

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513076

MELVIN POPEJOY, EMPLOYEE

CLAIMANT

FISHER SCIENTIFIC INTERNATIONAL, INC., EMPLOYER

RESPONDENT

**NEW HAMPSHIRE INSURANCE COMPANY,
C/O AIG CLAIM SERVICES**

RESPONDENT

OPINION FILED MARCH 3, 2008

Hearing before Administrative Law Judge O. Milton Fine II on December 5, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Jarrod Parrish, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 6, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on March 12, 2007. 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 two, which I accept:

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

2. The employee/employer/carrier relationship existed at all relevant times, including on or about August 2004, when Claimant sustained a compensable injury on his arms due to contact dermatitis.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. With the addition of one issue by Claimant regarding the constitutionality of the Arkansas Workers' Compensation Act and one by me regarding notice, the following were litigated:

1. Whether the Arkansas Workers' Compensation Act is constitutional.
2. Whether the Claimant is entitled to reasonable and necessary medical treatment.
3. When did Respondents receive notice of Claimant's claim?
4. What was Claimant's average weekly wage?

Contentions

The parties contend as follows:

Claimant:

1. The Claimant contends that he sustained a compensable injury and is entitled to ongoing reasonable and necessary medical treatment related to his injury.

Respondents:

1. Respondents contend that all appropriate benefits have been paid in this claim.
2. While Respondents accepted compensability of this claim, no notice was received until December 14, 2004. As such, Respondents should not be

liable for any benefits prior to that date. The Claimant was released to return to work full duty on December 14, 2004, February 10, 2005, and July 29, 2005. Respondents contend the medical records do not support entitlement to continued medical care, nor do they support entitlement to further indemnity benefits.

3. Respondents assert a set-off for any unemployment benefits received in the event Claimant is found to be entitled to further indemnity benefits.

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. Because admission of Claimant's deposition will help to "best ascertain the rights of the parties" pursuant to Ark. Code Ann. § 11-9-705(a)(1), Claimant's proffered Exhibit 3 is admitted into evidence.
4. Because admission of the spreadsheet that is Respondents' proffered Exhibit 3 will help to "best ascertain the rights of the parties" under Ark. Code Ann. § 11-9-705(a)(1), the document is admitted into evidence.
5. The Arkansas Workers' Compensation Act is constitutional.

6. Claimant has proven by a preponderance of the evidence that he is entitled to additional reasonable and necessary medical treatment for his compensable contact dermatitis.
7. Because there are no benefits Claimant can claim prior to December 14, 2004, when Respondents contend they first received notice of the claim, the issue of the timing of the notice is moot and will not be addressed.
8. Claimant's average weekly wage was \$373.22.
9. While Respondents contend that they are entitled to an offset against Claimant's unemployment benefits, this was not made an issue; hence, the question of an offset will not be addressed but will be treated as a reserved issue.

PRELIMINARY RULINGS

Admission of Claimant's Proffered Exhibit 3

Near the end of Claimant's testimony, his counsel moved for admission of the transcript of his March 23, 2006 deposition. Respondents' counsel objected as follows:

[R]espondents do object to its introduction on the same basis I did in the other two hearings. It's full of hearsay. And I realize the evidentiary rules are relaxed, but I don't think they should be relaxed to that extent. It was taken as a discovery depo [sic]. Questions were asked and answers were given that were pure hearsay. There's irrelevant information in there, and I don't think it's necessary. Mr. Popejoy's here today. I think we've covered what we need to cover and I think it would be cumulative and prejudicial to respondents.

I took the matter under advisement at the hearing and permitted Claimant to proffer the exhibit.

Rule 32 of the Arkansas Rules of Civil Procedure addresses how a deposition may be used in a trial or a hearing. Respondents used Claimant's deposition repeatedly during cross-examination. This is expressly allowed by Subsection (a)(1). But none of the provisions in the Rule 32(a) appear to authorize the wholesale introduction of the deposition transcript in light of the fact that Claimant was present and testified at the hearing. Hence, if this rule were applicable here, the transcript would not be admissible.

In AWCC R. 099.16, the Commission has stated in pertinent part:

Depositions may be taken and discovery had by any party after the claim has been controverted in accordance with the statutory provisions and rule of civil procedure relating to civil actions in the Chancery and Circuit Courts of this State, unless the parties agree otherwise.

Hence, the Arkansas Rules of Civil Procedure only apply to the extent of the conducting of the discovery in a workers' compensation claim—not the use of the discovery product in the hearing. For the latter, Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2002) provides:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

The Commission has a "great deal of latitude in evidentiary matters." *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). As noted above, Respondents in their cross-examination of Claimant repeatedly referred to his deposition. After due consideration of this matter, I find that admission of Claimant's deposition will help to "best ascertain the rights of the parties." Thus, Claimant's proffered Exhibit 3 should be and is hereby admitted into evidence.

Admission of Respondents' Proffered Exhibit 3

At the end of the hearing, Respondents offered its Proffered Exhibit 3, which is an untitled spreadsheet purporting to show payments to, among others, Claimant. Respondents stated that the document showed when they received notice of the instant claim, which is at issue. Claimant lodged the following objection:

Yes [we object], Your Honor. And the only reason, not for foundation, we were given that by respondents in their discovery. But it goes to, and I don't think it's really relevant to the issues. Certainly it, as [Respondents' counsel] had indicated, would correlate with what they say, what the adjustor says was their first notice. But it's not, doesn't correlate with any of the evidence under oath before Your Honor that all these problems and symptoms were obvious to the supervisors and told to the supervisors. So we just object to the spreadsheet as being irrelevant.

Respondents replied that the documents relevance would be more apparent once the deposition of Barry Chase (which the record was held open to receive) was admitted. I took the matter under advisement and permitted Respondents to proffer the exhibit.

As discussed above, § 11-9-705(a)(1) gives the Commission broad discretion concerning what should be admitted into evidence. Claimant's only objection was that the document was not relevant. Respondents stated that Chase's deposition would shed further light about this, by showing when Claimant's paperwork was filled out and when notification was given that there was a suspected work-related problem. But his deposition testimony did not touch on this issue. Nonetheless, I note that entries on the spreadsheet correspond with dates of service for treatment given Claimant, as reflected in Claimant's Exhibit 1 and Respondents' Exhibit 1. Because I find that admission of the spreadsheet will help to "best ascertain the rights of the parties" for purposes of § 11-9-705(a)(1), I hold that Respondents' proffered Exhibit 3 should be and is hereby admitted into evidence.

CASE IN CHIEF**Summary of Evidence**

_____ Two witnesses testified at the hearing: Claimant and Barbara Plauck, his former co-worker at Respondent Fisher. In addition, Claimant, Dr. Philip Hardin and Barry Chase testified *via* deposition.

In addition to the prehearing order discussed above, also admitted into evidence in this case was Claimant's Exhibit 1, medical records of Claimant, consisting of one index page and 10 separately numbered pages; Claimant's Exhibit 2, the transcript of the May 17, 2007 deposition of Dr. Philip Hardin, consisting of 58 pages of testimony and 83 pages of exhibits; Claimant's Exhibit 3, the transcript of the March 23, 2006 deposition of Claimant, consisting of 59 pages; Claimant's Exhibit 4, a one-page Form AR-W for Claimant bearing handwritten notations in the margins; Respondents' Exhibit 1, medical records of Claimant, consisting of one index page and 11 separately numbered pages; Respondents' Exhibit 2, non-medical records including Claimant's application for unemployment benefits and a Form AR-W for Claimant, consisting of one index page and seven separately numbered pages; Respondents' Exhibit 3, a spreadsheet consisting of four separately numbered pages; and Respondents' Exhibit 4, the transcript of the December 17, 2007 deposition of Barry Chase, consisting of 26 pages. In addition, Claimant's July 17, 2007 Motion to Recuse plus attachments, consisting of 381 pages, and Respondents' December 11, 2007 response thereto, consisting of 21 pages, have been blue-backed to the record.

Testimony-Hearing

Barbara Plauck. Plauck testified that she worked for Respondent Fisher Scientific, also known as Epoxy, for approximately eight months, beginning in July or August of 2004.

Claimant and she worked on the blacking table, treating countertops to be used in schools and hospitals. They applied an edge dressing to the edges of the countertops that had been cut by a saw. The workers mixed two compounds together to create the dressing.

Plauck testified that from the beginning of her tenure, she noticed that Claimant was having problems with contact dermatitis because of the epoxy resins. She observed a rash on his fingers, hands and arms, along his waistline, and around his eyes and mouth. The skin was peeled on his hands, and the other areas had small bumps that would form blisters and then scabs. He constantly scratched and rubbed the affected areas. Plauck and a girl in the packing area were experiencing problems as well. The plant manager, Barry Chase, along with the plant nurse, Nina Hargis, and the shift supervisor, Bob Stiles, were aware of the problems Claimant and others were having. She stated that if Chase said that he was not aware until December 2004, that would be false. Stiles told them that if they broke out, to report it immediately.

Dr. Hardin treated Plauck and at least three other workers from Respondent Fisher. She testified that she still experiences itching from time to time and has to be careful about exposure—particularly to resins.

When questioned by Respondents, Plauck stated that while she did not know what Claimant's hourly wage was, she assumed he made more than she did because of his longer tenure at the plant. She agreed that in her litigated workers' compensation claim, she stipulated that her average weekly wage was \$350.00. At one point while Claimant and she were working there, their hours were capped at 37.5 from Monday through Friday, but they could work on Saturday in order to reach 40. Plauck received a 50 cent "differential" for working the afternoon shift while a Respondent Fisher. She did not remember her hourly

wage, but stated that employees were paid differently based upon the years of service and raises given to each. Claimant and she were full time employees, working 40 hours a week. However, at times they were sent home early if equipment broke down. If overtime was necessary in order to fill an order, it was mandatory if there were not enough volunteers.

Plauck testified that in her experience, she could not transfer her rash to a new, unaffected location by scratching there after touching the rash. She is still working.

