

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500501

JERRY SLAUGHTER (DEC'D.), EMPLOYEE	CLAIMANT
CITY OF HAMPTON, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WC TRUST, CARRIER	RESPONDENT

OPINION FILED JUNE 16, 2006

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

Claimant represented by HONORABLE F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 29, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant's estate has failed to prove by a preponderance of the evidence that the claimant's respiratory accident is the major cause of his physical harm.

4. The claimant's estate has therefore failed to prove by a preponderance of the evidence that the claimant sustained a compensable injury.

5. The respondents have controverted this claim in its entirety.

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.

Thus, we affirm and adopt the 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's opinion affirming and adopting the administrative law judge's decision. Based upon my de novo review of the evidence presented at the hearing, it is my opinion that the Administrative Law Judge's decision should be reversed and all appropriate benefits awarded.

La Ronda Slaughter, the surviving spouse of Jerry Slaughter, has alleged that her husband suffered a fatal exposure of chlorine gas on November 17, 2004, and that this exposure eventually resulted in his death on January 15, 2005. The respondent controverted the claim in its entirety. Initially, it appears they contested the occurrence of the

event but pursuant to a stipulation at the hearing, they agreed that the exposure did occur on November 17, 2004. However, the respondent argues that any harmful effects from being exposed to the chlorine gas was not the major cause of the claimant's death. In support of that contention, the respondent cites the claimant's other health related problems, including his infection with human immune-deficit virus (HIV).

_____A hearing was held to determine whether Mrs. Slaughter, acting on behalf of Mr. Slaughter's estate and as his surviving spouse, was entitled to temporary total disability benefits, medical expenses and spousal dependency benefits. After the hearing, the Administrative Law Judge, in an Opinion dated July 29, 2005, held that Mrs. Slaughter failed to establish that the major cause of Mr. Slaughter's hospitalization and death was his exposure to the chlorine gas.

_____When the chlorine exposure occurred, the decedent was employed as a part of a three man crew working for the City of Hampton, Arkansas. The crew's job duties generally

consisted of assorted maintenance tasks on city properties and infrastructures. One of the crew's duties was to monitor the chlorine bottles which were used to chlorinate the city's water supply.

_____ On November 17, 2004, the claimant and his two coworkers (one of whom, Monroe Slaughter, was his father) went to the city's water tower where the chlorination system was located. The equipment for chlorinating the city's water was in a small shed underneath the water tower. In that shed, full bottles of chlorine gas were kept which would be switched out for the empty bottles which were hooked up to the chlorination system. On the date of the exposure, Mr. Slaughter and his father entered the shed to switch the bottles. The third member of the crew, Buddy Hannegan, stood in or near the doorway. According to the testimony of Monroe Slaughter, it was recommended that a respirator mask be worn any time someone entered the shed. Unfortunately, only one mask was available, and Mr. Monroe Slaughter was wearing that mask when the exposure occurred. Both Mr. Monroe

Slaughter and Mr. Hannegan testified that the decedent was not wearing a respirator mask or any other protection.

_____After the decedent and his father had changed the chlorine bottles, the decedent opened the valve on the new bottle. However, as revealed in a later investigation, the bottle in question had a crack in the valve which caused the chlorine inside to spew into the claimant's face when the valve was opened. Mr. Hannegan testified that when he saw the chlorine vapor leave the bottle he immediately ran out of the shed and consequently did not receive a significant exposure. The decedent's father, who also saw the chlorine gas escape and spew into the decedent's face remained in the shed long enough to turn off the valve to stop the gas from escaping. By that time, the decedent had left the shed, soon to be followed by his father.

_____Mr. Hannegan and Mr. Monroe Slaughter testified that after leaving the shed, the decedent went about 30 to 40 feet, and dropped to his hands and knees, gasping for breath. Monroe Slaughter stated that he also began to have breathing difficulties after he left the shed but, because

of the respirator mask and because he was farther away from the gas leak, he did not inhale a significant amount of the chlorine. Monroe Slaughter and Mr. Hannegan testified that since this incident was near quitting time, the crew put up their tools and went home.

_____Mrs. Slaughter testified that when Mr. Slaughter arrived at home the night of the incident, he stated, "Baby, I liked to have gotten killed today." She also noted that he was having problems breathing to the extent that she had to help him up the stairs of their apartment so that he could get into bed. She also testified that she tried to convince him to go to a hospital emergency room but that he refused. She further testified that during the night he got very little sleep because of the difficulty he had breathing.

_____The following day, the claimant returned to work. However, Mr. Hannegan and Monroe Slaughter testified that the claimant performed little actual work during the day and had a difficult time catching his breath and was obviously having breathing difficulties. They also testified that the claimant was extremely tired and at times appeared to be

dozing off. On the following work day, which was Friday, the claimant once again appeared but on this occasion was only able to work a half a day.

_____The decedent's coworkers testified that he did not work any day after the Friday following the chlorine exposure. However, records from the respondent employer indicate that he did not receive any kind of leave during the first week of December. There is, however, no dispute that the claimant did not work on any day after December 8, 2004.

_____On December 9, 2004, the claimant was seen by Dr. Robert Watson, a general practitioner in El Dorado, Arkansas. In a clinic note of that date, Dr. Watson found Mr. Slaughter's pulmonary function was between 31% and 43% of normal. He diagnosed Mr. Slaughter as suffering from a respiratory infection, acute bronchitis, restricted lung disease, and shortness of breath. Dr. Watson provided the claimant with some medication and directed him to return in two weeks. When the decedent returned to see Dr. Watson on

December 22, 2004, his condition had declined markedly and he was immediately hospitalized.

_____While in the hospital, the decedent came under the care of Dr. Richard Dietzen, a pulmonary specialist from El Dorado, Arkansas. On the date the claimant was admitted into the hospital, Dr. Dietzen performed a bronchoscopy to determine the state of the claimant's lungs and to obtain a specimen for pathologic examination. In the procedure notes authored by Dr. Dietzen on December 22, 2004, he indicates that the claimant had pneumocystis carinii pneumonia, an infection common in people with HIV. However, Dr. Dietzen's later review of the test results lead him to conclude that the claimant did not in fact have this infection. In his progress note of January 6, 2005, Dr. Dietzen notes Mr. Slaughter's deteriorating condition, stating that, he "had a 90% chance of dying within the next couple of weeks given his current course." Dr. Dietzen also states that the diagnostic testing done for various fungal and bacterial infections were negative. In this report, the doctor relates Mr. Slaughter's problems to the chlorine gas inhalation.

_____ Since the claim for benefits in this case is based upon a pulmonary injury, any entitlement of benefits is controlled by Ark. Code Ann. §11-9-114. The relevant section of that statute provides as follows:

_____ (a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

_____ At the hearing, the respondents stipulated that the chlorine exposure occurred. Clearly, the exposure, as described by Monroe Slaughter and Mr. Hannegan, was an accident as that term is used in the above quoted section. The only remaining issue is whether the injury the decedent sustained in inhaling the chlorine gas was the major cause of the physical harm which resulted in his death.

The deposition and reports of two doctors was offered as evidence in regard to this issue. The first of these physicians was Dr. Jim Gilbert, a pulmonologist in North Little Rock, Arkansas. In a letter dated April 14,

2005, Dr. Gilbert, who reviewed Mr. Slaughter's medical records but never saw or treated him, concluded that the chlorine gas exposure was not the result of the decedent's death. In reaching that conclusion, Dr. Gilbert noted that any significant chlorine gas inhalation would have required immediate medical attention, and, based upon the delay between the claimant's exposure and in seeing Dr. Watson, he suggested that the chlorine gas exposure was not a major event. Dr. Gilbert also discussed the claimant's HIV infection and concluded that it would substantially increase the likelihood of lung infections. He also stated his belief that the medical records indicated that the claimant, at the time of his death, was infected with *pneumocystis carinii* and had a high infection rate because of his HIV. Lastly, Dr. Gilbert noted the presence of alveolar proteinosis, which he said was a common complication of HIV. Since he could not find any reference to chlorine gas inhalation specifically dealing with alveolar proteinosis, he concluded that the claimant's exposure to the chlorine gas played no role in his death.

