

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210253

RONNIE LONG, EMPLOYEE	CLAIMANT
GLAD MANUFACTURING COMPANY (formerly FIRST BRANDS), EMPLOYER	RESPONDENT NO. 1
LUMBERMEN'S CASUALTY COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
INSURANCE COMPANY-STATE OF PENNSYLVANIA, INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED AUGUST 18, 2004

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JAY TOLLEY, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 2 appeals an administrative law judge's opinion filed September 9, 2003. The administrative law judge found that "During his employment with this respondent, the claimant developed a compensable occupational disease, in the form of occupational asthma." After reviewing the entire record *de novo*, the Full

Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained an occupational disease pursuant to Ark. Code Ann. §11-9-601(e)(1).

I. HISTORY

Ronnie Ray Long testified that he began working for the respondent-employer in April 1973. Mr. Long testified that the respondents manufactured trash bags and sandwich bags. The claimant testified that he first worked "in extrusion, which is the part of the plant that melts the plastic down to make film." The claimant recalled that he began working in "conversion" after one year, which was "the part that takes the roll of film and makes bags out of it." The claimant also described various other duties and work stations involved in his employment. The claimant testified:

Q. Is there a period of time that you can date when you began to have any problems and, if so, what were they?

A. Probably the early '90s was the first time this doctor told me I had asthma.

The claimant presented to Dr. Tim W. Yawn on June 1, 1994:

Mr. Long is a 41 year old white male who presents today with a history of some chest congestion and a cough which has been productive. He states that he contracted a virus in Columbia, Missouri in December 1993 and he has had problems with chest congestion off and on for the last five months, but denies any history of any asthma except as a baby....

Dr. Yawn assessed "acute bronchitis." The claimant testified that he missed no time from work following his visit with Dr. Yawn. (The claimant testified that he actually contracted the virus in the Republic of Colombia, not Columbia, Missouri.)

The claimant presented to Dr. Jon A. Sexton on May 2, 1995:

Mr. Long is self-referred for evaluation of persistent cough and chest congestion. According to his mother, he found out that he had a diagnosis of asthma as a child. His symptoms apparently remitted spontaneously and he did not have any problems until about a year or so ago when he developed a cold during the winter months. He had a lot of chest congestion, sputum production and wheezing which finally went away after a prolonged period of time....During the last winter, he has experienced similar symptoms with lower respiratory tract infections including wheezing, congestion and frequent cough....Triggers for his symptoms include pollens, cold air and questionably perfumes. Cigarette smoke does not seem to bother him but certain irritant aerosols such as hair spray and air fresheners will cause him to have some cough. He denies any history of atopic disease. He apparently is exposed to some burned plastic fumes at his work place and these will also occasionally bother him. Over the last six months, however, he

has been driving a truck so he has not been exposed to any fumes. His symptoms are quite minor....

He is a factory worker and they make plastics (trash bags); he has been there for the last 23 years and has done no other significant long-term work. He worked as a machine adjuster which exposed him to some of the plastic fumes....

Dr. Sexton's impression was "Chronic cough, most likely related to some chronic bronchitis or some mild recurrent cough variant asthma."

The claimant followed up with Dr. Sexton on May 23, 1995:

I felt as though he probably had some element of chronic exposure bronchitis or cough variant asthma. He certainly has enough potential triggers at home that this could be cough variant asthma. He has a cat which stays in the house a great deal of the time and also sleeps with a feather pillow. He admits that his house is probably a little too dusty and he could certainly have a fair number of dust mites. He also has chronic exposure to irritant fumes at his work place and all these things combined may conspire to be giving him some reactive airways problems....He is coughing hardly any at all at this point and says his breathing is much better....

Dr. Sexton's impression was "probable cough variant asthma."

The parties' stipulations indicate that Respondent-Carrier No. 1, Lumbermen's Casualty Company, was on the risk beginning July 1, 1995.

The record contains First Brands Corporation Internal Correspondence dated October 24, 1995:

This letter summarizes the air sampling results taken during June and July as a follow up to the coverletter on this issue dated June 23, 1995 (see attached)....

This survey information indicates the employees are not overexposed to air contaminants either during normal operations or shutdown conditions in the wrap department. The conversion exhaust ventilation was measured and found to not be at design ratings. The ducts need to be cleaned periodically to remove build up of material to restore normal ventilation flow rates. This will help remove the haze or smoke particles in the department that occur during times the ventilation is reduced during air conditioning periods. Air sampling results in the conversion area reported results well below safe levels with most samples reported below detection levels.

With ventilation systems operating as designed, employees should not have any concern from exposure to air contaminants. Shutdown of wrap extruders with purge compound should be done with exhaust ventilation operating to reduce haze in the department....

The impression of Dr. Stephen Goss on March 9, 1999 was "mild cough, I think probably just some mild upper airway irritation, perhaps from his work place."

The parties' stipulations indicate that Respondent-Carrier No. 2, Insurance Company - State Of Pennsylvania, was on the risk after August 1, 1999.

On February 20, 2002, Dr. Karen Farst assessed "Chronic bronchitis type illness. He is exposed to some chemicals at work, and I'm not sure if this is an irritant."

The claimant testified:

Q. Now, was there anything different about any of the products that you used as far as what they were used for and how they were designed or manufactured, how they operated? Was there anything different about any of the products?

A. Nothing except for the - they come out with an odor bag.

Q. What's that odor bag called?

A. I don't - I think it's Fresh & Clean, but I'm not for sure about that.

The claimant consulted with a pulmonary disease specialist, Dr. Kyle G. Hardy, on April 22, 2002:

This patient is a 50 year old white male sent by Dr. Karen Farst for evaluation of dyspnea. This patient reports shortness of breath for approximately 6 years which has been worse over the past 6 months. He is now experiencing some dyspnea at rest....The patient works at Glad Industries and has been there for 30 years. He works in an area where plastic pellets are melted. His job involves maintaining machines. They occasionally will make a product called "Clean and Fresh" which especially causes worsening dyspnea. This involves melting plastic pellets with a scent. He brought some of these pellets in to clinic today. I examined these and they do have a strong perfumed scent. He has been using these for about 6 years and this is about the time his dyspnea began. Some of the other pellets are polyethylene polymers. He also notes dyspnea when exposed to perfumes but no other exposures. His

symptoms are not seasonal. His dyspnea does seem to improve when he is on vacation....This patient is a lifelong nonsmoker....

Spirometry reveals a moderate reduction in FEV1 and severe reduction in midflow rates both of which improve significantly after bronchodilator therapy. There is a moderate elevation in total lung capacity and a moderate elevation in residual volume. There is also a slight elevation in diffusion capacity. This is compatible with moderate obstructive lung disease that improves after bronchodilator therapy. The flow volume loop is classic for obstructive lung disease.

Dr. Hardy assessed "1. Asthma, likely occupational asthma. His asthma seems to be triggered by exposures in the work place. 2. Allergic rhinitis also likely due to work place exposure." Dr. Hardy stated, "We have had a long discussion concerning occupational asthma today. The very best solution for him would be to avoid exposures to any materials which cause dyspnea. This might involve working in a different area of the plant or getting another job."

The record indicates that Dr. Hardy took the claimant off work beginning April 30, 2002. The claimant testified on cross-examination that he began missing work on May 6, 2002. Counsel for Respondent No. 1 cross-examined the claimant:

Q. I asked you, when I was taking your deposition, the first time that you talked to anybody out at Glad about any kind of problem with your respiratory system, and I think you told me

that was after you had seen Dr. Kyle Hardy, and that was on April 22nd of '02, so it was some time after April 22nd of '02 you did go in and talk to David Powell, who is the manager?

A. Yes, sir.

Q. And Cindy Allgood was in there with you?

A. He called in Cindy....

Q. And you didn't tell them at that time you thought it was any way related to work or caused by work or anything?

A. No. I needed some time off.

On May 29, 2002, Dr. Hardy assessed "Occupational asthma under poor control." On July 5, 2002, Dr. Hardy assessed "Asthma, still under poor control. It is possible he might have reflux contributing to his dyspnea and wheezing. Serevent tends to make him jittery and might be contributing to his muscle cramps."

The claimant presented to Dr. Hardy on October 7, 2002:

Patient is a 51-year-old white male with asthma, possibly occupationally induced. He has not worked now since April, but remains dyspneic. He describes a daily cough which is occasionally productive of clear sputum. He hears wheezing mostly in the morning. He denies waking at night with dyspnea. He does notice daily chest tightness; no rhinorrhea. Patient reports that Prednisone does help reduce his dyspnea and Albuterol also helps reduce his dyspnea. I reviewed his pulmonary function testing from 04-22-2002 and this is compatible with moderate obstructive lung disease that improves after bronchodilator therapy....

Dr. Hardy assessed "Asthma, possibly occupationally induced asthma. He has had no improvement in his symptoms."

Mr. Long claimed entitlement to worker's compensation, and a pre-hearing order was filed on November 20, 2002. The parties stipulated that both respondents controverted the claim. The parties agreed to litigate the following issues:

1. Whether the claimant sustained a compensable injury to his respiratory system during his employment with Glad Manufacturing Company;
2. The claimant's entitlement to medical treatment, temporary total disability, and/or permanent total disability commencing on April 22, 2002; and
3. Liability between carriers for any benefits awarded.

The administrative law judge found, in pertinent part:

4. During his employment with this respondent, the claimant developed a compensable occupational disease, in the form of occupational asthma. Specifically, the greater weight of the credible evidence proves the existence of a causal relationship between the claimant's exposure to certain air borne lung irritants in his employment environment and his progressive development of asthma. As the result of this employment related exposure to lung irritants, the claimant's asthmatic condition ultimately resulted in some degree of "disability" in May of 2002. The development of this disability (at least temporarily) occurred within one year of the claimant's last employment related injurious exposure to these lung irritants. The claimant's compensable occupational asthma does not constitute a contagious or infectious disease or an ordinary disease of life to which the general public is exposed.

8. The claimant has failed to prove by the greater weight of the credible evidence that his compensable occupational disease has rendered him totally disabled, either temporarily or permanently. Thus, he would not be entitled to either temporary total disability benefits or permanent total disability benefits.

The administrative law judge ordered that Respondent No. 2 shall be liable for reasonably necessary medical treatment. Respondent No. 2 appeals to the Full Commission. The claimant does not appeal the ALJ's denial of temporary or permanent disability.

II. ADJUDICATION

Ark. Code Ann. §11-9-601(e) (1) provides:

(A) "Occupational disease", as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

(3) No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

(f) (1) Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease and the carrier, if any, on the risk when the employee was last injuriously exposed under the employer shall be liable.

The Full Commission finds that the instant claimant did not prove by a preponderance of the evidence that he sustained an occupational disease pursuant to Ark. Code Ann. §11-9-601(e)(1). The claimant first began seeking medical treatment for respiratory problems in June 1994 after contracting a virus in Colombia. There is no indication that this viral contraction was in any way related to the claimant's work. It was reported in 1994 that the claimant had been asthmatic as an infant. The initial treating physician assessed "acute bronchitis," and this condition was not identified as being causally related to the claimant's work with the respondents. When the claimant began treating with Dr. Sexton in May 1995, it was again noted that the claimant had suffered from asthma as a child. Dr. Sexton identified the "triggers" for the claimant's symptoms to be pollens, cold air, and aerosols. Dr. Sexton also stated, "He certainly has enough potential triggers at home that this could be cough variant asthma." The October 1995 internal correspondence from the respondent-employer indicates, with no conflicting evidence, "employees should not have any concern from exposure to air contaminants." The claimant admitted on cross-examination that he at first did not attribute his symptoms to the workplace at the time

he first sought to be off work. Dr. Sexton noted other triggering factors in the claimant's home, including a cat, feather pillow, and dust mites. Dr. Sexton's impression was "cough variant asthma," and again there was no causal connection to the claimant's workplace.

The Full Commission recognizes Dr. Hardy's initial assessment in April 2002 of "likely occupational asthma." By October 2002, however, Dr. Hardy assessed "possibly occupationally induced asthma." A medical opinion addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16) (B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001). Expert opinions based upon "could," "may," or "possibly" lack the definiteness required to meet the claimant's burden of proving a causal connection. Frances v. Gaylord Container Corp., 341 Ark. 527, 20 S.W.3d 280 (2000). In the present matter, Dr. Hardy's assessment of "possibly" occupationally-induced asthma is not a medical opinion stated within a

reasonable degree of medical certainty sufficient to establish a causal connection.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained an occupational disease pursuant to Ark. Code Ann. §11-9-601(e)(1). The Full Commission therefore reverses the opinion of the administrative law judge, and we hereby dismiss this claim.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I dissent from the opinion of the majority and find that Claimant proved by a preponderance of the evidence that he developed a compensable occupational disease in the form of occupational asthma.

Claimant testified that he has worked in Respondent's plastic trash bag manufacturing facility since 1973. Throughout those years, Claimant rotated in and out of numerous positions in the plant, including the Extrusion

and Conversion Departments. In the Extrusion Department plastic pellets are heated and melted down to create plastic film for Respondent's trash bag production. In the Conversion Department rolls of plastic are cut into bags using a "hot knife" that is heated to approximately 400 degrees. Claimant testified that in while working in both of these departments, he was in contact with and smelled odor produced by production of the plastic pellets.

Claimant had been working in the Extrusion Department for about a year when he took a leave of absence in May, 2002, due to his asthmatic condition. Prior to that, he had worked in the Conversion Department for several years. Claimant credibly testified that his coughing and breathing problems, which he had developed in the early 1990s, worsened upon his exposure to fumes in the Extrusion Department. More specifically, Claimant stated that the fumes began to aggravate his breathing when he was exposed to the plastic product scented with a "Fresh & Clean" odor. Respondent's witness testified that this odor was also irritating to many other employees, which resulted in a renovations to the exhaust system in the Extrusion Department in 2002.

Material safety data sheets on four of the chemical compounds used by Respondent in the manufacturing process are included in the record. These sheets warn that fumes produced by these compounds, when heated, may be toxic, irritating, and/or corrosive to the respiratory tract.

The medical evidence shows that Claimant's breathing difficulties significantly increased upon his exposure to these chemicals at work. Further, Dr. Hardy, a pulmonologist, has opined that Claimant's most recent episode of asthmatic symptoms in 2002 are "most likely" indicative of "occupational asthma, which seems to be triggered by exposures in his work place."

I, therefore, find that Claimant has proven by a preponderance of the evidence that his asthmatic condition is a compensable occupational disease and must dissent from the majority opinion.

SHELBY W. TURNER, Commissioner