She was not aware of when Claimant filled out his workers' compensation paperwork. Her observations of his condition were while the two were still working at the plant. However, she still sees him because she does his laundry, and she has observed that he still has skin problems, including itching and bleeding, with his hands and fingers. Plauck has seen Claimant around a dozen times, none social in nature, since leaving Respondent Fisher. The two live a quarter mile apart.

When questioned by me, Plauck testified that the term "shift differential" refers to extra pay given as an incentive to get a worker to work a less popular shift. Workers were expected to work some Saturdays unless they were scheduled for vacation. These Saturdays either allowed a worker to complete a 40-hour workweek or were overtime.

Melvin Dewayne Popejoy. Claimant testified that he is 71 and worked at Respondent Fisher for three years. He worked with Plauck and another worker on his shift at the station. He was at the end of the finishing line there, and his job was to wipe the edge dressing along the edges of the countertops where the saw marks were. After applying the dressing, he had to wipe the excess off. This was the last step before the product was packaged for shipping.

Because of the delaying in the drying of the edge dressing so the product could be packaged, different tactics were attempted to speed up the process. John Stroh, a chemist hired by Respondent Fisher, began experimenting, changing the formula of the dressing. Soon thereafter, Claimant began experiencing skin problems. The first night, the chemicals Claimant mixed burned his right forefinger. This occurred approximately in August 2004. From there, his fingernails were affected, and then the rash spread to his legs and buttocks.

Claimant testified that his supervisor was aware of dermatitis when it first happened. The supervisors were aware that he was seeking medical treatment. The company nurse sent him to Dr. Richard Burnett, the first doctor to treat him for the contact dermatitis. The nurse also sent him to Dr. Phillip Hardin.

He stated that his next appointment with Dr. Hardin was January 5, 2008. Dr. Hardin is still treating Claimant because he is still experiencing problems. He begins itching, and pimples appear. Once the pustules break, the itch ceases in that area. At the time of the hearing, he stated that he had a rash on his neck, and that his back was itching severely. To avoid aggravating his condition, he takes showers twice a day and avoids all strong chemicals with the exception of gasoline for his lawn mower. He uses a prescription salve for his condition, but is nearly out of the medicine. Claimant testified that he has paid for some of his treatment, but that he is asking that Respondents pay for his continued treatment.

With respect to his wages, Claimant stated that he was making \$10.38 an hour. This included the shift differential. He was a full-time employee at Respondent Fisher. He agreed with Respondents that he worked 104.16 hours of overtime in the year preceding his injury. He also admitted that some weeks, he only worked 38 hours. That occurred

when orders were slow. Claimant could not state that he missed work due to the contact dermatitis prior to going to the doctor. He testified that his average weekly wage should be \$446.39.

When questioned by Respondents, Claimant testified that Respondents paid for Dr. Hardin's treatment after he notified them that he was going to file a workers' compensation claim. While they discontinued paying for his treatment when Dr. Hardin wrote that he was clear at that time, Claimant stated that he did not know if he was symptom-free then. Dr. Hardin also treated him for a fungus on his nails and hands, but that condition resolved. While Claimant's job at Lowe's does not aggravate his condition, he continues to have flare-ups. The condition has not affected his strength, but finger tenderness has affected his grasping ability.

Claimant was terminated by Respondent Fisher. He had never been fired from a job before. Dr. Hardin had stated that he needed to work someone other than at the finishing table. Prior to going to work at Lowe's, Claimant drew around 26 weeks of unemployment benefits. To do so, he certified that he did not have any disabilities or problems that would prevent him from going to work. He works full-time at Lowe's.

As for his schedule at Respondent Fisher, Claimant stated that the plant bumped his hours back to 36 or 37 hours a week for awhile, due to slow sales. But he worked on Saturdays whenever he could to reach 40 hours. Because he worked the evening shift, from 2:30 to 11:30 p.m., Claimant received an additional 50 cents an hour. The night shift received an additional \$1.00. He stayed on the evening shift until he was assigned light duty, which he performed on the day shift.

With respect to the formula change, Claimant was not aware of what Stroh did to alter it.

When questioned by me, Claimant stated that his station was known as the blacking table. He only applied the dressing on the edges of the tabletops. Claimant and his co-workers created the blacking agent by mixing a coloring agent (depending on the color of the tabletop) with a hardening agent. He applied the dressing with a sponge, and did not wear chemical-resistant gloves. However, after he started breaking out, he wore gloves. But they were only thin latex gloves.

I asked Claimant if he had any place where he was currently suffering from contact dermatitis. He displayed an area of scaly skin at the base of his neck, going down into the back. He reiterated that the area begins to itch, and then pimples or pustules form. When these break, the itching in that area ceases.

Testimony-Deposition

Dr. Philip Hardin. Dr. Hardin was deposed on May 17, 2007. As noted above, the transcript of his deposition was admitted as Claimant's Exhibit 2. He testified that he is board-certified in Dermatology and Dermatopathology. Claimant, along with Barbara Plauck and Debra Chuk, were patients of his. The patients had told him that Respondent Epoxyn had changed its epoxy formula so that it would harden more quickly, and that they thought their problems had begun or had accelerated after that point.