However, a review of Dr. Gilbert's deposition indicates that he was unaware of several factors which could have effected his opinion. During direct examination, Dr. Gilbert restated his position that a chlorine gas inhalation would have caused an immediate onset of symptoms, which he believed the claimant did not display. Dr. Gilbert described these symptoms as being similar to asthma and referred to them as reactive airway dysfunction syndrome or RADS. When it was suggested during his deposition that Mr. Slaughter had those symptoms, Dr. Gilbert asked whether the claimant complained of shortness of breath or a cough, and then stated, "...If he is saying I am short of breath, I am having trouble breathing, that's different... ." When asked to clarify what he meant by, "different" Dr. Gilbert stated as follows:

A. Well, you know if you have a chlorine gas inhalation, even if you don't get treated for it, you can still have trouble with shortness of breath and things that can go over several days.

Obviously, Dr. Gilbert was unaware he was describing Mr. Slaughter's condition exactly. That is, after

the chlorine gas exposure, he had significant breathing problems and missed some work and was only performing very limited duties when he did appear.

Later, under cross examination, Dr. Gilbert admitted that he would defer to Dr. Dietzen, who had a superior knowledge of the case in that he had actually treated the claimant. Also under cross examination, Dr. Gilbert concluded that the lack of airway disease was a clinical diagnosis which would be made based upon the observation of the patient. Since Dr. Gilbert did not ever examine the decedent and based his opinions solely on the medical records, he would have no way of knowing that Mr. Slaughter was suffering from shortness of breath and related symptoms which would indicate that he was suffering from problems associated with the chlorine gas exposure and not an HIV related lung infection.

Dr. Gilbert also stated it was his belief that Mr. Slaughter was infected with pneumocystis carinii even though Dr. Dietzen determined that he was not. When asked about this discrepancy, Dr. Gilbert indicated that he was

not aware that there was a possibility of false-positives on tests for this infection and did not seem to think that it was significant that all other tests for this infection were negative and that Dr. Dietzen did not find the claimant suffering from symptoms in accord with this infection.

Dr. Dietzen also gave his opinion and testified in a deposition regarding his conclusions about Mr. Slaughter's death. Dr. Dietzen acknowledged that the claimant had other complicating factors, but was firmly of the opinion that the chlorine exposure was what Dr. Dietzen called the "inciting event" that precipitated his illness, hospitalization, and death. Dr. Dietzen supported his conclusions by noting that the tests the claimant underwent indicated that he did not have the lung conditions typically arising from HIV. He also explained that the alveolar proteinosis that was present in the claimant's lung tissue was not the type normally associated with infections. He arrived at this conclusion based upon his actual observation of the test results, something that Dr. Gilbert did not have access to. Dr. Dietzen theorized that the alveolar proteinosis was

caused by a tissue breakdown occasioned by the chlorine exposure. He also stated that the only positive test which the claimant had for lung infections was a false positive based upon his observation of the actual test and the biopsy from the claimant's lungs. Once again, this is information that Dr. Gilbert either did not have or was unfamiliar with.

The Administrative Law Judge in considering these doctors found Dr. Dietzen's opinions to be more persuasive. On this point I am in entire agreement with him. Dr. Dietzen not only had the advantage of personally examining the claimant and actually seeing the results of the test but also seemed to be the most experienced and knowledgeable in regard to the particulars of the claimant's condition and much more certain in his conclusions.

Where I disagree with the Administrative Law Judge is when he concludes that the major cause of Mr. Slaughters physical harm and subsequent death was not his exposure and inhalation of chlorine gas. In reaching this conclusion, the Judge stated:

The medical evidence suggests that while the chlorine gas exposure may have

initiated the process that lead to the claimant's death, the process is more severe than it might have been in the absence of the unrelated preexisting conditions.

In my opinion, that statement is simply not in accord with well established case law. The Judge acknowledged that when he stated, in his Opinion, that there is a "long line of cases" which have held that a precipitating injury entitles a claimant to benefits even if there are preexisting circumstances which are also causes of an injury. Although, he then disregards those cases, saying that they involve heart attacks, strokes, and "similar conditions" instead of a pulmonary injury as was involved here.

The Arkansas Court of Appeals has, on numerous occasions, applied the major cause standard found in Ark. Code Ann. §11-9-114. While most of those cases have involved cardiac or cerebrovascular injury, I do not believe that the nature of the injury is of any real significance. In other words, I do not think that "major cause" means one thing when a claim involves repetitive motion or cardiac injury but has a different standard when the claim concerns a

pulmonary injury. I believe the standard is the same in all those situations. That is, the major cause requirement is satisfied when it can be shown that a job related injury was the precipitating event of the resulting injury or condition.

In Cloverleaf Express v. Fouts, ___ Ark. App. ___, ___ S.W.3d_ (2005), the claimant had major arterial blockage and a history of seizures and heart problems. However, the Court held that the claimant had established a compensable injury because the exertion the claimant was engaged in at work caused a reduction in the oxygen flow into his heart, resulting in a myocardial infarction. In reaching that conclusion it was noted that the blockage of the claimant's arteries would have made the claimant more susceptible to this type of injury and, in the absence of these blockages, the exertion would have been unlikely to cause the claimant's heart attack. The strain brought about by the claimant's job related activities was therefore found to be more than 50% of the cause of his heart attack. See also Wilford v. City of North Little Rock, 62 Ark. App. 198, 969

S.W.2d 687 (1998); and, City of Blytheville v. McCormick, 56 Ark. App. 149, 939 S.W.2d 855 (1997).

My review of the above cited cases, as well as cases decided by this Commission on several other occasions, leads me to conclude that the correct standard is whether or not a job related event or accident precipitates an injury. While it is true that Mr. Slaughter had certain preexisting conditions, but for the lung injury sustained when he inhaled chlorine gas, Mr. Slaughter would not have had the rapid decline in his lung function, which ultimately resulted in his death. In fact, even though the claimant did have a number of underlying pulmonary problems, including being infected with HIV, he was apparently asymptomatic and it is quite likely that, had he not inhaled chlorine gas on November 17, 2004, he would still be alive today. On that basis, it is my opinion that the facts of this case clearly establish that the major cause of Mr. Slaughter's lung injury and resulting death was the exposure to chlorine gas he suffered at work. Therefore, I would find that he

sustained a compensable, job related injury and is entitled to the appropriate medical and disability benefits.

One remaining issue is whether Mrs. Slaughter established that she was a spouse entitled to receive dependency benefits. In this regard, I note that, at the time of Mr. Slaughter's injury, she was not his wife. According to the testimony developed at the hearing, they were cohabitating but were not married on November 17, 2004, the date of the claimant's injury. They did not become married until on or about January 5, 2005, while the claimant was in the hospital.

Dependency benefits are controlled by Ark. Code Ann. §11-9-527. That statute provides, among other things, that persons who were wholly and actually dependent upon a deceased employee would be entitled to receive benefits. The dependents so entitled to receive benefits are widows, children, parents, siblings, and grandchildren or grandparents.

While I believe that the testimony at the hearing establishes that Mrs. Slaughter was entirely dependent upon

Mr. Slaughter at the time of his accident, she did not become his spouse until approximately six weeks later. However, Ark. Code Ann. §11-9-527 (h) specifically states that: "All questions of dependency shall be determined as of the time of the injury." Since the claimant's injury occurred on November 17, 2004, and, at that time, Mrs. Slaughter was not the claimant's spouse, I do not believe that she can assert a claim for dependency benefits based upon the claimant's death. While I realize that application of that statute may seem harsh, the provisions of the Worker's Compensation Act only allow dependency benefits for spouses.

For the foregoing reasons, I must respectfully dissent from the majority's opinion affirming and adopting the Administrative Law Judge's decision.

SHELBY W. TURNER, Commissioner