

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604075

LARRY MCGINLEY,
EMPLOYEE

CLAIMANT

LITTLE ROCK SHEET METAL,
EMPLOYER

RESPONDENT

SOUTHERN GUARANTY INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 27, 2007

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ANDREW M. IVEY,
Attorney at Law, Little Rock, 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 29, 2007. 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 over this claim.
2. An employee-employer on or about March 7, 2006, and at all other times relevant.
3. Respondents have controverted this claim in its entirety.

4. The claimant earned sufficient wages to be entitled to the maximum compensation rates for 2006.

5. The claimant has failed to establish by a preponderance of the evidence that his chronic obstructive pulmonary disease is related to his employment at Little Rock Sheet Metal Company, Inc. The claimant has therefore failed to establish by a preponderance of the evidence that he sustained a compensable occupational 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.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the March 29, 2007 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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority decision finding that the claimant did not sustain a compensable occupational disease injury. In denying the claimant benefits, it appears that the Majority has rejected the opinion of Dr. McCracken, the claimant's treating physician, and the opinion of Dr. Rose, who also treated the claimant. Instead, the Majority has relied on the opinion of Dr. Simmons who related the claimant's condition to gastroesophageal reflux disease (GERD). After reviewing the record, I find that the Majority has erred in rejecting the opinions of Dr. McCracken and Dr. Rose. I find that the opinions of Dr. McCracken and Dr. Rose are entitled to far more weight than the opinion of Dr. Simmons, who was hired by the respondents and never even treated the claimant.

In my opinion, the evidence in the record clearly shows that the claimant's condition was caused by his work conditions rather than due to GERD. The claimant testified that he worked as a welder for the employer from 1973 to 2006. The claimant testified that the work conditions were such that there was a constant cloud of smoke and dust in the work area. The claimant further testified that the quality of air was so poor in the work area that the air conditioner vent had to be changed some two to three times a day.

The claimant also indicated that while he was working for the respondents he would receive treatment, his conditions would improve for a period of time, and then when he returned to work, his condition would worsen again. The claimant said he has gotten somewhat better since he stopped working for the respondents; however, his symptoms have not totally resolved.

The Commission has the duty of weighing medical evidence as it does any other evidence, and resolving any conflict is a question of fact for the Commission. Crow v. Weyerhauser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). The Commission is not bound by medical opinion; however, it may not arbitrarily disregard the testimony of any witness. Id. The

Commission may also examine the basis for a doctor's opinion in deciding the weight to which that opinion is entitled. Id.

I find that the Majority has erred in rejecting the opinions of Dr. Rose and Dr. Dr. McCracken. Both Dr. Rose and Dr. McCracken treated the claimant and were both of the opinion that the claimant has COPD with asthmatic bronchitis caused by his job. On May 25, 2006, Dr. Rose indicated that the claimant suffered from Arc-welding asthma which was caused by the claimant's work. Dr. Rose further opined that the claimant could not return to his employment but indicated that he would not be prohibited from returning to other work where he did not have exposure to fumes.

Likewise, Dr. McCracken opined the claimant suffered from Arc-welding asthma which was fume induced. Dr. McCracken indicated that the claimant's work environment would be consistent with the claimant's occupation with the respondents and insisted that if the claimant could not return to work with a respirator, then he could not go back to work in the same capacity.

When reviewing the opinions of Dr. Rose and Dr. McCracken, I find that their opinions should be given great weight. Both Dr. Rose and Dr. McCracken

treated the claimant and were familiar with the progression of his symptoms. Additionally, the medical records indicate that both were given accurate information regarding the type of exposure the claimant received while working. In my opinion, this adds even more veracity to their opinions.

In particular, I found the opinion of Dr. McCracken to be convincing. Dr. McCracken is a pulmonary specialist and it is obvious from reviewing her deposition testimony that she is an expert in determining what would cause a condition such as the claimant's. While Dr. McCracken indicated that no test could objectively show the reason for the claimant's condition, she still concluded that the claimant's condition was caused by his work. She testified with great detail and clarity regarding the claimant's job duties and how those would cause the claimant's condition. As such, I find that her opinion should on causation should have been accepted by the Majority.

In contrast to the opinions of Dr. McCracken, (and Dr. Rose, the Majority has preferred the opinion of Dr. Simmons. Dr. Simmons was hired by the respondents after two treating physicians had already diagnosed the claimant with a work-related injury. Not

surprisingly, Dr. Simmons gave an opinion consistent with the position necessary to allow the respondents to avoid liability. Unfortunately, the Majority, despite the obvious bias, and despite the bizarre and unfounded basis for the opinion of Dr. Simmons, has decided to give his opinion the most weight.

In evaluating the opinion of Dr. Simmons, it is apparent that his conclusions are based on incorrect facts and are simply not supported by the weight of the evidence. In particular, I disagree with Dr. Simmons' conclusion that the only plausible explanation for the claimant's condition is because of his GERD. I find Dr. Simmons' opinion regarding the cause of the claimant's condition to be very peculiar as every physician that treated the claimant's conditions was aware of his diagnosis of GERD. In spite of this knowledge, not one of those physicians were of the opinion that the claimant's condition was due to his GERD. Instead, they concluded the claimant's condition was due to his exposure to fumes at work. Yet, Dr. Simmons, who was hired by the respondents and never treated the claimant, conveniently came to the conclusion that the claimant's condition could not have been caused by his work

environment. I find that the opinion of Dr. Simmons is simply too convenient to be believable.

There is no dispute that the claimant was receiving treatment for his GERD throughout his employment with the respondents. The claimant was repeatedly noted to be taking medication for his GERD and seemed to be able to delineate his asthma symptoms from his GERD. Notably, there is also no evidence that when the claimant began having his asthma problems he had some increase in symptoms regarding his GERD. I also find that it is curious that the claimant's asthma like symptoms were not diagnosed as being related to his GERD, especially since the claimant was being actively treated for GERD, and was seen by a specialist for that condition in 2006.

I also note that the opinion of Dr. Simmons is simply not consistent with the claimant's medical history. Dr. Simmons seems to base his opinion, in part, on the proposition that the claimant's coughing and condition were worse at night. In fact, the claimant testified that he was symptomatic all the time, but that his symptoms simply kept him from sleeping. Notably, the claimant's wife corroborated this claim.

I also find that it is significant to note that despite Dr. Simmons' assertions, the claimant's condition has improved since he stopped working for the respondents. The claimant testified that after he stopped working for the respondents, he has fewer "episodes" than he did while working for the respondents. Though this is not a complete elimination of symptoms, this is clearly evidence that the claimant's condition has improved since he stopped working for the respondents. When this testimony is considered with Dr. McCracken's testimony that the claimant's condition had progressed to the point that the claimant had sustained some permanent danger, it is apparent that the claimant simply has some symptoms that will never resolve.

Finally, I take issue with Dr. Simmons conclusion that Dr. McCracken had not taken into consideration other potential causes for the claimant's conditions before diagnosing him. Clearly, Dr. McCracken, who was described by Dr. Rose as, "the leading pulmonologist in town", did not simply diagnose the claimant without considering other potential sources for his illness. Dr. McCracken took a detailed history from the claimant, and in particular, noted the

claimant's history of GERD. She specifically noted the claimant had no childhood history of asthma and that he had not been a smoker. She also testified that she was aware of the claimant's work-environment and that it was well documented that such fumes would cause the claimant's condition. She further testified that the fumes would cause a permanent condition. As such, for Dr. Simmons to assert that Dr. McCracken did not consider other sources for the claimant's condition is simply wrong, as is his assertion that the claimant's exposure would not cause a permanent condition.

In short, I simply must agree with the finding that Dr. Simmons' opinion is entitled to more weight than that of Dr. McCracken or Dr. Rose. Not one physician that actually treated the claimant believed his condition was related to his GERD. It is apparent that Dr. Simmons has simply come up with an opinion that is consistent with what the respondents needed for litigation. I make this finding because it is obvious that Dr. Simmons based his opinion on erroneous facts and almost offhandedly dismissed the opinion of Dr. McCracken, who was noted by Dr. Rose to be a leading pulmonologist. Furthermore, it is apparent that Dr. Simmons seems to be of the opinion that the claimant's

gastrointestinal specialists were not competent to diagnose or treat the claimant's gastrointestinal symptoms. I find that it is simply not likely that Dr. Simmons, who never treated the claimant, is the only competent physician to assess or treat the claimant's condition. Furthermore, to accept his opinion over the claimant's multiple, other treating physicians simply encourages the respondents to "doctor shop" until they find an opinion which shields them from liability. This should not be tolerated and I simply cannot agree with such methods.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner