

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F300238

VADA LINDSEY, EMPLOYEE	CLAIMANT
FOREMAN SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED MARCH 14, 2006

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

Claimant represented by the HONORABLE GREG GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by the HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

On May 27, 2004, an Administrative Law Judge issued a decision finding the claimant did not establish that she suffered an injury to her lungs as a result of a job-related chemical exposure. On June 2, 2005, the Full Commission affirmed and adopted the decision of the Administrative Law Judge as their own. The claimant appealed that decision and on January 25, 2005, the Court of Appeals reversed and remanded the case to the Full Commission. Specifically, the Court of Appeals reversed and remanded the case for the Commission to,

"consider the impact-if any-of the manufacturer's safety data relating to these chemicals on Lindsey's claim of occupational disease."

After a de novo review of the record, and after specifically considering the impact of the manufacturer's safety data on the chemicals in regard to the claimant's claim of occupational disease, we reverse the decision of the Administrative Law Judge. We find that the claimant has shown she sustained a compensable injury due to her exposure to the chemicals and that she is entitled to the requested medical and disability benefits.

In July of 2000, the claimant went to work for the Foreman School District as a custodian. She continued employment in this capacity through September 2002. Her duties included cleaning and maintaining the buildings. During the summer months, she was responsible for stripping the accumulated wax off the floors and then applying new wax coats. The claimant worked throughout 2000 and 2001 and most of 2002 without incident. However, around June of 2002, the respondent changed some of their cleaning products. During the summer of 2002, the claimant had a negative reaction to

some of the new chemicals. The claimant described one of the substances being used as "very strong smelling" and said that it "took her breath away." The claimant testified that during the stripping process, she would mix the chemicals together in a bucket which would then be applied to the floor with a mop so as to dissolve the existing wax. She stated that she frequently had to go outside to get some fresh air because of the coughing and breathing difficulties these fumes caused her. The claimant also testified about another cleaning substance used to clean bathrooms. The substance was some type of anti-bacterial agent which she said caused a similar effect on her.

The claimant testified that in June 2002 she asked for a mask to breathe through and complained that her exposure to the chemicals caused difficulty in her breathing. She further indicated she was not given a mask to alleviate her concerns. The claimant's coworkers, Robert Easter and Tammy Green, corroborated the claimant's testimony that she had complained of shortness of breath and being unable to breathe. Both also testified that the claimant would, on occasion, go outside to get fresh air. Green also said that the

claimant looked unwell during the summer of 2002. She testified that the claimant looked pale and, on occasion, her eyes looked dilated. Lastly, Green complained that she had personally had problems with one of the cleaners, testifying that the chemical used for cleaning the commode made her "strangle".

In June 2002, the claimant sought treatment from Dr. Kevin Kleinschmidt, her family doctor, who practices in Ashdown, Arkansas. In his progress note dated June 17, 2002, the claimant was found to be complaining of coughing, sneezing, and chest congestion. He also noted, "has been exposed to some chemicals for stripping floors."

On September 19, 2002, Dr. Kleinschmidt advised the claimant to avoid chemicals, if possible. The next day, Dr. Kleinschmidt had the claimant hospitalized. In an admission note dated September 19, 2002, the doctor stated that the claimant was wheezing and suffered from sharp pain when breathing. He also noted that she was suffering from a general malaise, with myalgias with pain in her legs, feet, and arms. He further set out that she was suffering headaches, photophobia, and shortness of breath. He diagnosed her

with, among other things, acute bronchitis with a reactive airway component and possible chemical bronchitis from exposure to cleaning solutions.

While in the hospital, Dr. Kleinschmidt treated the claimant with medication and breathing therapy. The claimant improved somewhat during her hospital stay and was released to return home on September 24, 2002.

Eventually, Dr. Kleinschmidt referred the claimant to Dr. Christopher Bailey, a pulmonologist, to evaluate her breathing problems. On November 22, 2002, he conducted a bronchoscope and determined that the claimant suffered from hemoptysis with bilateral lower lobe bronchiectasis. He also noted that the claimant appeared to be suffering from obstructive sleep apnea syndrome with acute chronic bronchitis. In a doctor's note dated March 5, 2003, Dr. Kleinschmidt opined that the claimant suffered an exacerbation of symptoms when she returned to work and was exposed to chemicals. He further indicated that her symptoms appeared to be related to her exposure to chemicals at work.

Dr. Kleinschmidt had taken the claimant off work in September 2002. On December 16, 2002, he issued

a note indicating that the claimant could return to work as of December 26, 2002. However, on December 23, 2002, Dr. Kleinschmidt indicated the claimant would be unable to return to work. Ultimately, he did not return her to her duties until March 31, 2003. Even then, he opined that the claimant would likely be unable to work in an occupation exposing her to chemicals. The respondent was not able to provide the claimant with a job without exposing her to chemicals similar to those which caused her problems. Accordingly, the claimant did not return to work with the respondent, nor any other employer.

In our opinion, the objective medical findings contained in the record clearly establish that the claimant is suffering from bronchitis and respiratory illness resulting from chemical exposure. The doctors who have treated her for this condition have consistently found that her condition resulted from chemical exposures at work. Likewise, warning labels on the chemicals used by the claimant show that exposure leads to such conditions. Accordingly, we find that there is no basis for denying her claim.

An "occupational disease" is any disease resulting in disability or death that arises out of or

in the course of an occupation or employment of the employee. Ark. Code Ann. §11-9-601(e)(1)(A) (Repl. 2002). Prior to the enactment of Act 1281 of 2001, the burden of proof was clear and convincing evidence in order for the claimant to prove he/she has a compensable occupational injury. However, Act 1281 changes the burden to a preponderance of the evidence. Ark. Code Ann. §11-9-601(e)(1)(B) (Repl. 2002).

Ordinary diseases of life to which the general public is exposed are not compensable. Ark. Code Ann. §11-9-601(e)(3) (Repl. 2002). The occupational disease must be "due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his employment." Ark. Code Ann. §11-9-601(g)(1)(A) (Repl. 2002). However, a disease may be considered compensable although the general public may contract the disease if the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments. Osrose Wood Preserving v. Jones, 40 Ark. App. 190, 843 S.W.2d 875 (1992); Sanyo Mfg. Corp.

v. Leisure, 12 Ark. App. 274, 675 S.W.2d 841 (1984). To constitute an occupational disease, there must be a recognizable link between the nature of the job and an increased risk in contracting the disease. Sanyo Mfg. Corp., Supra.

In this instance, it is clear that the claimant's risk of exposure to chemicals was greater than that of the general public. It is undisputed that the claimant's job required her to perform a myriad of duties which required her to use harsh cleaning chemicals. Since the claimant worked as a janitor, she was clearly exposed to a greater risk of coming into contact with those chemicals and had greater exposure to the chemicals than the general public.

The Administrative Law Judge's Opinion discussed some of the claimant's other health problems and noted that they were not related to a chemical exposure. We certainly agree that the claimant's anxiety, depression, migraine headaches, and stomach problems were not related to a chemical exposure. However, there is no allegation that they were. What the claimant has alleged is that exposure to the chemical at her workplace caused her to develop chronic

bronchitis and respiratory illness.

The medical records indicate that the claimant had never been diagnosed with respiratory problems in advance of her exposure to chemicals with the employer. Likewise, there is no evidence that she ever required treatment for asthma, sinuses, or her sleep apnea. Further, the doctors who have been treating her for her respiratory illness have consistently opined that her illness was the result of her workplace chemical exposure. As the Court of Appeals has held on numerous occasions, while the Commission has the duty and the authority to evaluate medical evidence, it cannot arbitrarily disregard doctors' findings and conclusions. Swife-Eckrich, Inc., v. Brock, 63 Ark. App. 118, 975 S.W.2d 857, (1998), citing Reeder v. Rheem Mft. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992).

