

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F706527

GEORGE HOLTZEN, Employee	CLAIMANT
BLESSINGS, LLC, Employer	RESPONDENT
CCMSI, TPA	RESPONDENT

OPINION FILED JANUARY 28, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by ALAN LANE, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 9, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 31, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the parties at all relevant times.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$208.00 for total disability benefits and \$156.00 for permanent partial disability benefits.

At the time of the hearing the parties also agreed to stipulate that the first notice of this claim was given to respondent by way of an AR-C dated June 26, 2007.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's lungs.

2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.

At the time of the hearing the claimant indicated that the requested period of temporary total disability benefits would begin June 26, 2007 and continue through a date yet to be determined. In addition, the respondent also raised as an issue the claimant's failure to provide notice of a potential work-related injury until Form C was filed on June 26, 2007.

The claimant contends he sustained an injury to his lungs while in the scope and course of his employment. He has been employed by Blessings, LLC as a maintenance worker since 2001. As a part of his regular duties he was engaged in the clean up of certain properties owned and/or managed by his employer. During this activity he was repeatedly exposed to pigeon droppings as well as solvents, caulking, and floor shipping products. He was diagnosed with histoplasmosis on or about June 22, 2007. This claim has been controverted and no benefits have been paid. Claimant has remained off work since May 11, 2007 under a doctor's care. Respondents have paid no medical or temporary total disability benefits. Claimant continues to require additional medical care that his doctors feel is reasonable and necessary. Claimant continues to suffer from histoplasmosis, and his attorney is entitled to a controverted attorney's fee.

The respondents contend that claimant was not injured at work and that his condition is not related to his employment. He cannot meet the requirements of A.C.A. §11-9-114. There is no objective medical evidence. Respondent also contends that claimant is not entitled to compensation benefits prior to the date he provided notice of a potential work-related injury on June 26, 2007. Respondent relies upon the notice provisions of A.C.A. §11-9-701 and §11-9-603.

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 made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 31, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that the respondent's first notice of this claim was an AR-C dated June 26, 2007 is likewise accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of histoplasmosis.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant is entitled to temporary total disability benefits beginning June 26, 2007 and continuing through August 23, 2007.

6. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

DISCUSSION

The claimant is a 48-year-old man who graduated from high school and also obtained 80 hours of college credit in the study of general business. The claimant has worked for the respondent and its predecessor companies for several years. Claimant originally worked for the respondent as a carpenter before moving into building maintenance.

The respondent company owns and operates various commercial, retail, and

residential properties. One of these properties includes the Three Sisters' project on Dickson Street in Fayetteville. While claimant performed building maintenance work for the respondent at all of its properties, he primarily worked at Three Sisters.

Claimant testified that in addition to normal building maintenance work he was also required to remove pigeon droppings at the Three Sisters' building beginning in late 1999 or early 2000. Pigeon droppings were removed by using a flathead shovel or putty knife to scrape the droppings before sweeping them into a large dust pan. According to claimant's testimony this process caused the air to become dusty with residue from the droppings. This activity of cleaning pigeon droppings was performed a minimum of three days a week and was performed year round.

Claimant testified that in the fall of 2006 he developed a cough which progressively worsened. Claimant sought medical treatment from his family physician, Dr. Tuttle, and was diagnosed with pneumonia. Claimant testified that his condition would improve for a period of time before it worsened again. At some point Dr. Tuttle suggested an x-ray which revealed a nodule in the claimant's right lung. Claimant was referred to Dr. Counce, who in a report dated May 15, 2007 indicated that claimant had a pulmonary nodule in his right lung and enlarged lymph nodes. As a result, Dr. Counce recommended additional testing and also recommended a procedure to perform a biopsy of the claimant's lymph nodes. This procedure was performed on May 21, 2007. In a report dated June 5, 2007, Dr. Counce noted that the procedure had revealed benign lymph nodes with multiple granulomas. Dr. Counce also noted that the claimant had a lesion in his right lung which was highly suspicious and PET positive. As a result, Dr. Counce recommended a second procedure to evaluate the nodule in claimant's right lung. This surgery was performed on June 20 and several nodules in the claimant's right lung were removed. Subsequent pathology tests revealed histoplasmosis. Since the second surgical procedure, the claimant has been treated with medication.

Claimant has filed this claim contending that he contracted histoplasmosis as a result of his exposure to pigeon droppings and various chemicals while working for respondent. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

The initial issue for consideration is whether claimant's claim is governed by the occupational disease statutes, A.C.A. §11-9-601, et al, or whether claimant's condition is a pulmonary injury and governed by the provisions of A.C.A. §11-9-114. The Arkansas Court of Appeals and the Full Commission have both noted that A.C.A. §11-9-114 refers to an "accident" which results from an event caused by a specific incident identifiable by time and place of occurrence. On the other hand, the occupational disease statute governs conditions which are not the result of a specific accident identifiable by time and place of occurrence but rather are the result of a gradual onset or cumulative effect. *City of Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W. 2d 855 (1997); *Tibbett v. Agricultural Productivity Company*, Full Commission Opinion filed March 11, 1998 (E510708). In this particular case, claimant does not contend that he contracted histoplasmosis as a result of an accident caused by a specific incident identifiable by time and place of occurrence. Instead, claimant's contention is that he contracted histoplasmosis as a result of exposure to pigeon droppings over a period of years. Accordingly, I find that claimant's claim is for an occupational disease and is therefore governed by the provisions of A.C.A. §11-9-601, et al.

In order for a claimant to prove a compensable occupational disease, they have the burden of establishing a causal connection between their occupation and the disease by preponderance of the evidence. A.C.A. §11-9-601(e)(1)(B). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that

claimant has met his burden of proving by a preponderance of the evidence that he suffered an occupational disease in the form of histoplasmosis which is causally related to his employment with the respondent. Therefore, claimant's histoplasmosis is a compensable injury.

As previously noted, claimant testified that while performing building maintenance one of his primary job duties was to scrape pigeon droppings beginning in late 1999 or early 2000. In the process of scraping these pigeon droppings dust was created which claimant breathed in. According to claimant's testimony he would clean droppings almost every day and he cleaned droppings at least three days per week. Claimant's testimony regarding his job duties was corroborated by that of Danny Zigler, the respondent's maintenance manager and claimant's immediate supervisor. According to Zigler's testimony, the claimant was required to clean pigeon droppings a minimum of three days per week. Zigler testified that if droppings were in front of a door it was cleaned daily. Zigler testified that in addition to removing the droppings, they were also required to remove the pigeon nests. Zigler testified that these activities caused the droppings to become dusty and airborne. Zigler testified that claimant performed these activities from 2000 until the date claimant last worked for the respondent in May 2007. Zigler also testified that the amount of pigeon droppings progressively worsened over time because more pigeons came to the property. Zigler testified that initially there were approximately 10 pigeons and that at last count there were approximately 40. He estimated that claimant would spend anywhere from one to three hours a day cleaning the droppings.

When claimant initially sought medical treatment for his condition he was diagnosed as suffering from pneumonia. When claimant's condition did not improve an x-ray was taken and a nodule on the claimant's right lung was discovered. In addition, claimant was also diagnosed as suffering from enlarged lymph nodes. A biopsy of the claimant's lymph nodes revealed it to be benign. A subsequent procedure was performed to remove the

nodule from claimant's right lung on June 20, 2007. During the process of this removal other nodules were also discovered and removed at the same time. Subsequent testing on the nodules revealed that claimant suffered from histoplasmosis. In a letter dated August 23, 2007, Dr. Agee stated that claimant's histoplasmosis was due to his exposure to the pigeon droppings:

George Holtzen is a patient of mine who in May of this year underwent a thoracotomy for diagnosis of a lung nodule. It turned out that this was due to histoplasmosis. This is most likely related to his maintenance work that he was engaged in prior to discovery of this lung nodule. He had exposure to pigeon droppings as well as to solvents, caulking, and floor stripping equipment. Pigeon droppings are a likely source of histoplasmosis and this is without a doubt how he contracted this disease. (Emphasis added.)

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable occupational disease in the form of histoplasmosis as a result of his employment with the respondent. Testimony from both the claimant and his supervisor indicates that claimant has been exposed to dust from pigeon droppings since at least 2000. According to the opinion of Dr. Agee, claimant's exposure to the pigeon droppings resulted in his contracting histoplasmosis. Based upon this evidence which I find to be credible, I find that claimant has met his burden of proof.

With respect to compensability, it should be noted that respondent contended at the time of the pre-hearing conference that there was no objective medical evidence establishing a compensable injury. However, the x-ray report revealed a nodule in the claimant's right lung and a subsequent surgery was performed to remove that nodule along with other nodules. In my opinion, the x-ray report revealing the nodule and the subsequent removal by surgery is a sufficient objective finding to establish a compensable injury.

Having found that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of histoplasmosis, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

I also find that claimant is entitled to temporary total disability benefits beginning on the requested date of June 26, 2007 and continuing through August 23, 2007. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, claimant has requested temporary total disability benefits beginning June 26, 2007 and continuing through a date yet to be determined. Prior to June 26, 2007 claimant had undergone surgery to remove the nodules in his right lung on June 20, 2007. Following that surgery claimant continued to be treated by his physicians with medication. In fact, claimant continues to receive medical treatment for his condition. Based upon claimant's surgical procedure and his continuation of medical treatment, I find that claimant remained within his healing period as of June 26, 2007 through August 23, 2007.

I also find that claimant suffered a total incapacity to earn wages during this period of time. Obviously, claimant was not capable of working immediately after his surgery due to his hospitalization. I find that claimant's total incapacity to earn wages continued from June 26, 2007 through August 23, 2007, the date Dr. Agee indicated that claimant could no longer work around pigeon droppings or other lung irritants. There is no indication that claimant has been taken off work by his treating physicians subsequent to August 23, 2007. While claimant has not returned to work for respondent or any other employer since that date, I find insufficient evidence that claimant has been totally incapacitated from working since that time. Accordingly, I find that claimant is entitled to temporary total

disability benefits beginning June 26, 2007 and continuing through August 23, 2007.

The final issue for consideration involves respondent's contention that claimant is not entitled to compensation benefits prior to the date he provided respondent with notice of a potential work-related injury on June 26, 2007. Respondent relies upon A.C.A. §11-9-603 and A.C.A. §11-9-701. I find no merit to respondent's contention that claimant is not entitled to compensation benefits for failure to provide notice prior to June 26, 2007. According to A.C.A. §11-9-603(a)(2)(A), written notice of an occupational disease must be given to the employer by the employee within 90 days after the first distinct manifestation. In *Quality Service Railcar v. Williams*, 36 Ark. App. 29, 820 S.W. 2d 278 (1991), the Court indicated that the time period begins to run from the first distinct manifestation of the disease cognizable under workers' compensation, not the first distinct manifestation of the disease. In other words, claimant must know or have reason to believe that he has a potential work-related occupational disease. In this particular case, claimant did not become aware that he had a potential work-related injury until histoplasmosis was diagnosed after the nodules were removed during the surgery on June 20, 2007. Prior to that date claimant had no reason to believe that his condition was related to his exposure to pigeon droppings at his place of employment. Therefore, notice claimant provided on June 26, 2007 was within 90 days of the first distinct manifestation of a disease cognizable under Arkansas workers' compensation law.

In addition, I also note that the Court in *Quality Service Railcar, supra*, indicated that the authority of the Commission to excuse failure to give notice pursuant to A.C.A. §11-9-701 also applies to failure to give notice of occupational disease as required by A.C.A. §11-9-603. A.C.A. §11-9-701 indicates that the Commission may excuse failure to give notice if the employee had no knowledge that the condition or disease arose out of and in the course of the employment. As previously noted, claimant was not aware of a potential causal connection between the nodules in his right lung and his work with the respondent

until after the surgery was performed to remove the nodules on June 20, 2007, and pathology indicated that claimant suffered from histoplasmosis. Once claimant learned of that diagnosis he provided notice to the respondent.

Accordingly, I find that claimant is not barred from receiving compensation benefits prior to June 26, 2007. Claimant did in fact provide timely notice to the respondent pursuant to A.C.A. §11-9-603 and in addition, any failure to provide notice earlier would be excused under the provisions of A.C.A. §11-9-701 on the basis that claimant was not aware that his disease arose out of and in the course of his employment with the respondent.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable occupational disease in the form of histoplasmosis while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning June 26, 2007 and continuing through August 23, 2007. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$324.75.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE