representation made to OSHA that the recycling of water began in May 2003. While she stated that OSHA found a violation at the plant, one was not substantiated regarding rashes. She explained this by stating that the illness logs falsely reflect that there were no reported rash cases in 2003 and 2004, when she made three such reports to the plant nurses. While she admitted that OSHA found no violation with respect to the use of the Inspexx, the agency did so with respect to training regarding the handling of it. While she at first stated she was unaware if OSHA performed testing after she complained on February 4, 2004, she later stated that during the formal meeting with management that month, she was informed that testing was performed and that nothing was found. She did not know that further testing was performed in April, June and July 2004 until OSHA sent her the paperwork. Nothing was found.

As for her other assignments, Claimant testified that she was moved to the box room, which was away from any Inspexx. From there, she went to the liver and kidney rooms and the packing room. She complained that she could not tolerate the glue in the box room and the cold in the packing room. Claimant stated that she ended up requesting to be returned to the re-hanging room because it was warm there and because she did not know at the time that she had asthma.

Under further questioning from her counsel, Claimant stated that Dr. Starnes not only recommended that she quit smoking, but that she find a new job as well.

In follow-up by Respondents, Claimant stated that she was unaware that anything changed with respect to the use of Inspexx after February 4, 2004. She admitted writing in 2003 that she thought there was a cover-up at the plant regarding her condition. When

asked to explain how she could have thought this when she did not know about the Inspexx until February 2004, she stated:

> Because everybody knows their body, and when you've been on a job for three and a half years, I knew something was wrong. And when everybody else was complaining of rashes and eyes and nose burning and mouth burning and headaches everyday or nose bleeding or whatever, that is why I knew something was going on.

She stated that Pilgrim's Pride knew when OSHA was coming to the plant and covered up what occurred. Claimant surmised that chemicals were being improperly mixed together because she smelled vinegar every night on the line.

Testimony-Deposition

Dr. Anthony R. Giglia. Giglia was deposed on August 22, 2007, and the transcript thereof was admitted at the hearing as Respondents' Exhibit 7. When questioned by Respondents, he testified that he first saw Claimant on October 13, 2004. Dr. Lori Kagy referred her. Claimant stated that she had repeatedly and constantly been exposed to chemicals at work and had problems with breathing and a tight chest. She related that the chemicals began to be used in April 2003 at the plant where she worked. A rash developed in September 2003, and by February 2004 she was having breathing difficulties. Her problems improved when she was off work. By the time of her first October visit to him, she had been away from the plant for three months. Giglia stated that he would have expected her to improve during that time, but she stated that she was having the same symptoms. However, he stated that this was not unusual with a hyperactive airway–other chemical triggers can set it off. Dr. Giglia attributed the continuing aggravation of her airway to her smoking.

Giglia stated that pneumonitis is simply inflammation of the lung and can be caused by irritating chemical fumes as well as an infection. He stated that smoking could cause it. Based on her history, he termed Claimant a heavy smoker. While there is not a definite correlation, Dr. Giglia testified that there appears to be an increased incidence of asthma in people who have smoked since they were young. Claimant fit into that category. Smokers have the symptoms she had. Also, Claimant had gastroesophageal reflux, which can cause, inter alia, coughing, chest tightness, and shortness of breath. Claimant related to him that she had no breathing problems prior to her alleged chemical exposure. Giglia stated that whether or not bronchitis could cause her symptoms would depend on its frequency and severity. He viewed her missing work for two years straight due to bronchitis in 2002 and 2003 as significant. Dr. Giglia found nothing of significance on her chest x-ray. His examination found no evidence of expiratory wheezing, which is present in most asthmatics. However, the methacholine challenge test he administered was positive, which shows that she has hyperactive airways and is consistent with asthma. But he stated that a 28-year smoker like Claimant could have a hyperactive airway due to that habit. Giglia stated that Claimant was not forthright with him about her past involvement in prostitution, which he said was an HIV-risk activity and could lead to pulmonary problems. She also did not tell him that she had asthmatic bronchitis in 1997.

Claimant brought him MSDSs that showed that Inspexx 100 was not to be mixed with a chlorinate. She related that Inspexx was mixed with chlorine at the plant. However, he did not have OSHA test results. Claimant complained of being sensitive to perfume, but was not bothered by cigarette smoke. Giglia opined that this was an inconsistent complaint. He saw Claimant next on December 14, 2004. Her examination appeared

normal. Dr. Giglia advised her to quit smoking because it would worsen her symptoms and cost her money she needed to purchase medicine. She told him that she would not quit until she had a sense of financial security.

Dr. Giglia testified that while Claimant's symptoms were consistent with the history of chemical exposure she related to him, he did not administer a challenge test to definitively prove that this was the cause of her problems. As she continued to see him, she reported having adverse reactions to every medication he was prescribing. This led him to question whether she was being truthful in relating this, since she had to have been exposed in the past to the particular medication or one in its class and since she was reporting adverse reactions to all of the medications. He was also not seeing any evidence of asthma attacks when she was in his office.

Giglia on July 19, 2005 wrote that he did not know what else to do for Claimant. He stated that generally, an asthmatic can be helped to a certain degree. But this was not the case with Claimant. Also, he stated that ordinarily, a person who is clear every time he or she is at the doctor, such as Claimant was, has asthma that can be controlled with medication. But this again was not the case with Claimant. She also was not going for treatment for asthma attacks between visits to Giglia, which he thought was unusual for someone reporting symptoms as severe as hers. Dr. Giglia also noted that while Claimant was reporting that she was not able to go anywhere due to her chemical sensitivity, his office was unable to reach her. This led him to question her honesty. She would not call the office back, which was inconsistent with someone with a major medical problem. Giglia also stated that her inability to use any type of inhaled steroid was unusual. Finally, he

stated that he would have expected her to have presented with asthmatic symptoms during one visit with him over the course of the three years he saw her; but she did not.

Claimant went to the Veterans Administration Hospital and was tested, but was found to be normal. The doctor advised her, as did Giglia, to avoid triggers. Giglia last saw her on May 3, 2007, and again her examination was essentially normal.

Dr. Giglia was of the opinion that, based on the chemicals Claimant stated she was exposed to, a combination of chlorine and Inspexx 100 caused her breathing problem. However, he added that Inspexx 100 by itself could do it. He also admitted that the opinion was based on Claimant's history as she related it. If she was untruthful about what occurred, her smoking could explain her condition. Giglia testified that even if air testing showed it to be within acceptable limits, there could be enough to affect Claimant if in fact that she became sensitized in the past due to exposure. But he thought it was unusual that Claimant's alleged problems were episodic. Only through the one test has Giglia found evidence that Claimant is asthmatic. In fact, he stated that based on his testing alone, there is no reason why she cannot return to work.

When questioned by Claimant, Dr. Giglia testified that Claimant has an objective diagnosis of hyperactive airways. But he added that "nothing tells me under which circumstances that might be active." Hyperactive airways is a permanent condition. Giglia stated that he could not quantify Claimant's lung impairment from it. Without a flare-up, the person essentially functions as someone without a condition. When asked whether he would still opine within a reasonable degree of medical certainty, as he did on December 2, 2004, that her hyperactive airways was caused by chemical exposure at work, Dr. Giglia stated:

> Maybe less so than I was at that time, because, again, you have to, you know, interpret those tests on the basis of the history you have. Now, if there's other data that I don't have, like the OSHA data and different exposure data, that may bring it in somewhat suspect, but at that time, that's the information I had, and that was the timing, the history, and the results of the tests all pointed to that.

Despite this qualification, Giglia stated that Claimant, to his knowledge, did not have a preexisting hyperactive airways condition, despite the fact that she smoked before the alleged chemical exposure. And he added that his opinion would remain the same if Claimant was truthful in her statements to him and if the plant actually began using Inspexx 100 and chlorine near her around that time. He indicated that he was still bothered by the fact that Claimant was not calling his office and complaining of having flare-ups, along with the fact that she did not inform him about the asthmatic bronchitis bout, which he stated could be the result of bronchitis coupled with hyperactive airways disease.

David Davis. Deposed on April 14, 2008, Davis testified under questioning by Respondents that he has been the Safety Manager for Pilgrim's Pride for seven years. He was unsure when Inspexx 100 began to be used at the plant, but believed that it was prior to 2003. The plant has a special room set up for handling the chemical in concentrated form, including a shower, apron, face shields, and other safety equipment. He stated that the concentrated form of Inspexx 100 does not leave that area of the plant. It is diluted with water into two categories before it leaves the area. The chemical is approved by EcoLab, its manufacturer, for solutions of 800 to 1,200 parts per million ("ppm") in solutions of acidified sodium chloride, which is used in the chiller baths and other areas of the plant to treat the poultry carcasses. The solution is tested three to five times per shift for safety and quality purposes. He explained the reports. Chlorine is tested as well. Davis stated

that the concentration of Inspexx 100 used is half the recommended amount, or roughly 50 parts per million. The chiller log shows the parts per million of Inspexx 100 used. The log he reviewed at the deposition showed concentrations from 22 to 33 parts per million.

When asked why the tests were not done in Claimant's area, where the scalder is located, Davis stated:

> There is [sic] actually three levels of Inspexx. You have Inspexx in the chiller, which is right outside of the Inspexx additive room, and they're at a low part per million, less than 50 parts per million. Then you have the Inspexx in the Inspexx cabinet, where the Inspexx is directly applied to the carcasses, eviscerated birds, prior to going into our chiller system. And then you have what's called the re-used water, which is the Inspexx is sprayed on the birds, the Inspexx sanitizes the birds and most of the chemical the Inspexx is used up. What is left goes down into a holding tank. It is mixed with water and is used in a diluted form in certain areas of the plant to kill bacterias and save money on water because we can re-use that water.

Davis testified that the concentration of the Inspexx in the holding tanks is about 20 ppm–about one-ninth the concentration used to spray on the birds. According to EcoLab, this is well within acceptable levels. In fact, EcoLab has stated that 1,500 to 1,800 parts per million concentration should not cause skin rashes or other problems.

When Claimant complained about physical problems in February 2004, Davis tested her area for known contaminants such as acetic acid, hydrogen peroxide and chlorine, and basically found nothing. These were a series of tests, or "snap shots." Galson Laboratories brought in tests that tested over an eight-hour period. The tests, also for acetic acid, hydrogen peroxide and chlorine, were well within acceptable limits for exposure, and Galson stated that all of the results met the quality control requirements of the American Industrial Hygiene Association.

After the testing, Davis and others met with Claimant to go over the results. They offered to move her elsewhere in the plant. She was moved to the box room, which had no Inspexx or chlorine, but Claimant stated she could not work there because of the glue smell. No one else had complained about the glue before. The second place to which she was moved was reprocessing salvage, which had only chlorinated water. But Claimant complained about the chlorine smell and stated that she could not work in that area, so she was moved to the mirror trim area. That area used only tap water, but Claimant again complained about the chlorine. For that reason, the decision was made to take her out of any area that had any chlorine, Inspexx, glue or other chemicals and place her in the further processing area. Here, Claimant complained about the cold and requested to return to her original job as a re-hanger. However, she wanted placement in an alternate position about eight feet away. This was accommodated. However, Claimant complained yet again. A meeting was held at which the union representative was present. According to Davis, Claimant stated that she did not believe the test results and that she believed she was being treated unfairly.

Around an hour after the meeting, the plant received a complaint from OSHA that employees were being exposed to Inspexx 100 containing acetic acid, hydrogen peroxide, and with chlorinated chemicals. The complaint specified that employees were not being provided safety equipment and were experiencing throat and nasal irritation, shortness of breath, lymph node complications, rashes and abscesses. Pilgrim's Pride responded with an explanation of its Inspexx 100 application system.

With respect to the re-used water, Davis testified that the chiller water is not re-used, but is sent to waste water for treatment. The re-use system to recycle used water came

about in May 2003. The Inspexx-containing water from the spray is sent to a re-use tank along with tap water from other processes. Chlorinated water (50 parts per million) is used in the plant when there is a "fecal failure," but Davis said a study shows that no levels of chlorine were going into the re-used water. Davis noted that the Inspexx 100 orientation package states that mixing Inspexx with chlorinated water up to 100 parts per million is not hazardous.

Additional testing was performed at the plant in June 2004. All of the results, according to Davis, were within acceptable limits. The plant purchased kits to test continually for chlorine and Inspexx over an eight-hour period. Inspexx 100 is comprised of hydrogen peroxide and acetic acid. Tests for these components came back at well under acceptable limits. For instance, in the pre-chill area, where the Inspexx spray cabinets are located, tested at .1 ppm acetic acid (with permissible exposure limit of 10 ppm) and .078 ppm hydrogen peroxide (permissible exposure limit of 1.4 ppm). OSHA found that Claimant's complaints could not be substantiated. Davis testified that the OSHA compliance office did cite Pilgrim's Pride for failure to train employees on personal protective equipment dealing with a hazardous substance. However, this was overturned on appeal. Nevertheless, the plant continued to perform testing. The August 2004 results were sent to Galson Laboratories, which found them to be good.

Davis stated that the United States Department of Agriculture performed testing as well. However, USDA never followed up. Davis stated that if USDA had found a problem, it would have informed the plant.

When asked about adverse reaction precautions, Davis stated that according to the Inspexx dispensing guidelines and safety instructions, Inspexx 100 should not be mixed

with concentrated chlorinated chemicals, or harmful chlorine vapors could result. But he stated that Inspexx is not mixed with concentrated chlorinated chemicals at the plant. Also, according to the guidelines, Inspexx can be mixed with chlorinated water of up to 100 ppm without a problem. Based on this, Davis stated that water containing Inspexx can be mixed with non-concentrated chlorinated water–which is what they were doing by re-using the water. Davis testified that before the re-use of water was put into practice, the plant checked with the Inspexx manufacturer, EcoLab, to see if it was okay. Furthermore, efforts were made to move Claimant on the premise that she was hypersensitive. He reiterated that no test came back to indicate that rash or breathing problems could be taking place.

When questioned by Claimant, Davis stated that when the plant began testing over an eight-hour period, a testing apparatus was actually placed on Claimant. For the snapshot or pull-tube testing that was done initially, Davis stated that he took samples in the same area that Claimant was breathing. Davis disagreed that Claimant's working position as a re-hanger exposed her to more steam than others, and he stated that he did not know why she requested to be moved to line two of the re-hanging area.

When asked why he only tested for acetic acid and hydrogen peroxide when Inspexx 100 has other components, Davis testified that both EcoLab and Galson Laboratories instructed him to do so. He only provided the timed tests to Galson because he could interpret the snapshot or pull-tube testing himself.

Davis stated that Inspexx is neutralized by bacteria on the skin of chicken. The excess from the spray process is mixed with tap water from the mirror trim area, which significantly reduces the 40 ppm concentrate that formed the spray. It is used in the scalder, but only to replace the lost fresh water in the vat. Because it is only replacement

or “makeup” water, the Inspexx would have a low concentration. A vent hood is in place near the scalder, and the steam from it is vented to the outside. Davis admitted that it was possible for some of the Inspexx to become part of the steam rising off the scalder. He admitted that the steam was not tested–only the areas where people worked. Davis was adamant that the water from the chiller is not part of the re-use process.

He agreed that it was possible for Claimant to have had an allergic reaction to the Inspexx, despite the fact that testing showed the concentration to be well within acceptable limits. Davis never observed her to have a rash. He admitted that chlorine and Inspexx are present in the re-used water–albeit in extremely small quantities that according to OSHA and EcoLab, are not a problem. The box room where Claimant worked for a short time uses glue.

Under further questioning from Respondents, Davis stated that once the Inspexx 100 ends up in the scalder, it has been diluted three times. The parameters used by EcoLab are the same as those used by OSHA and USDA. However, Pilgrim’s Pride uses lower parameters. To Davis’ knowledge, Pilgrim’s Pride has never been outside USDA or OSHA parameters.

Records-Medical

The medical records of Claimant that were introduced at the hearing and constitute Claimant’s Exhibit 1, Claimant’s Exhibit 2, Claimant’s Exhibit 3, Claimant’s Exhibit 4, and Respondents’ Exhibit 1 reflect the following:

Dr. Harry Starnes in October 1997 wrote that he have been treating Claimant for “Asthmatic Bronchitis.”

On September 19, 2003, Claimant presented to Dr. Starnes with, inter alia, a rash. He assessed her as having contact dermatitis. He wrote that the "rash does not appear to be poison ivy or oak. It appears to be a parasite or possibly a chemical reaction." When she returned on January 4, 2004, the rash was absent. She told Dr. Starnes on February 20, 2004 that her gums had been burning for six months, but nothing was found in this regard. She returned on March 19, 2004 with a rash, stating that it occurs "where the juice off the chickens hit her, they are run through chlorine." Starnes added that "[n]o one else is going to the doctors for this, but she got the worst of it because she works right in front of the machine that blows the mist." He again diagnosed her as having contact dermatitis. On March 31, 2004, Claimant presented with sores on her head. Dr. Starnes diagnosed her with Dyspnea (shortness of breath) and Seborrhea capitis. She presented on April 14, 2004 with inflammation in her mouth and nasal cavity and shortness of breath and was diagnosed with acute bronchitis "possibly a result of fumes at work and smoking." On April 30, 2004, Dr. Starnes treated her for skin lesions on her right forearm. She reported having to hold her breath in order to successfully travel through the laundry section at the store because of the smell. Starnes recommended that she see Dr. Kelsey Caplinger for allergy evaluation. Because she continued to present with a burning chest and throat that she contended was from fumes at work, Starnes on June 7, 2004 recommended that she find another line of work. When he saw her on June 30, 2004, she presented with no objective skin or airway findings. Nonetheless, he assessed her as having pneumonitis and advised her to avoid chemical exposure until she could be seen by a pulmonologist.

Claimant on November 20, 2003 sought treatment from Dr. J. Doug Stroud for soreness of her left nasal vestibule. She was diagnosed with vestibulitis and advised to

quit smoking. She went to Conway Regional Hospital's emergency room on February 25, 2004, complaining of a burning chest due to breathing hydrogen peroxide and vinegar at work. Her chest x-ray was clear, and no objective signs of her complaints were found. She was released to full duty with the instruction to wear a mask or similar protective device at work. Claimant underwent a pulmonary function test on March 19, 2004 that came back as normal.

Claimant continued to present with a rash on her upper extremities during the spring of 2004 and was referred by Dr. Starnes to Dr. Lori Kagy of the Arkansas Allergy and Asthma Clinic on May 17, 2004. She presented with no rash at that time, and Dr. Kagy did not recommend intradermal testing. Dr. George Gray on June 20, 2004 noted that Claimant had a rash and assessed her as having pneumonitis caused by chemical exposure. He took her off work until July 7, 2004, and wrote on that date that her condition had resolved.

Claimant was diagnosed by Dr. S.P. Schoettle on August 31, 2004 as having a small hiatal hernia. He wrote that "there is no way to prove that this chemical exposure has been causing the gastric and esophageal irritation." She was seen by Dr. Anthony Giglia on October 13, 2004. Her spirometry was normal. He noted that the MSDS for chlorine matched her symptoms, and stated that his suspicion was that she "now has industrial chemical-induced asthma" and that "[s]he is probably sensitized and now has hyperactive airways . . . . " Giglia recommended a methacholine challenge test to see if she has hyperactive airways. The test, performed on December 12, 2004, came back as "very strongly positive." He opined "that there is a reasonable degree of medical certainty that her problem is caused by chemical exposure at work . . . ."

Notes from Dr. Giglia's office on July 19, 2005 reflect that Claimant was tried on several medications that did not help and that she has not attempted to set up a follow-up appointment with Giglia despite his recommendation that she do so. She finally returned to him on November 15, 2005. He noted that Claimant reported being unable to tolerate any medication he has placed her on. Giglia noted that her spirometry was basically normal. He recommended Intal as a last resort and again strongly recommended that she cease smoking. In a follow-up appointment one year later, on November 7, 2006, Claimant reported that she could not afford the Intal and that she was continuing to experience chest burning and shortness of breath when around chemicals. She was smoking one to two packs a day and denied that it caused a flare-up of her asthma. He gave her a trial of Xopenex and Azmanex. Later, she reported a reaction to the Azmanex. Claimant underwent a chest x-ray on May 3, 2007 that Giglia stated was essentially normal. She related that her breathing was okay if she avoided triggers. Dr. Giglia gave her a trial of Pulmicort, but she related that because nothing in the past had worked for her, this probably would not, either. She reported during her February 27, 2008 visit that the Pulmicort did not help. Dr. Giglia prescribed Zyflo as a maintenance drug. He wrote: "It is interesting to note that each time I see this lady she has developed more asthma triggers and less tolerance to being out in public."

E-mails from the plant nurses at Pilgrim's Pride in April 2004 that are part of Claimant's Exhibit 5 reflect that Dr. Krishna Reddy informed them that Claimant's skin condition was due to a bug bite as opposed to chemical exposure. The e-mail on April 20, 2004 reads in pertinent part:

> I made Diana an appt with Reddy for today. David said to document every job you have put Diana on and her complaint. Do not put her back on a job that she has had problems with. Eventually she will run out of jobs to do. In other words give her enough rope to hang herself. At the rate she is going, it shouldn't take long.

In another one that same day, it was written:

> Comes in tonight to report a rash on her arms from Thursday night from the [chlorine] on the birds. She had been moved to salvage and washout after her last complaints of the smell in the back last week to Rodney. Her right forearm is greatly infected, it is swollen, red, tender . . . She said she had a rash on her arm, I told her I couldn't see a rash, there was redness, she said she had rash on other arm too and what she pointed out didn't look like what I would call a rash. I will try what I can tonight, her arm looks so bad, I'm afraid she'll be a dr. case. I don't know about her at all, motives or anything else. I don't know if this is an infection from her scratching it, an insect bite, or what except what she said, let me know how ya'll want to proceed, she says it's from the [chlorine], do you want me to send her to Dr. Reddy? What are we going to do with her? This is our line of work...and she consist[e]ntly has problems....!

Claimant's records reflect that she underwent a methacholine challenge test at St. Vincent's Hospital and it was positive at the lowest dose with a 21 percent decrease in FEV1.

<u>Records-Non-medical</u>

The non-medical records that comprise Claimant's Exhibit 3 are documents from OSHA and the United States Department of Labor. On December 2, 2004 OSHA wrote Claimant that it had investigated her allegation that Pilgrim's Pride employees were being exposed to Inspexx 100 mixed with chlorine and are experiencing rashes, and that the agency could not substantiate a violation. The agency could not substantiate a violation from her allegation that employees were experiencing throat and nasal irritation, rashes, and shortness of breath, among other symptoms, from breathing vapors from the mixture

of these chemicals. However, the plant was cited for failure to train employees regarding Inspexx and chlorine.

Respondents' Exhibit 2 contains a number of documents. The MSDS for Inspexx 100 provides warnings for dealing with it in concentrated form. EcoLab on April 22, 2002 wrote that dipping a chicken treated with sodium chlorite solution into a chiller bath containing Inspexx would not pose any health risks. The June 24, 2004 response of Pilgrim's Pride to the OSHA complaint is along the lines of Davis' testimony. EcoLab's paperwork regarding Inspexx and as discussed by Davis is here as well. The exhibit contains test results referred to by David Davis in his deposition. The results never reflect that quality control limits set by any authority were exceeded. This exhibit reflects that Claimant was off work in June 2004 due to pneumonia and pneumonitis. Finally, the exhibit contains multi-page narrative purportedly handwritten by Claimant on September 25 and October 20 of 2003 concerning her claim.

Respondents' Exhibit 3 is comprised of laboratory test results on the plant from August 2, 2004 to January 6, 2005, that were submitted to Galson Laboratories.

Respondents' Exhibit 4 contains process line chlorine test results from January 5 to May 22 of 2004, the chiller log from May 31-June 4, 2004 and the OLR system log for June 2, 2004.

Respondents' Exhibit 5 is comprised of plant nurses' notes regarding Claimant. The note for April 8, 2004 notes that she complained of inhaling chlorine. On April 14, 2004, Claimant complained of a rash that had become infected. A note from LPN Ledonna Gilmer dated October 1, 2003 states in pertinent part:

> She had come in to first aid and seen Pam with rash on both forearms–it looked like poison oak to Pam when she saw it then. The employee came in on 9-12-03 with the rash to me wanting to know what I thought it was told her I didn't know she needed to see doctor, she asked me if I thought it was "chicken itch" and I told her that I did not . She came in one night the next week with sleeves already on both arms for the endo of the sleeves to be taped down, I did not see the rash that night, it was already covered by employee. She came in early a.m. on 9-18-03 wanting to see the company dr. with rash she knew it was from here–due to the chickens and chemicals. She feels like the salt additive the scaulder [sic] is also the problem.

Finally, the exhibit contains a list of positions to which Claimant was assigned at the plant from March 16, 2004 to May 13, 2004.

Respondents' Exhibit 6 is an excerpt of the blueprint for the plant, detailing various workstations at issue here.

Adjudication

A. Compensability

Claimant has contended that she suffered compensable injuries in the form of chemical exposure. Respondents have controverted this.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of Claimant's alleged injury, defines "compensable injury":

> (i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings that cannot come under the voluntary control of the patient. *Id*. § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between

the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id*. A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co*., 234 Ark. 104, 357 S.W.2d 263 (1962).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co*., 81 Ark. App. 269, 101 S.W.3d 252 (2003)(citing *Smith v. Magnet Cove Barium Corp*., 212 Ark. 491, 206 S.W.2d 442 (1947)).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id*. In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id*.

The medical evidence, supported by objective findings, shows that Claimant suffered two injuries: a rash and what Dr. Gigli termed "hyperactive airways." With respect to the rash, Claimant had objective findings of a rash on numerous doctor visits in 2003

and 2004. On September 19, 2003, she presented to Dr. Starnes with a rash that he determined to be contact dermatitis. Starnes wrote that the "rash does not appear to be poison ivy or oak. It appears to be a parasite or possibly a chemical reaction." While she also presented to Starnes on April 14, 2004 with inflammation in her mouth and nasal cavity, which is an objective finding, he attributed the condition to "possibly a result of fumes at work and smoking." Hence at the outset it appears that tying this condition to her work cannot be achieved without resort to speculation, which I cannot do. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). Claimant testified that she began suffering rashes in 2003. Linda Bramlett testified that Inspexx 100 began to be used at the Pilgrim's Pride plant that year, and was part of the recycled water that ended up in the scalder near Claimant's workstation. Despite the disagreement among the witnesses regarding whether the water from the chiller was recycled, all of the witnesses agreed that the recycled water containing the Inspexx went into the scalder. Claimant's testimony, corroborated by Joseph Prevost, was that the steam at times enveloped her, soaking her clothes. I am inclined to credit this over the testimony of David Davis, the safety manager, that distance and the presence of a venting hood would have kept the steam away from her. Claimant stated that she broke out wherever the steam touched her, including her arms and face. Bramlett and Prevost confirmed this. Bramlett corroborated Claimant's testimony that she did not have a rash until the introduction of the Inspexx 100. Both Claimant and Prevost testified that she would came to work without a skin reaction, but would have a flare-up after exposure to the steam. Prevost switched jobs one day with her at the beginning of the shift, and noted that she did not break out until she assumed her regular position as a re-

hanger. Notes from plant nurses confirm that Claimant presented with rashes attributed to chemical exposure at the plant. Both Claimant and Prevost testified that other employees had rashes as well. However, Claimant's rashes disappeared after she stopped working at the plant. Davis testified that the levels of the chemicals hydrogen peroxide and acetic acid (the components of Inspexx 100), along with chlorine, were well within acceptable limits. These products were heavily diluted in the re-used water. The MSDS warnings on Inspexx concerned its use in concentrated form. However, even Davis admitted that a hypersenstive individual could nonetheless suffer a reaction. Claimant has thus shown that her contact dermatitis caused physical harm and resulted in her need for medical treatment, that it was accidental in that it was caused by a specific incident or incidents identifiable by time and place of occurrence, and that it arose out of and in the course of her employment for Respondent Pilgrim's Pride.

Claimant's pulmonary injury was in the form of what Dr. Giglia termed "hyperactive airways," which he stated was consistent with asthma. This was objectively documented by the methacholine challenge test she underwent. The result of the test, performed on December 12, 2004, was "very strongly positive." This is the only objective finding of pulmonary injury to Claimant. But the test was not administered until five months after she left Pilgrim's Pride. Claimant by her own admission has been a smoker for 28 years. Dr. Giglia testified that this habit could be the cause of her hyperactive airways, along with the pneumonitis diagnosis she was given near the end of her tenure at the plant. He thought it was inconsistent for Claimant to claim that cigarette smoke did not bother her despite her problems with a myriad of other chemicals, including bleach, gasoline, perfume and glue.

Giglia noted that her documented gastroesophgeal reflux could also be a cause of her breathing problems.

In addition, Dr. Giglia testified that Claimant was not forthright in relating her health history concerning matters that could bear on her pulmonary condition. He was not aware that she previous engaged in HIV-risk activity. Giglia also did not know that she had bronchitis two years in a row–including asthmatic bronchitis.

In his deposition, the doctor also found other features of Claimant's case to be troubling. He stated that while generally an asthmatic can be helped to a certain degree, this was not the case with Claimant. She claimed to have problems with each and every medication he tried with her. However, this was inconsistent with the fact that her airways were clear every time she saw him. Dr. Giglia was bothered by the fact that despite her representations that her condition rendered her a virtual homebody, his office was never able to reach her. He also took note of the fact that it is unusual for someone to be unable to use any time of inhaled steroid. Finally, he pointed out that it was out of the ordinary for someone in Claimant's condition to experience difficulties only on an episodic basis. He testified that if Claimant had been untruthful in relating her health history, her smoking could explain the hyperactive airways.

Despite these misgivings, Dr. Giglia in his testimony reiterated that he thought that Claimant's pulmonary condition was caused by Inspexx 100, alone or in combination with chlorine. Asked if this would be true if those chemicals were being used at acceptable levels, he stated that Claimant's hypersensitivity could still be tied to a previous exposure. But Davis' testimony and the voluminous test results admitted in this case do not indicate that Claimant would have been exposed to a higher concentration at the plant sometime

in the past. The results were consistently below limits established by the manufacturer and other authorities.

When asked if he was still of the opinion within a reasonable degree of medical certainty that her hyperactive airways was caused by exposure to chemicals at Pilgrim's Pride, Dr. Giglia at his deposition stated "[m]aybe less so than I was at that time" because his interpretation was based on the health history Claimant provided. He also allowed that OSHA and other testing data might also call his opinion into question.

The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). In *Cooper v. Textron*, 2005 AWCC 31, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examination medical opinions concerning causation:

> Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. *See, Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In light of the evidence adduced in this case and outlined above, I cannot credit Dr. Giglia's opinion regarding causation. The evidence in this case is such that in order for me to find that the hyperactive airways was caused by chemical exposure at the plant, I would have to engage in speculation and conjecture. But again, I am not permitted to do this. *See Dena, supra*. Hence, I find that Claimant has not proven by a preponderance of the evidence that her pulmonary condition arose out of and in the course of her employment, and that, consequently, she has not proven that this is a compensable injury.

B. Temporary Total Disability Benefits

Claimant contends that she is entitled to temporary total disability benefits from July 12, 2004 to a date yet to be determined. According to her testimony, that period began when she last worked at Respondent Pilgrim's Pride. She was terminated the following Monday, July 15, 2004, for accumulating 12 points, which are analogous to demerits.

Claimant's compensable injury to her skin in the form of contact dermatitis is unscheduled. *See* Ark. Code Ann. § 11-9-521 & (c) (Repl. 2002). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he or she has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that the claimant has the capacity to earn the same or any part of the wages he was receiving

at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1) (Repl. 2002).

The last reference in her medical records to her having a rash was on June 20, 2004, when Dr. George Gray wrote that Claimant had a rash and assessed her as having pneumonitis caused by chemical exposure. He took her off work until July 7, 2004, and wrote on that date that her condition had resolved. Even viewing Dr. Gray's action in the light most favorable to Claimant, the fact remains that she was not even suffering from a rash as of July 12, 2004. Her testimony at the hearing was that she no longer suffers from rashes. After she left Pilgrim's Pride, she held other jobs–restaurant worker, school cafeteria worker, meter reader and rock carrier. In none of these jobs did she suffer from a rash. Her departures from the catfish restaurant and school cafeteria were due to the alleged affect of the chemicals there on her breathing. Hence, apart from whether she was still in her healing period at that point, Claimant as of July 12, 2004 and thereafter did not have a total incapacity to earn wages due to her contact dermatitis. Thus, she has not proven by a preponderance of the evidence that she is entitled to temporary total disability benefits.

C. Reasonable and Necessary Medical Care

Under Ark. Code Ann. § 11-9-508(a), an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed

necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, *supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). "Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer." *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

As I have found, Claimant sustained a compensable injury in the form of contact dermatitis. Her medical records in the exhibits above detail the treatment she has received for this injury. I find that the treatment detailed in those records to be reasonable and necessary. Her hearing testimony was that she does not have rashes anymore. Moreover, nothing in the medical records indicates that she will need future treatment for the condition. Hence, she is not entitled to future medical treatment.

D. Attorney's Fee

As the parties stipulated, this claim has been controverted in its entirety. However, I have not awarded Claimant any indemnity benefits herein. Claimant's attorney is thus not entitled to a controverted attorney's fee pursuant to Ark. Code Ann. § 11-9-715.

CONCLUSION AND AWARD

Respondents are directed to pay benefits in accordance with the findings of fact set forth above. 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 Ark. Code Ann. § 11-9-809. *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

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Hon. O. Milton Fine II
Administrative Law Judge