In our opinion, causation is further established when considering the manufacturing labels for the chemicals used by the claimant. One agent, called, "Clean on the Go NABC Concentrate", is described as having a health rating of "2-Moderate". The warning label indicated that one would need to use safety glasses and gloves when using it. Under the section

disclosing the health hazards, the label indicated, "Product causes eye damage and skin irritation. Do not get in eyes or on skin or clothing." The label further indicated to, "Avoid inhalation or vapors or mist," and instructed the person be exposed to fresh air if exposed.

Another agent, "Clean on the Go hdqC2", was also noted as having a health risk rating of "2-Moderate". The report regarding the product also indicates, "Corrosive. Causes eye and skin damage. Harmful or fatal if swallowed. Breathing product mist may cause respiratory irritation. Do not get in eyes, skin or clothing. Avoid inhalation or mist. Do not swallow."

The product, "Foamy Q & A" was also rated as having a health risk rating of 2. The safety information on it indicated that inhalation of the product could cause irritation to the throat and respiratory system. It further advised not to allow the product to come into contact with the eyes, skin, or clothing. The literature also specifically indicated, "Do not inhale mist.", and advised to seek medical attention in the case of ongoing respiratory irritation

after treatment with fresh air. The safety sheet recommended the use of goggles or a face shield and acid resistant boots or aprons in some conditions. Lastly, the information indicated that local exhaust ventilation might be required in some instances.

Each of the aforementioned chemicals was used by the claimant and illustrates that she was in direct contact with chemicals that cause respiratory illness. Furthermore, the information on the chemicals indicates that respiratory irritation could result in the need for medical attention. I first note that it appears the employer did not provide the claimant with goggles, masks, or other safety equipment recommended by the warning labels. In our opinion, since the claimant had no history of respiratory illness prior to her exposure to these chemicals, and it is apparent that these chemicals are associated with causing such conditions, we find that the claimant has shown a causal connection for her respiratory illness.

In regard to the claimant's request for medical benefits, we find that the claimant has shown the requested treatment is reasonably necessary and directly related to her compensable injury.

Specifically, we find the claimant is entitled to medical benefits related to treating her respiratory illness.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a) (Repl. 2002). What constitutes reasonably necessary medical treatment is a question to be determined by the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the

compensable injury.

In this instance, the medical records are clear that the claimant's respiratory illness and need for treatment is directly related to her exposure to cleaning agents. Additionally, the preponderance of the evidence shows that the treatment requested by the claimant is both reasonable and necessary in order to treat her respiratory illness. Accordingly, we reverse the Administrative Law Judge's decision and award medical benefits.

Finally, we deal with the claimant's request for temporary total disability benefits for the time period of September 14, 2002 to March 31, 2003. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc., v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In this instance, the medical evidence indicates that the claimant remained in her healing period and was unable to work during the time period for which she requests benefits. There is no dispute that during that time period, the claimant received ongoing treatment for her condition and was restricted from working until September 14, 2002 to March 31, 2003. Accordingly, we find that she is entitled to temporary total disability benefits for that time period.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance

with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that her respiratory problems were caused by the chemicals to which she was exposed during the course and scope of her employment. Although, true, that she was exposed to certain cleaning compounds that carried precautions concerning their use, and warnings as to possible side affects due to exposure to those chemicals, in my opinion, the claimant has failed to prove by a preponderance of the evidence that her current respiratory problems are causally related to her use of and exposure to these cleaning products.

Pursuant to Ark. Code Ann. §11-9-114, a respiratory injury or illness is compensable only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm. Moreover, under Ark. Code Ann. §11-9-601(e)(1)(A), an "occupational disease" is defined as 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. Furthermore, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence. Ark. Code Ann. §11-9-601(e)(1)(B). In the present case, the claimant was clearly exposed to chemicals that could cause a mild respiratory reaction under certain conditions of use. In addition, the claimant held a sincere belief that her exposure to these chemicals caused her respiratory problems. However, a review of the documentary evidence finds it lacking with regard to which chemicals the claimant was exposed to, how often she was exposed, and the duration of those exposures. Unfortunately, the claimant's

testimony does little to clarify which of the chemicals she worked with was the culprit, or if, in fact, a combination of these chemicals caused her problems. For example, whereas the claimant first testified that it was the new floor stripping agent that caused her onset of respiratory problems, she later stated that the substance she used to clean the toilets caused her distress, as well.

Furthermore, finding that the claimant was exposed to chemicals that have possible adverse effects to the respiratory system under certain conditions is simply not sufficient to establish that the claimant's bronchitis was caused by her exposure to these chemicals, especially in light of the claimant's other health problems that were obviously not a result of her employment. The claimant was apparently in poor general health at the time she started having respiratory problems, which was attributed to various social stresses that she was currently under. For example, the claimant, who lost her husband shortly before she came to work for the district in July of 2000, was seen by her family physician in March of 2002 for symptoms

similar to those she thought were caused by chemical exposure in June of 2002. As of her March episode, what the claimant believed to be heart problems turned out to be a panic attack. The claimant further testified that she "started feeling worse in June" of 2002 after she and her two co-workers began stripping the old wax off of the floors. However, the claimant admitted that neither of her co-workers were physically affected by the chemicals to which they were all exposed. This was corroborated by the testimony of one of her co-workers, namely Fern Green.

A careful review of the Material Safety Data Sheets (MSDS) contained within the record demonstrates that of the cleaning compounds allegedly used by the claimant, the only one listed with the potential to cause respiratory irritation was Foamy Q&A. More specifically, the MSDS for this particular compound states, "[I]nhalation may irritate throat and respiratory system. ... Do not inhale mist." In case of respiratory inhalation, the instructions said "move the person to fresh air". The MSDS for the chemical compound apparently used by the claimant to strip floors, known

as STRIP, reflects that the primary routes of entry for this product are through the skin, eyes, and by ingestion. Aside from an advisement that local exhaust be used, none of the information on this data sheet indicates that this product presents a potentially serious hazard to the respiratory system. Further, although the MSDS for the remaining three chemical compounds allegedly used by the claimant each state that inhalation of vapors and mist should be avoided and that "good ventilation should be sufficient for most conditions", none require the use of respiratory protection equipment. All instruct that in case of respiratory irritation, "move the person to fresh air."

A review of the records reveals that the chemical compounds in question presented only moderate risks of respiratory injury to the claimant, with a generally simple remedy - fresh air. Assuming only for the sake of argument that these chemicals triggered the claimant's bronchitis, to which she may have been predisposed, it is questionable whether she would have been affected by these chemicals were it not for other factors affecting her health at that time, such as

smoking and frequent exposure to cigarette smoke, financial stress, and depression. Moreover, the claimant admitted that she did not have an immediate reaction to the chemicals she was using and by which she claims to have been injured. Instead, on September 19, 2002, the claimant was awakened in the middle of the night by her symptoms and later taken to the hospital. However, the claimant's testimony reflects that by that time, her floor stripping duties had ended.

There is no presumption under our workers' compensation law that a claimant is entitled to benefits. Farmer v. L.H. Knight Co., 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proving entitlement to workers' compensation benefits by a preponderance of the evidence rests upon the claimant. Pearson v. Faulkner Radio Serv., 221 Ark. 368, 247 S.W.2d 964 (1952). Based upon a de novo review of the record, giving particular attention to the MSDS for the chemical compounds allegedly used by the claimant, the preponderance of the evidence fails to establish that a causal connection exists between the claimant's respiratory problems and the chemicals she used in the course and scope of her

employment. Therefore, I must respectfully dissent from the majority opinion in this matter, finding instead that the claimant has failed to meet her burden of proof in establishing the compensability of this claim.

KAREN H. MCKINNEY, Commissioner