

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500528

TIM SWEENEY, EMPLOYEE	CLAIMANT
AMERICAN RAILCAR INDUSTRIES, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 6, 2006

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

Claimant is not represented but appears *pro se*.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 27, 2005. 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. On December 20, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On December 20, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$275.00/\$207.00, for temporary total/permanent partial disability benefits.

4. On December 20, 2004, the claimant sustained an inhalation injury arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period December 21, 2004, continuing through January 3, 2005.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 20, 2004.

7. 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 27, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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 (Repl. 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that on December 20, 2004, he sustained a compensable injury in the form of an

occupational disease. Based upon my de novo review of the record, I find that claimant has failed to meet his burden of proof.

The claimant began working for the respondent employer as a sand blasting laborer on April 20, 2004. The claimant was eventually put in the position as a paint sprayer. The claimant testified that approximately one week prior to his injury that his role as paint sprayer changed to the job of an out man. An out man assisted the paint sprayers from outside the railroad car while the sprayers painted the inside of the car. The claimant stated that he was employed in this capacity when he sustained a compensable injury to his lungs on December 20, 2004. The claimant maintains that on the date of this alleged injury he was not provided protective equipment. He began experiencing difficulty breathing. The claimant went to the front office where the first responders were called and the claimant was given oxygen. The claimant ultimately left the respondent employer, after he was told he would be provided light duty for the remainder of the day, and sought treatment in the emergency room at Lawrence Memorial Hospital in Walnut Ridge. The claimant ended up spending two nights in the hospital where he was given updraft treatments. The claimant was discharged from the

hospital on December 22, 2004. The claimant was prohibited from being exposed to chemicals. The claimant submitted this restrictive release to his supervisory personnel on December 28, 2004, and the claimant was provided work duties within these restrictions. The claimant was transferred to the vinyl assembly area and his supervisor was instructed that the claimant should not be exposed to paint. The claimant worked the day shift in the vinyl assembly area for approximately two weeks and then was returned to the night shift for an additional week. The claimant ceased working for the respondent employer on January 25, 2005. The claimant had a dispute with the respondent employer with respect to the amount of pay the claimant was to receive. The claimant has not worked for the respondent employer or any other employer, for that matter, since January 28, 2005. The claimant asserts that his respiratory problems are on-going and he requires continuing medical treatment.

The medical evidence demonstrates that after the claimant was released from the hospital on December 22, 2004, he did not seek medical attention until he saw a physician on June 14, 2005. The claimant was examined by Dr. Michael Langley.

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.

The claimant testified that he was employed in the capacity as an out man when he suffered his alleged injury to his lungs on December 20, 2004. However, the respondents' witnesses who worked with the claimant on December 20, 2004, testified that the claimant was not assigned the duty as an out man, but was assigned the task as booth clean up. This task differed from that of an out man. The respondents offered the testimony of Kevin Hawes who was the paint technician supervisor and was the claimant's direct supervisor at the respondent employer. Mr. Hawes testified that the claimant was performing the job duties as booth clean up on December 20, 2004.

The claimant testified that the week he served as an out man, that the employer never provided him any safety equipment. However, during the hearing the claimant retracted this statement and admitted that he was at least provided a half mask respirator and he had safety glasses with him, but nothing else. The respondents offered the testimony of Mr. Hawes as well

as Tom Hazelwood, the employer's coding manager, that testified that the claimant was wearing his respirator and a paint suit when he initially reported his alleged injury to them on December 20, 2004.

The claimant testified that prior to December 20, 2004, he had never experienced any respiratory problems, including shortness of breath and coughing. However, the record contains various medical records which demonstrate that the claimant had visited Dr. Ted Lancaster on September 17, 2004, and October 5, 2004, for pneumonia and anemia. Furthermore, the claimant attributed his difficulty in breathing when he reported it to Mr. Hazelwood to his previous attack of pneumonia.

The claimant's testimony is replete with inconsistencies, as demonstrated above, as well as the following. The claimant recalled that he had a cough only in the weeks preceding his alleged injury. He vehemently denied that he had any shortness of breath. The medical records dated December 20, 2004, when the claimant was admitted to the hospital, stated that the claimant had been wheezing for a couple of weeks and had taken some of his Doxycycline that was left over from a previous infection and began feeling better. He told Dr. Spencer, the treating emergency room physician, that for a couple of days he had been having an increase in

his cough and shortness of breath. The claimant was also a heavy smoker for twenty-five to thirty-five years, averaging one pack of cigarettes a day. The claimant stated that he had not smoked any cigarettes for two weeks preceding this alleged injury. However, the claimant deviated from this statement to the emergency room nurse that he had not had any cigarettes for two weeks when he testified at the hearing that he was "sure" he had smoked that day.

I find that the claimant is not a credible witness. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. 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.

The claimant's testimony is replete with inconsistencies and therefore is wholly unreliable. I find that the medical records and the testimony of Mr.

Hawes and Mr. Hazelwood established that the claimant is not being truthful with respect to his employment duties, nor truthful with respect to the symptoms that he was suffering from prior to this alleged incident on December 20, 2004.

If the requirements of Ark. Code Ann. §11-9-114 are applied to this case, the claimant also cannot prove by a preponderance of the evidence that he sustained a compensable pulmonary injury or illness.

Ark. Code Ann. §11-9-114 provides:

(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.

(b) (1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in

determining whether the employee or claimant has met his or her burden of proof.

The evidence demonstrates that the claimant was not exerting himself in an extraordinary or unusual manner in comparison to his usual work for the employer. The claimant was indeed performing his regular job duties and confirmed such on examination at the hearing. The claimant never offered into evidence any proof or testimony that he was engaging in any activity that would remotely be considered to be extraordinary or unusual in comparison to his usual work.

The claimant also cannot prove by objective medical evidence that he sustained a compensable occupational disease. The claimant failed to offer any objective evidence whatsoever linking or attributing his purported ailments to his work environment. The claimant offered no medical opinions addressing compensability or permanent impairment stated within a reasonable degree of medical certainty. The only evidence we have is the claimant's own self-serving testimony based on his speculation and conjecture. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264

Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Furthermore, the claimant has failed to establish a causal connection between his purported injury his ailments. The claimant has attempted to rely on his own determination that he had an allergic reaction to the liner the respondent employer was using on December 20, 2004. The claimant has obtained no medical opinion containing any statement or report tracing the claimant's alleged affliction with COPD to his job with the employer. The claimant's belief that Dr. Spencer's prescription notes contain the requisite causal connection between his injury and his work is clearly erroneous. Dr. Spencer's note by no means satisfies the provisions of Ark. Code Ann. §11-9-102 requiring that any sort of medical statement on compensability must be made within a reasonable degree of medical certainty. Dr. Spencer's note states "[the claimant] was hospitalized 12/20/04 - 12/22/04 for respiratory illness, likely at least partially related to chemical exposure, possibly allergic. He will be ready to return to work 1/3/05. He needs to avoid occupation requiring similar respiratory exposure." Dr. Spencer's use of the words "likely at least

partially" and "possibly" do not satisfy the requirement that they be stated within a reasonable degree of medical certainty.

Moreover, the claimant has been an avid smoker since he was a teenager. In virtually every medical record there is a mention of the claimant's long-term smoking habit where the claimant averaged one pack of cigarettes per day. Furthermore, the claimant has suffered similar symptoms prior to the date in which this alleged exposure occurred.

Therefore, for all the reasons set forth herein, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on December 20, 2004. Furthermore, I find that the claimant cannot prove that he sustained a compensable occupational disease on December 20, 2004. Accordingly, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner