

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. C910926

JOHN C. TUTT (DEC'D.),
EMPLOYEE

CLAIMANT

INTERNATIONAL PAPER COMPANY,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 6, 2004

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

Claimant represented by the HONORABLE ALBERT J. THOMAS,
III, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL J.
DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed March 17, 2003. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent, the relationship of employee-employer existed between the parties.
3. At all times pertinent, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$112.00.
4. The claimant has failed to sustain his burden of proof by clear and convincing evidence a causal connection between his

employment/occupation and diagnosed COPD/
emphysema.

5. The claimant has failed to sustain his burden of proof by clear and convincing evidence or a preponderance of the evidence that his employment precipitated, aggravated or accelerated his lung disease.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the March 17, 2003 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority opinion finding that claimant's chronic obstructive pulmonary disease (COPD) and/or emphysema was not causally related to his employment with International Paper Company.

Initially, I note that the Administrative Law Judge found, and the parties assert, that claimant suffered from a disease and that the burden of proof is by clear and convincing evidence. However, in John Sikes v. Georgia-Pacific Corp., Full Commission Opinion filed July 7, 2003 (F000657), this Commission found that Act 1281 of 2001 is to be applied retroactively. Accordingly, claimant's burden of proof is by a preponderance of the evidence.

Claimant worked for the employer from 1942 until 1978, approximately 36 years. Claimant's breathing difficulties forced him to retire. Claimant had been diagnosed with COPD in 1964 or 1965. A claim for benefits was filed in 1979. However, claimant passed away on November 20, 1983, before a hearing was held on the compensability of his claim.

The employer's Camden facility has been closed for several years. As a result of this closure, the

employer's records were apparently shipped to Memphis for storage. Claimant has had significant difficulty obtaining documentary evidence from the employer. Respondent has been unwilling or unable to comply with legitimate requests for production of documents. Respondent could not even produce claimant's personnel file.

It is important to remember that claimant did not allege that the employment caused his COPD/emphysema. He claimed only that the work environment aggravated, precipitated, or accelerated the disease process. Admittedly, claimant had a "significant cigarette smoking history" and this habit was a factor in causing his respiratory problems. However, if the employment aggravated, precipitated, accelerated, or combined with the underlying disease to produce the condition for which compensation is sought, an award of benefits is appropriate. Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (1979).

The greater weight of the evidence indicates that claimant's COPD was aggravated by inhalation of various industrial pollutants and irritants. It seems undisputed that these noxious inhalants were present

during claimant's employment and were of significant concern to the employer and its employees. Further, it also does not appear disputed that claimant had considerable exposure to these elements, although, as repeatedly pointed out by counsel for respondent, the actual extent of this exposure has been especially difficult for claimant to prove. This is so because the employer did not produce claimant's personnel file, along with various other documents.

The above problem with claimant's proof appears to form the basis of the opinions of the expert witnesses hired by respondent. These two witnesses were understandably evasive when responding to any question about the possible aggravation of claimant's respiratory condition by the inhalation of substances at work. I note, however, that these professionals have not had any particular professional experience with respiratory conditions in relation to pulpwood mills. Additionally, neither of these witnesses are pulmonologists.

In contrast, Dr. Christopher John, a pulmonologist with the Little Rock Pulmonary Clinic, testified on behalf of claimant. He has vast experience with pulmonary difficulties as these conditions relate to inhalation of various pollutants in the paper mill industry. His unequivocal opinion is that claimant's

lung disease was aggravated by the industrial exposure to these irritants.

In my opinion, claimant has met his burden of proof by a preponderance of the evidence. Accordingly, the opinion of the Administrative Law Judge should be reversed.

SHELBY W. TURNER, Commissioner