Claimant first came to see him December 20, 2004. Dr. Richard Burnett had referred him. Claimant told Dr. Hardin that he was allergic to epoxy and worked at Epoxyn. His examination of Claimant revealed "numerous excoriations, scratches on his arms and abdomen. He had a purple dermatitis on his volar forearms. He had thickened red scaly

hands and feet, and he had yellow crumbly toenails.” Dr. Hardin did not recall seeing anything wrong with Claimant’s face, neck or chest at that time. He suspected that at least part of Claimant’s problems were not due to an epoxy allergy, and a test showed the presence of fungus. The fungus treatment improved his condition, but did not eliminate it entirely. A patch test showed a 2+ positive reaction to epoxy resin. Dr. Hardin opined that Claimant “probably had a true allergic contact dermatitis since [Claimant] had, it made sense in the context of his work situation.” He termed it a “significant reaction.” While he was not sure if the dermatitis made Claimant more susceptible to fungus, or vice versa, he was of the opinion that the dermatitis contributed to most of Claimant’s skin problems.

Dr. Hardin returned Claimant to work on April 7, 2005. He gave him permanent restrictions to avoid contact with epoxy resin or hardener, vapors from curing epoxy, and primary irritants, solvents and detergents. When he saw Claimant on February 10, 2006, he presented with significant itching with evidence of acute contact dermatitis. Dr. Hardin treated him with sedating antihistamines and a steroid lotion. On his next visit, Claimant presented with no fungus but a mild dermatitis around the waist, which Dr. Hardin opined was caused in part by rubbing and scratching. He had demonstrated a tendency to form hives where he had heat pressure or friction on his skin. On March 26, 2007, he was itching, but had improved somewhat. He last saw Claimant on May 7, 2007. Then, his symptoms were “well-controlled.” He did have pigmentary changes where he previously had the dermatitis.

Dr. Hardin opined that the dermatitis arose from Claimant’s exposure to epoxy resin at Respondent Fisher. The “intractable itching,” as Hardin described it, can lead to broken skin due to scratching, which can lead to pain and infection. He stated that such itching can

be more difficult to tolerate than pain. He testified that Claimant “is to the point where he does not require treatment at this time.” Dr. Hardin further stated that he could not predict what might happen in the future. He elaborated that Claimant would not necessarily need future doctor visits, provided that he can abide by the permanent restrictions. However, he added that it would be difficult to avoid these irritants and that exposure to them might cause further dermatitis that would require treatment.

At the deposition, Dr. Hardin looked at the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (hereinafter “AMA Guides”), stated that he was “[v]aguely” familiar with it. He opined that based on page 289, Table 2 of the AMA Guides, Claimant belonged in Class 2 with fifteen percent (15%) impairment. Further, he was of the opinion that the rating arose out of the exposure to the epoxy at Respondent Fisher. He stated that he was giving these opinions within a reasonable degree of medical certainty.

Dr. Hardin testified that he has been a dermatologist in the Mountain Home area for thirty years. There are a lot of boat manufacturers in the area. Dr. Hardin stated that while he is not a polymer chemist, he is “pretty familiar with the medical implications” of epoxy. He stated that sweeping would not expose someone to a toxic resin in a significant way. Dr. Hardin testified that “[t]he resin is not particularly volatile. It is a problem only in its liquid form and the vapors when it is curing. Once it’s cured, in dust form or not, the stuff is inert and its not a sensitizer.” But the fumes emitted during the curing process are allergenic. Controlled ventilation is required to limit harm. Dr. Hardin testified that he was a dermatologist in the U.S. Navy at the naval air station in Corpus Christi, where Huey helicopters were rebuilt. He stated that he saw a number of contact dermatitis cases there from the vapor phase of the curing epoxy—epoxy paint was utilized. Once the Navy

modified the ventilation system, he no longer saw problems. He has spoken to the nurse at Epoxyn about their air flow situation.

He stated that 80 percent (80%) of reactions are to the epoxy resin, while the rest of the reactions are to the hardener. There are 20 or more resins that can be used. The resins with lower molecular weight wet the skin and penetrate it better, and thus are more effective sensitizers. Hardeners are generally more volatile than the resin.

When questioned by Respondents, Dr. Hardin stated that Claimant has returned to see him four times since he returned him to work on July 29, 2005. He stated that he was not surprised that Claimant returned because:

The allergic contact dermatitis, I think one is that he seemed determined to continue, you know, working at the job if he could, having put in as many years as he had and anticipating that he might have trouble finding employment elsewhere. Two, you get long term permeability changes in the skin, and hand dermatitis, in particular, tends to be a chronic problem.

At present, Claimant is doing fairly well.

Hardin opined that while Claimant's fungal infection might have made him more susceptible to dermatitis by affecting the permeability of his skin, it did not cause the dermatitis. But like the dermatitis, the condition could make Claimant sensitive to primary irritants, which Dr. Hardin defined as a substance that will produce dermatitis on anyone. The systemic anti-fungal treatment Dr. Hardin gave Claimant worked well. With respect to the symptoms with which Claimant presented on his first visit, Hardin stated that the finger nail problem was the only one that was fungus-related.

When Claimant returned in February 2006 for an appointment, some of his symptoms were attributable to his scratching. At that point, Claimant's skin was capable of producing hives merely by scratching. At this time, he prescribed a sedating

antihistamine to help with the itching and a lotion that contained corticosteroid, menthol and phenol, which are counter-irritants. He had not been given these medications before. A limited number of refills have been authorized. Hardin stated that there was never an indication that Claimant was exaggerating the extent of the itching. In fact, to Dr. Hardin Claimant appeared "rather stoic about his condition."

Hardin testified that when he released Claimant in July of 2005, he was clear at that point. But he did not assign him an impairment rating then because Claimant did not request one. He testified that he has assigned Claimant a fifteen percent (15%) rating based on his having a Class 2 impairment, when Class 2 ranges from ten percent (10%) to 25 percent (25%), Dr. Hardin explained:

Well, you know, part of the description [of Class 2] is signs and symptoms of skin disorder are present or intermittently present. I would have, I'd say intermittently present. And there's limitation of performance of some of the activities of daily living, and intermittent treatment may be required. Pick a number, you know, that's what it seems to be.

He added that he did not know if Claimant would require intermittent or constant treatment. The doctor opined that Claimant's skin "is not going to be normal for a long time." He stated that he expects Claimant will not be able to tolerate exposure to heat, friction, solvents, detergents, and primary irritants. Exposure to an arthropod assault may be enough to cause another round of dermatitis requiring treatment. He stated that the more damaged and sensitive the skin, the less exposure is required to cause harm. Once the barrier of the skin becomes damaged, according to Hardin, it is difficult to restore it, he analogized it to "falling through thin ice."

At the time he was released, Claimant no longer had any objective signs of the dermatitis, but Dr. Hardin qualified that statement by noting that he only conducted a limited examination, with Claimant not undressing completely.

Dr. Hardin testified that there is approximately five percent (5%) of the population that seems resistant to contact sensitization. Exposure to substances such as epoxy resin would not bother them. He did not believe that Claimant or the others had anything that made them more susceptible to the initial breakout. When asked to explain why some employees of Epoxyn have not gotten dermatitis, he stated:

I just don't think their number's come up yet. Epoxy resin is not a horrible sensitizer like poison ivy. With poison ivy, almost everyone who gets in it will become sensitized on one or two exposures to it. Nonetheless, you know, [epoxy is] a major cause of industrial disability, but it requires, you know, multiple exposures before you come up with it.

He testified that it is possible, through adequate ventilation and the supplying of vinyl gloves, to protect individuals such as Claimant while allowing them to continue to work at Epoxyn. But he added, "[w]hether it is practical or economical[ly] feasible is another question." Using a heavier molecular weight of epoxy resin would help them as well. Dr. Hardin opined that it was in Claimant's best interest if conditions were modified at Epoxyn to enable her to work there. He admitted that even if the ventilation system were improved, some people will still develop contact dermatitis from splashing epoxy resin on their skin and/or refusing to wear protective equipment.

He testified that he has dealt with approximately 12 to 13 contact dermatitis cases that have come from Respondent Epoxyn during his 30-year career. Presently, there is one other dermatologist in the Mountain Home area, but Dr. Hardin was not aware if the doctor had treated anyone for contact dermatitis related to epoxy resin. When asked, Dr. Hardin

opined that contact allergens and primary irritants have a synergistic effect in causing a dermatitis.

Melvin Duane Popejoy. Claimant was deposed on March 23, 2006. As noted above, the transcript of his deposition was admitted as Claimant's Exhibit 3. He testified that he graduated high school at age 16, served in the United States Air Force for four years, worked as a ranch foreman for 30 years, and helped manufacture wiring harnesses for two to three years before going to work at Respondent Fisher.

Asked to explain the multi-week gap in his pay record in the year preceding his skin injury, Claimant stated that it was due to either carpal tunnel or hernia repair surgery. While he worked there, he earned \$10.50 per hour. While at first Claimant worked 40 hours a week and some overtime, at a certain point his hours were cut back to 36. Claimant stated that his payroll records would reflect this change. However, there was never a company policy that capped weekly hours at less than 40.

Claimant testified that when the edging formula was first changed in July 2004, supervisors told him about it. The first night this occurred, Claimant suffered burns to his wrist and fingers. His problems began then. However, he did not report his condition until August or September of 2004, when his fingers began bleeding. He reported this to Paul Smith, a supervisor. Smith indicated that Claimant was not the only one experiencing problems due to the edging. However, no incident report was prepared at that time. Claimant did not recall when such a report was made.

Claimant stated that his fingers are still so tender that it is difficult to open a box at his current job without his fingers bleeding. Heat does not cause his skin to react. He uses a medication cream every day. At the deposition, Claimant presented with an affected area

above his right hip. He stated that he can transfer to rash to an unaffected area by scratching an affected area first. The itching begins in an area before a flare-up of the dermatitis occurs. And Claimant stated that he is itching, somewhere, all of the time, and that he has never been completely free of flare-ups. In addition to his fingers and hands, his arms, back, abdomen and legs have been affected. It takes weeks for a flare-up to subside once he begins applying salve at the affected spot.

Claimant testified that he never missed work because of his condition. He applied for unemployment after being terminated from Respondent Fisher on July 11, 2005, and received benefits for 26 weeks. Claimant receives Social Security benefits due to his age, but has never applied for disability benefits. His own health insurance has paid for some prescriptions related to his dermatitis, when he first noticed the skin problem. He intends to return to the doctor once he runs out of salve.

Barry Chase. Chase was deposed on December 17, 2007. As noted above, the record was left open and the transcript of his deposition was admitted as Respondents' Exhibit 4. Under questioning from Respondents, Chase testified that he is the general manager of Epoxyn Products in Mountain Home, and has held this position since May 2001. Fisher Epoxyn makes work surfaces for laboratory environments. These surfaces are chemically resistant. Liquid epoxy resin is a primary ingredient used in manufacturing the countertops. In his experience, there are some people who are allergic to epoxy resin. Claimant worked in the fabrication department at Respondent Fisher, and worked with edge dressing, which is made of liquid epoxy and applied to the edges of the countertops that have been machined.

Chase stated that formula changes occur based on the seasons of the year. However, the amounts of the components in the dressing are changed; new chemicals are not added.

The dressing is comprised of liquid epoxy, hardeners, a diluent, and a coloring agent. Diluents promote faster drying. Employees such as Claimant are tasked to combine the hardener with the edge dressing mix according to a prescribed formula. These are done in small quantities.

With respect to equipment, Chase testified that the edge dressing area has a requirement for sock sleeves, long sleeve shirts, nitrite, chemical-resistant gloves, and Tyvek gloves. In addition, Tyvek suits are available for use.

When questioned by Claimant, Chase stated that the plant would not know if a worker is experiencing a work-related reaction unless the worker tells them. Company policy is for an employee to report an injury or condition once the employee notices it. Respondent Fisher sends such individuals to Dr. Burnett, who in turn has referred them to Dr. Hardin. Chase stated that he was not aware of any employee experiencing an allergic reaction to epoxy resin when the edge dressing formula was changed. The employees at the plant are aware who the plant chemist is. Formula changes are performed in the lab and not at the workstation. The component that is changed is the one containing the pigment. The hardener is an off-the-shelf product.

Records-Medical

The medical records of Claimant that were introduced at the December 5, 2007 hearing and constitute Claimant's Exhibit 1, Respondents' Exhibit 1, and Exhibit 1 of Joint Claimant's Exhibit 2 (the deposition of Dr. Hardin) reflect the following:

On December 14, 2004, Claimant presented to Dr. Richard Burnett with a rash that Claimant stated was over all of his body and which had gotten worse since August 2004. He stated that it itches very badly. Dr. Burnett assessed him as having folliculitis and dry skin, prescribed medication along with the use of gloves and barrier cream, and returned him to full duty.

Claimant went to Dr. Phillip Hardin on December 20, 2004, stating that he had an epoxy allergy that is driving him crazy. There, he presented with numerous excoriations on his right arms and abdomen. In addition, he had purple dermatitis on his right forearm and thickened red scaly hands and feet, along with yellow crumbly toenails. He was negative for dermographism. Dr. Hardin prescribed Lamisil and directed him to stop taking the topical cortisone.

When he returned to Dr. Hardin on January 31, 2005, his hands and arms were still sore. His fingers, especially the tips, were fissuring and peeling. He was assessed as having a fungus and was patch-tested for contact dermatitis. Claimant had a positive reaction (2+) to epoxy resin.

Claimant had a follow-up visit with Dr. Burnett on February 10, 2005, where he complained of a rash on his arms, left eyelid, left flank, and nose. Dr. Burnett assessed him as having, *inter alia*, contact dermatitis due to epoxy resin; but he noted that Claimant's rash had "resolved."

On March 3, 2005, Claimant returned to Dr. Hardin. He had no further reaction and stated that everything was healed. He requested to return from light to regular duty. Dr. Hardin returned him to work, but directed that he avoid epoxy resin and vapor. Claimant on April 7, 2005 still presented as improving. Again, he asked for a work release. His skin

was thickened and pink. Dr. Hardin released him to work but left intact the restriction against direct contact with epoxy resin or the reactive vapor thereof. However, he stated that Claimant, per his request, could try to work with epoxy vapors.

On May 13, 2005, Dr. Hardin wrote:

Melvin Popejoy was seen in my office April 13, 2005 for management of his allergic contact dermatitis. He had a relevant allergy (2+) to contact with epoxy resin. He has been instructed to avoid contact with epoxy resin and vapors from reacting epoxy resin. Mr. Popejoy is scheduled for follow up June 9, 2005 at 1:40PM. He will continue to require medical management as long as his condition persists. He may be released back to work as long as he is able to avoid contact with epoxy resin or vapors from reacting epoxy. Contact with these substances will cause an acute flare of his allergic contact dermatitis.

Claimant returned to regular duty, but his arms broke out again. He came back to Dr. Hardin on May 27, 2005 with a rash on his forearms, chest and neck. Claimant was instructed that each exposure and allergic response will intensify the inflammatory response, and advised to work somewhere to ensure that epoxy exposure no longer happens. He was clear when he presented on July 29, 2005. He had been on light duty for two weeks and laid off for two weeks thereafter. Dr. Hardin adjudged him to be symptom-free and released him with the warning that further contact with epoxy resin would result in further outbreaks.

On August 22, 2007, Claimant underwent an independent medical evaluation by Dr. Jerri Hoskyn. Claimant did not present with active dermatitis on the day of the examination, but there was objective evidence of pruritus (excoriations). Dr. Hoskyn noted that Claimant "has continued intermittent pruritus requiring intermittent treatment. Re-exposure to epoxy would be expected to cause a recurrence of his contact dermatitis and worsening of the

itching.” Dr. Hoskyn opined to a reasonable degree of medical certainty that Claimant had reached maximum medical improvement.

Records-Non-medical

As discussed more fully herein, Claimant’s Exhibit No. 4 and Respondents’ Exhibit 2 contain a Form AR-W for Claimant. Respondents’ Exhibit 2 also contains Claimant’s unemployment benefits application dated July 13, 2005 and a record of unemployment benefits paid. Finally, Respondents’ Exhibit 3 is a spreadsheet that reflects payments to, *inter alia*, Claimant.

ADJUDICATION

A. Constitutionality of the Arkansas Workers’ Compensation Act

As noted above, Claimant filed on July 18, 2007 a “Motion to Recuse and Notice of Intent to Introduce Evidence at Hearing.” Therein, he argued, *inter alia*, that the provisions of the Arkansas Workers’ Compensation Act that provide for the establishment of administrative law judges are unconstitutional. The motion and attachments, along with Respondents’ December 11, 2007 response, have been blue-backed to the record in this case.

The points raised in the motion are identical to those considered and rejected by the Arkansas Court of Appeals in *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, ___ S.W.3d ___ (Ark. Ct. App. 2007), *pet. for rev. denied*, No. O7-268 (Ark. May 3, 2007). Claimant has not sought to distinguish *Long* or to argue that it should be modified or overruled. Hence, the Act is constitutional, and Claimant’s motion is denied.

B. 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).

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.*

Barbara Plauck, who worked with Claimant at the backing table, testified that she saw a rash on his fingers, hands, arms, waistline, eyes and mouth. The skin on his hands was peeling. Plauck and Claimant still see each other, and Plauck stated that she has noticed that Claimant still has skin problems, including itching and bleeding, with his hands and fingers.

Claimant worked at the blackening table at Respondent Fisher, where he came into contact with epoxy resin. As the parties stipulated, Claimant sustained a compensable injury in the form of contact dermatitis on his arms. However, the evidence showed that he had dermatitis on other areas of his body as well. It has particularly affected his hands and fingers. At the hearing, he had the condition on his neck and back.

Claimant saw Drs. Burnett and Hardin, and still treats with Dr. Hardin. He uses a medicated salve that has helped his condition. But he uses the salve every day, and is nearly out of it. His next appointment was scheduled for January 5, 2008—after the hearing. Claimant testified that he is still experiencing symptoms although he has been away from Respondent Fisher for some time. He stated that he has never been free of flare-ups. At the hearing, his back was itching severely. With his condition, itching leads to the formation of pimples or pustules. Once these sores break, the itching in that area stops.

Dr. Hardin testified that when Claimant first presented to him for treatment, he had multiple excoriations on his arms and abdomen, along with thickened red scaly hands and feet. A patch test showed that Claimant had a significant reaction—2+—to epoxy resin. He treated him with sedating antihistamines and a steroid lotion. A limited number of refills have been authorized. Claimant's skin tends to form hives where he had heat pressure or friction on his skin. Dr. Hardin assigned him a fifteen percent (15%) impairment based on page 289, table 2, of the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, FOURTH EDITION. He testified that Claimant did not need further treatment at the time of the deposition. But he added that he could not predict what would happen in the future. While Claimant could avoid additional flare-ups by staying away from irritants, Dr. Hardin stated that it would be difficult to avoid them and that exposure to them might cause further

dermatitis that would require treatment. He noted that Claimant had returned to see him four times since his release, and was not surprised because long term permeability changes in the skin along with hand dermatitis tend to be chronic. Dr. Hardin opined that Claimant's skin will not be normal for a long time; the barrier of the skin, once damaged, is hard to restore.

While Dr. Hoskyn, who performed the IME on Claimant, was of the opinion that Claimant had reached maximum medical improvement, she also stated that he had continued intermittent pruritus requiring intermittent treatment. Also, she opined that he requires topical steroids (currently fluocinonide cream) and antihistamines (currently doxepin 25 mg) to treat the dermatitis as the need arises. "Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer." *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Based on the foregoing, I find that Claimant has proven by a preponderance of the evidence that he is entitled to additional reasonable and necessary medical treatment for his compensable contact dermatitis.

C. Notice

Respondents have contended that they did not receive notice of this claim until December 14, 2004, and thus should not be liable for any benefits prior to that date.

Arkansas Code Annotated § 11-9-701(a)(1) & (b) provides:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

...

(b)(1) Failure to give the notice shall not bar any claim:
(A) If the employer had knowledge of the injury or death;
(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or
(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

(2) Objection to failure to give notice must be made at or before the first hearing on the claim.

My review of the record shows that Claimant did not receive medical treatment for his compensable injury prior to December 14, 2004. Moreover, Claimant's testimony was that he never missed work because of his compensable injury. Because there are no benefits prior to December 14, 2004 that Claimant can claim, this issue is moot and will not be addressed.

D. Average Weekly Wage

Arkansas Code Annotated Section 11-9-518 (Repl. 2002) provides:

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. *Ryan v. NAPA*, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40-hour workweek, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (1993); *A & C Servs., Inc. v. Sowell*, 44 Ark. App. 150, 870 S.W.2d 764 (1994). However, the Arkansas Court of Appeals has held that the Commission did not err in basing a claimant's wage rate for seasonal work on a 40-hour workweek when his contract of hire was for 40 hours per week or more whenever the work was available, but the claimant worked less than 40 hours per week when the hours were reduced due to the weather. *Chapel Gardens Nursery v. Lovelady*, 47 Ark. App. 114, 885 S.W.2d 915 (1994). The Court of Appeals has also affirmed a Commission finding that a claimant should not be penalized for missing work for legitimate leave time including personal health reasons and for company convenience when work was not available. *Rheem Mfg. Inc. v. Bark*, 97 Ark. App. 224, ___ S.W.3d ___ (2006).

Claimant testified that during the period at issue, he was making \$10.38 per hour. This included a 50-cent "differential," a slight premium based on the fact that he worked the evening shift at Respondent Fisher. I note that in his deposition, Claimant testified that he earned \$10.50 per hour. He estimated at the hearing that his average weekly wage was

\$446.39. He stated that at one point, due to slowing sales, his hours were cut back to 36-37 hours per week, with the opportunity of completing 40 hours on Saturdays. At another point in his testimony, he said his hours were cut back to 38. He testified that he worked on Saturdays whenever he could to reach 40 hours. Claimant stated that either carpal tunnel or hernia repair surgery caused the multi-week gap in his pay record in the year prior to his injury.

Plauck, one of his co-workers, admitted that when she litigated her own workers' compensation claim, she stipulated to an average weekly wage of \$350.00. She could not remember her hourly rate, but testified that Claimant would have made more than her because of her longer tenure at the plant. Plauck corroborated Claimant's testimony that second shift personnel received a 50-cent differential. She testified that while their hours were capped at 37.5 from Monday through Friday, they could work on Saturday to reach 40. She stated that Claimant and she were full time employees. If overtime were necessary to fill an order, it was mandatory if not enough employees volunteered. However, in his deposition testimony Claimant denied that their hours were capped at less than 40.

I have reviewed the Form AR-W, part of Respondents' Exhibit 2. I have also reviewed this form that Claimant's counsel made notations on and which was admitted as Claimant's Exhibit 4. It is noteworthy that Claimant only worked a 40-hour workweek 18 out of the 52 weeks preceding his injury. His hourly rate at the time of his injury, based upon the Form AR-W, was \$9.60. This is the applicable rate. See *Jones v. Griffin Gin Co.*, 1998 AWCC 65, Claim No. E317017, (Full Commission Opinion filed February 13, 1998). Based on my review of the evidence, I find that Claimant has failed to establish by a preponderance of the evidence that he was a full-time employee who was expected to work

40 hours per week when the work was available. I also find, per *Bark, supra*, that weeks 5 and 14-21 should be excluded in calculating his average weekly wage. He worked 1515.47 hours in the 43 weeks preceding his injury. Therefore, I find that his average weekly wage before overtime was $(\$9.60 \text{ per hour}) \times (1515.47 \text{ hours}) / (43 \text{ weeks}) = \338.34 . In the week before his injury, he earned \$14.40 per hour working overtime. He worked 104.16 hours of overtime in 14 weeks. His average overtime was thus $(\$14.40 \text{ per hour}) \times (104.16 \text{ hours}) / 43 \text{ weeks} = \34.88 . His average weekly wage was thus $\$338.34 + \$34.88 = \$373.22$.

E. Offset

Respondents in their contentions argue that they are entitled to an offset for unemployment benefits Claimant received against any indemnity benefits he may be awarded. However, the question of an offset was not made an issue to the hearing. For that reason, the question of an offset will not be addressed but will be treated as a reserved issue. See *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006)(improper for administrative law judge to address issue not raised at hearing), *rev'd on other grounds*, No. CA06-398 (Dec. 6, 2006)(unpublished).

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).

Popejoy - Claim No. F513076

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IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge