

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508000

MARLENE SERATT, EMPLOYEE	CLAIMANT
PHARMERICA, EMPLOYER	RESPONDENT
HARTFORD INS. CO. OF THE MIDWEST, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2007

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes before the Commission on the claimant's appeal of the December 29, 2006, opinion of the Administrative Law Judge finding that the claimant did not sustain a compensable injury. Specifically, the Administrative Law Judge found the claimant had no objective findings to show she had a compensable injury. After a de novo review of the record, we reverse the opinion of the Administrative Law Judge. Specifically,

we find that the claimant had objective signs of a compensable injury as shown by swelling and redness of her nasal passages, polyps in her nasal passage, increased carbon monoxide levels as shown by blood testing.

The claimant testified that she began working for the respondent-employer in 1998. She said that she was initially hired as a delivery driver and that in 1999 she began working as a technician. The claimant said that prior to the incident on June 8, 2005, the water heater had a history of leaking and despite the claimant's repeated complaints, it was not fixed. She and several other technicians would take turns emptying out a plastic water catcher that was used to collect water from the leaking water heater.

The claimant testified that she had a history of smoking, but said that she had no medical problems until after she began working for the respondent-employer. However, she testified that after she started working for the respondent-employer, she eventually began having sinus problems. She also suffered from pain in her joints and muscles. She indicated that the doctor diagnosed her with fibromyalgia because he could

not determine the source of her pain.

The claimant described that on June 8, 2005, she reported to work at 8:00 a.m. She described that the night before, she had noticed the water heater had leaked to the extent that there was a small water spot on the carpet where she worked. By June 8, 2005, the claimant said that the water leak had spread and that it had smelled "horrible." The claimant further described that shortly after working, she began experiencing a headache. She indicated,

A. Well, when I came in I had started getting a headache the same as I always did, and I just assumed it was from the computer. As the day went on, as time went on, it started getting worse and then my nose, my throat was starting to burn. We ended up putting on masks to try to, you know, keep whatever was happening - -

Q. Who put on the masks?

A. Actually all of us did. All the techs put on masks to try to - - you know, to help keep whatever was going on, you know, out of our noses because it was burning our throats and our noses and our eyes.

The claimant and the other workers reported their symptoms to Amanda Johnson, supervisor. Johnson opened the doors and then let the workers rotate leaving the

building for 30 minute increments.

The claimant described that she also began suffering from difficulty in concentrating and her hands shaking. She testified that her coworkers were having similar problems. The claimant testified that she eventually left work to go to the emergency room. She described that when she was at the hospital, she was still shaking, her eyes, throat, and nose were burning, and that her voice had become raspy. She was instructed to take Claritin and drink water.

The claimant described that after June 8, 2005, she has suffered from memory problems difficulty in concentrating, and an inability to multitask. She also suffered from headaches, blurred vision, and loss of memory. The claimant testified that she no longer works for the respondent-employer because she was discharged after taking a vacation for which she had received pre-approval.

The medical records largely corroborate the claimant's testimony. The claimant was treated on June 2, 2005. At that time, the claimant requested refills for Estratest, Synthroid, Singulair, Clinoril, Norflex, Zetia, and Clonopin. The claimant also reported that

she had suffered from increased stress. The claimant was noted to have, "nasal mucosa red and edematous especially on the right." The doctor's report provides,

Assessment:

Sinusitis, acute #461.9
histoplasmosis
Fatigue. #780.79
Headache, NOS #784.0.
Fibromyalgia (multiple tender and
tense muscle groups) #729.1.
hypothyroidism.

The doctor's note indicates that the claimant was to have blood work performed. The claimant was also given medications in the form of a steroid injection, Flonase, Keflex, Advair, Kenalog and Decadron. Additionally, the following day, a refill of the claimant's Clinoril was given.

On June 8, 2005, the date of the incident in question, the claimant was treated at the emergency room. She was told to take Benadryl or Claritin until her symptoms resolved. She was also instructed to drink a lot of water and to take Motrin or Tylenol for headaches. Finally, she was told not to return to work until cleanup was completed.

On June 9, 2005, the claimant was treated by Max Beasley, ANP. The claimant reported the incident that had occurred on June 8, 2005. The claimant

reported that the emergency room doctor had told her to take Claritin and Benadryl PM. She also relayed that the emergency room doctor told her not to return to the building where the mold exposure was. The claimant reported that she was still suffering from a headache, photophobia, burning of the throat and nose, and a cough. The claimant reported that she was taking Singulair related to a respiratory component of some reflux problem. She also indicated she was taking Hydrocodone, Orphenadrine and Sulindac for some myalgias and arthralgias which had developed a year before. The claimant also reported she was on Estratest due to post hysterectomy and taking Synthroid for thyroid insufficiency as well as Clonazepam for sleep. Her physical examination revealed,

On exam, Ms. Seratt is alert, pleasant in no apparent distress. Her blood pressure is 130/88, her temperature is 96.3 tympanically, pulse is 72, respirations are 16. Her height is 5 feet 8-1/4 inches. Weight is 189 pounds. Her pulse oximetry shows 97% on room air. Her head is normocephalic. Pupils are equal and reactive to light and accommodation. Extraocular movements are intact bilaterally. Oral mucosa is moist and pink. I see no swelling. I see no white patches. Nose-she has anterior nasal turbinate swelling and mild

pallor. There are no erosions or polyps. Ears-canals are patent. Tympanic membranes are intact. Neck is soft and supple. She has full range of motion of her neck. Lungs are clear to auscultation bilaterally. Heart has a regular rate and rhythm without rubs, gallops or murmur. Abdomen is soft and nontender. Skin-there are no rashes. We obtained a chest x-ray which shows lymphadenopathy present which is possibly due to hitoplasmosis exposure. Spirometry was within normal limits.

The claimant was assessed with mold exposure, instructed to increase her fluids, and not to return to the place of previous mold exposure. The claimant also apparently asked if her history of arthralgias and myalgias which had developed one year before could be related to her mold exposure at work. The claimant was instructed to ask Dr. Moffitt whether that was a possibility.

On June 13, 2005, the claimant was treated by Dr. Moffitt. The claimant reported body pain and significant fatigue. The claimant also reported that she suffered from a cough, sore throat, nasal congestion, and coughing fits at work. The claimant also complained of loss of appetite. Dr. Moffitt indicated that the claimant's x-rays showed some calcified nodules that would be consistent with previous

histoplasmosis but indicated that there were no active infiltrates. He further indicated that the claimant's spirometry was normal. Dr. Moffitt opined that it would be important to know if any mold was growing in the building and exactly what type was growing. Dr. Moffitt returned the claimant to work and declined to prescribe treatment as it was objectively unknown if the claimant was exposed to mold. However, Dr. Moffitt did indicate that the claimant should avoid going into the building suspected of having mold and instructed the claimant to return in a week.

The claimant was treated by Dr. Corwin Petty again on June 20, 2005. The claimant reported that she had suffered from an increase in fatigue, pain in her joints, shortness of breath, and difficulty with clearing her throat of mucus. The claimant was again noted to have, "Nasal mucosa red and edematous." The claimant was diagnosed with, leukocytosis, dyspnea, headache, fatigue, b12 def, allergies, and anthralgia. The claimant was tested for allergies and given a prescription for her headaches.

On June 23, 2005, Dr. Moffitt again treated the claimant. He noted the claimant had no objective

findings and indicated that he did not believe her symptoms were related to exposure to an insecticide used at the workplace. He indicated that the evaluation for mold exposure was not yet completed and indicated the claimant could return to work with the same restrictions. Finally, he instructed the claimant to return to him in two weeks.

On June 29, 2005, the claimant was treated by Dr. Petty. The report indicates,

H/A continue. carbon monoxide exposure? Fatigue. Kathleen Clark, LPN.

Patient states that during a teleconference they were told that they were exposed to carbon monoxide but they are unsure for how long. The complaints that they have had are consistent with carbon monoxide poisoning.

She continues to have a headache, and this past Sunday was terribly nauseated and vomited "all day long". She still complains of ear pain, nasal congestion and sore throat. She also states that she is continuing to have "memory loss" she will start doing something and then forget that she was doing it such as cooking dinner. She reports this occurring for at least the last year and attributed it to her hysterectomy.

The claimant's objective examination revealed, "Nasal mucosa red and edematous with a polyp on the right posterior region." The claimant was diagnosed with carbon monoxide poisoning and a headache. The claimant was sent to have another complete blood count and arterial blood gases assessing for carboxyhemoglobin by cooximetry. On June 29, 2005, the claimant submitted to blood work which revealed the claimant's "FCO_Hp" to be at 7.3. The normal reference range is indicated to be .5 to 1.5.

On July 1, 2005, the claimant received treatment from Dr. Brown. The claimant reported that she had carbon monoxide poisoning which had caused headaches, fatigue, body pain, memory problems, sinus problems, and shortness of breath. Dr. Brown indicated that the claimant's arterial blood gas test had revealed a carbon monoxide level of 7.3 with normal being between .5 and 1.5. Dr. Brown indicated that based on the claimant's history, many of her physical problems predated the incident on June 8, 2005. Dr. Brown recommended an MRI to see if the claimant suffered from basal ganglia abnormalities. He further indicated that many of the claimant's symptoms would not be related to

carbon monoxide poisoning.

On July 6, 2005, the claimant was treated by Dr. Whiteside. Dr. Whiteside diagnosed the claimant with allergic rhinitis, possible chronic sinusitis, allergic conjunctivitis, and mild intermittent asthma. The claimant was given medications and told to undergo immunotherapy. On July 11, 2005, Dr. Moffitt indicated that the claimant's symptoms had not resolved. He indicated that the claimant had various allergies and that Dr. Whiteside had diagnosed her with asthma, allergic rhinitis, possible chronic sinusitis and conjunctivitis. He noted the findings of the claimant's carboxyhemoglobin test but indicated that smokers often have elevated carboxyhemoglobin levels which were up to 10. Dr. Moffitt recommended the claimant be seen by a neurologist and instructed the claimant to return in one month. An additional blood test was performed on July 11, 2005, and the claimant's carbon monoxide level was found to be at 6.3%.

On July 11, 2005, Dr. Brown indicated the claimant's MRI was normal and did not reveal basal ganglia infarcts. However, he also indicated, "There is a poorly understood more chronic CO2 intoxication

syndrome which has more cognitive type symptoms." Dr. Brown further indicated that he was not going to prescribe medication for the claimant's headaches as he did not believe medication would be successful until the claimant's anger with the company had resolved.

Dr. Whiteside corresponded with Debbie Doyle, R.N., on July 13, 2005:

Enclosed you will find the results of our evaluation on the six employees to determine if they have significant allergies. As requested, we also performed a pulmonary evaluation that included spirometry (pulmonary functioning) on each one of them. We have made every attempt to determine if any of these employee's symptoms could have been caused by being exposed to mold in the workplace. It appears with the available research we have at this time, there is no way a patient could inhale enough mold spores to cause a toxic reaction to mold that might be found in the home or workplace. However, it is possible to eat enough food contaminated with mold to have a toxic reaction following that ingestion.

If any of these employees have a significant allergy, especially to mold, they could have an increased difficulty with their allergies after exposure to increased mold spores. We found significant allergies in three of the six employees. They are Brian K. Smith,

Mary A. Doss, and Daniel D. McMillion. They are all allergic to mold but that is not their primary allergen. Even if they did have mold in the workplace and were exposed to a significant amount, it would be highly unlikely that their difficulty now is related to that exposure.

As mentioned before, we did a spirometry on each employee and they were all normal except for Mary A. Doss and Aurora Cortez. . . .

It appears to me that the difficulty these employees are having with their headaches and other symptoms would have to be due to another etiology other than allergy (IgE mediated disease). I was a Flight Surgeon in the Air National Guard and Air Force for a total of twenty years and it appears to me the difficulty they are experiencing is probably due to exposure to carbon monoxide and/or nitrogen dioxide.

The claimant was treated by Dr. Rutherford on July 20, 2005. Dr. Rutherford indicated the claimant's neurological examination was normal and that there was no evidence to suggest a neurological injury. He further indicated that he was requesting the MRI performed at the request of Dr. Brown and indicated that the claimant would be scheduled a neuropsychological examination with Dr. Johnson and a FCE with Rick Byrd. Dr. Rutherford indicated the claimant was to return when

those evaluations were complete.

On August 31, 2006, Dr. Petty indicated as follows,

This letter is in regards to Aurora Carter, Marlene Seratt and Daniel McMillan. Based on their symptoms and the chronological order that these events took place, I believe with medical certainty that the above patients suffer from delayed neurological sequelae due to prolonged carbon monoxide exposure and subsequent poisoning.

The following is medical literature that supports my opinion. . . .

Environmental CO exposure is typically less than 0.001%, or 10 ppm [6], but it may be higher in urban areas [7]. The amount of CO absorbed by the body is dependent on minute ventilation, duration of exposure, and concentrations of CO and oxygen in the environment. . . . A cigarette smoker is exposed to an estimated 400 to 500 ppm of CO while actively smoking [7]. . . . The current Occupational Safety and Health Administration permissible limit for CO exposure in workers is 50 ppm averaged over an 8-hour work day. . . .

The claimant was seen by Eric Walker with the Millennium Chiropractic and Rehab Center on August 10, 2005, with complaints of cervical and lumbar spine pain. The claimant reports that her cervical problems began in

2000 and that her lumbar pain began in 2001. The therapist notes that he anticipates seeing the claimant at a rate of one to two times a week over a four-week period, noting that she is also receiving messages to reduce her myofascial restrictions in both her lumbar and cervical spine. Mr. Walker writes that the claimant was given home exercise instructions as well as a topical ointment to help relieve her pain. Cervical radiographs were obtained and revealed mild to moderate degenerative disc disease at C5/C6 and C6/C7 and she also had a moderate reversal of her cervical lordotic curve.

The claimant was seen by Dr. Judy White Johnson, a clinical neuropsychologist, on August 17, 2005. Dr. Johnson notes that the claimant reports her current symptoms as headache, confusion vision, fatigue, sinus, asthma, allergies, memory and that one day last week she woke with her hands tingling and could not breathe and began crying. The claimant also reports to the doctor that she is taking thirteen medications on a daily basis and that she is just undergone allergy testing and is scheduled to begin injections, further noting that she is a smoker. The claimant reported to Dr. Johnson that she had "googled" on the internet and

found out that her symptoms do not fit carbon monoxide but has determined that her problem is nitrogen dioxide poisoning from the hot water heater leak. Dr. Johnson writes that the claimant does not like her job, believes that she is underpaid and gives a history of being discriminated against when she was passed over for a manager's job. Dr. Johnson administered the claimant numerous neuropsychological tests and sets out at length the various findings for these different tests. Dr. Johnson writes that the claimant throughout the test would exhibit behaviors which would interfere with her performance and it is noted that without any prompting the claimant would begin talking about the events at work, various illnesses of co-workers and things she had read on the internet.

Dr. Johnson assessed the claimant with having an intellectual functioning level of the upper limit of below average. Dr. Johnson notes that on memory testing the claimant's overall performance was consistent with her other cognitive abilities but due to her test behavior, her verbal learning/verbal memory were areas of great weakness, further noting that when the claimant was administered follow up testing to specifically

assess this dimension no problems were found. On the claimant's Wahler's test it was noted by Dr. Johnson that the number and frequency of the complaints reported by the claimant were numerous each day. Dr. Johnson writes that the all over pattern of the claimant's reported symptoms are consistent with symptom magnification. Dr. Johnson concludes after going through the claimant's various tests that the claimant's overall pattern of neuropsychological test findings reflects an individual who is functioning in the low average range of cognitive abilities with no significant impairments or focal problems. Dr. Johnson writes that there is no indicator in the findings of brain damage or traumatic injury and further notes that the claimant's personality findings indicate that she is apt to have significant emotional problems and personality difficulties in her interpersonal relationships, behavior, attitudes and day to day functioning. Dr. Johnson notes that the claimant's pattern of findings is consistent with a somatization disorder and borderline personality disorder.

Dr. Rutherford writes on August 18, 2005, that he has reviewed the claimant's MRI of her brain which

was normal as well as the report from Dr. Johnson. Dr. Rutherford writes that the claimant's FCE revealed inconsistent and unreliable effort on the part of the claimant, noting that she passed forty-one out of sixty-one consistency measures. Dr. Rutherford released the claimant to resume full unrestricted duties with no permanent partial impairment rating.

The claimant continued to be seen by Dr. Petty for medication refills throughout September and on September 1, 2005, it is noted that the claimant reports that her nerves are getting the best of her and that she is quite upset with the neuropsychiatrist for the report she wrote. It is also noted that the claimant is quite upset due to her best friend committing suicide and reports that she, the claimant, has been yelling at her co-workers and her children. It is noted that the claimant reports having pain all over that is relieved by the pain medications and Norflex and that she would like to have something stronger for her nerves. The claimant was seen by Dr. Eric Stewart on October 24, 2005, for some skin disorders.

On October 24, 2005, Kristy Walker with Dr. Petty's office writes that the claimant is taking

Neurotin for headaches but feels it is not helping as much and was causing more sexual dysfunction. Ms. Walker writes that the claimant is concerned with her asthma diagnosis and states that she has increased her smoking up to three packs a day, noting that her allergies are worse. Ms. Walker writes that she discussed with the claimant the fact that she is on multiple pain medications and the claimant indicated that she does not feel that this is her problem and that she needs her medications to function. Ms. Walker encouraged the claimant to decrease her smoking dramatically, noting that smoking is not helping anxiety her allergies and sinus infections or headaches. Ms. Walker recommended that the claimant begin chiropractic therapy and message therapy.

On November 3, 2005, Dr. Petty writes that the claimant reports numbness on the right side of her face. Dr. Petty notes that the claimant's cranial nerves are intact except for decreased sensation in the right facial nerve distribution, noting further that the claimant has normal motor function, no facial droop, no slurring of words and the claimant has good movement of her eyes and is able to open and close them. Medications

were prescribed and a CT scan was performed. An MRI of the claimant's brain made on November 7, 2005, was normal. A CT of the claimant's head done on November 4 was normal. Throughout November Dr. Petty continued to follow the claimant as to her face numbness and notes that the claimant overall is doing better. Dr. Petty continued to monitor and prescribe medications for the claimant throughout December 2005 and into January 2006.

The non-medical evidence sets forth that the Rogers Fire Department responded to a call from the respondent on June 8, 2005, at 11:43 a.m. The report sets forth that the manager, Amanda Johnson, reported that everyone in the office had been having headaches and she showed them a wet spot on the floor in the northwest corner of the building. Upon inspection, it was discovered in the mechanical room there was water dripping down into the return platform. It is further reported that one inch of water was found under the platform and the problem appeared to be a stopped up condensation drain line. John Minden with Minden Engineering filed a report on June 29, 2005, concerning his inspection of the respondent's physical plant in Rogers, Arkansas. The results of Mr. Minden's test do

set forth that the levels of carbon monoxide and carbon dioxide in the main pharmacy room did increase when the hot water heater was fired, noting that this was evidence that the hot water heater flue gases are being drawn into the mechanical air handler and distributed into the pharmacy space.

The claimant contends that she was injured on June 8, 2005. The parties agreed to litigate compensability "due to carbon monoxide and mold." At the time of the hearing, neither party explicitly informed the Administrative Law Judge which statutory elements of compensability they relied on. The Administrative Law Judge denied the claim, but also failed to indicate which workers' compensation statute she relied on. Neither party on appeal expressly informs the Full Commission with regard to the relevant statute for adjudication.

In any event, the Full Commission infers from the claimant's testimony and the record that the claimant's symptoms were gradual in nature rather than sudden in onset. Ark. Code Ann. § 11-9-601(e)(1) (Repl. 2002) provides:

(A) "Occupational disease", as used

in this chapter, unless the context otherwise requires, means 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 as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

Although the Act does not define the distinction between "accidental injury" and "disease," one widely accepted and salient distinction is that occupational diseases are generally gradual rather than sudden in onset.

Johnson v. Democrat Printing & Lithograph, 57 Ark. App. 274, 944 S.W.2d 138 (1997), citing Hancock v. Modern Indus. Laundry, 46 Ark. App. 186, 878 S.W.2d 416 (1994).

In Hancock, the Court of Appeals reversed the Commission's finding that the claimant had sustained an occupational injury, because the claimant's injury had resulted from "a single injurious exposure and was sudden in its onset."

In the present matter, the claimant's symptoms did not result from "a single injurious exposure" which was "sudden in its onset." The claimant's testimony

indicates that her symptoms arose gradually. The claimant specifically testified that she had no medical problems until after she began working for the respondent. Yet, afterward, she began suffering from sinus problems and other symptoms consistent with exposure to carbon monoxide. Indeed, a medical report from the week before the incident in question the claimant was noted to symptoms such as headache and fatigue which were consistent with exposure. Furthermore, the claimant was noted to have, "nasal mucosa red and edematous especially on the right", which would be consistent with carbon monoxide exposure. Furthermore, and as discussed more fully below, the claimant's symptoms worsened after the incident on June 8, 2005.

The claimant's testimony does not describe a "single injurious exposure sudden in onset". We recognize that there appeared to be a "culmination" of claimant's symptoms when he and several co-workers were allegedly exposed on June 8, 2005. As previously indicated, the claimant's testimony shows a gradual onset of symptoms and the medical reports show that days before June 8, 2005, the claimant had symptoms which

would be consistent with prolonged carbon monoxide exposure.

The record is also wrought with examples of objective evidence that the claimant sustained a compensable occupational injury. Only after the claimant began working for the respondent did she suffer from allergy problems, fatigue, headache, seizures, and other symptoms consistent with carbon monoxide exposure. The claimant was repeatedly noted to have objective findings to her nasal passages. In particular, we note that on June 9, 2005, the claimant was noted to have, "anterior nasal turbinate swelling and mild pallor." On June 29, 2005, she was noted to have, "Nasal mucosa red and edematous with polyp on the right posterior region." Additionally, on the same date the claimant had blood work which revealed that she had a "FCOHP" of 7.3. Likewise, on July 11, 2005, the claimant's carbon monoxide level was found to be at 6.3%. Each of these are findings that are not within the claimant's control and are objective. Furthermore, we find that the claimant's objective findings are causally related to her exposure to carbon monoxide at work.

We also specifically find that the claimant's

elevated carbon monoxide level is related to her work-related carbon monoxide exposure. In making this finding, we rely on the opinion of Dr. Whiteside, who opined in his July 2005, report that specifically indicated the claimant's and the other workers symptoms were consistent with having been exposed to carbon monoxide. We find that there is no probative evidence to show that the claimant's cigarette smoking caused her to have such a high level of carbon monoxide in her blood. In particular, we note that some 19 days after the June 8, 2005, incident, the claimant's workplace was tested and found to have carbon monoxide levels of some 267 parts per million. Notably Dr. Petty's report, dated August 31, 2006, indicates that the acceptable rate of carbon monoxide is typically 10 parts per million and that the Occupational Safety and Health Administration (OSHA) allows for levels of up to 50 parts per million over an eight hour day. Clearly, since even some almost three weeks passed before testing was performed and the levels of carbon monoxide remained exorbitantly high, we find that it is more probable than not the claimant's exposure to carbon monoxide at work caused her various health complaints. Likewise, it is

important to note that while the claimant had minor health problems before working for the respondent, she did not become symptomatic of having carbon monoxide poisoning until after she began working for the respondent, which further establishes a causal connection.

Based on our de novo review of the record, we find that the claimant has sustained a compensable injury in the form of a gradual exposure to carbon monoxide at work. The claimant has shown that she is entitled to reasonably necessary medical treatment pursuant to Ark. Code Ann. §11-9-508(a). The claimant is entitled to treatment for the symptoms related to her compensable injury including headache, burning of the nose, throat and chest, photophobia, memory loss, shaking confusion, breathing problems, and other symptoms. For the aforementioned reasons, we reverse the Administrative Law Judge's opinion.

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. §11-8-715 (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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant to proved by a preponderance of the evidence that the she sustained a compensable injury. After conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable occupational disease by way of carbon monoxide poisoning or nitrogen dioxide. Therefore, I find that the decision of the Administrative Law Judge should be affirmed.

No one is disputing the fact that the claimant and several of her co-workers were exposed to carbon monoxide and mold at work. The claimant argued that her exposure to carbon monoxide and/or nitrogen dioxide led to injuries to her eyes, nose, throat, lungs and brain. However, as noted by the Administrative Law Judge, the claimant has failed to produce objective medical evidence of a compensable injury.

The claimant has been administered numerous tests and has been examined by a number of well qualified physicians in varying fields of medicine. With the exception of the common, everyday findings in allergy sufferers in Arkansas, the record is silent with regard to objective medical findings. In fact, the claimant underwent a carbon monoxide blood test, MRI of the brain, a psychological examination and a carboxyhemoglobin test. All of these tests came back normal with the exception of the carboxyhomoglobin test which showed elevated levels of carbon monoxide. However, the claimant is a life long smoker and has smoked up to three packs of cigarettes per day. Cigarette smoking is the leading cause of elevated carbon monoxide levels. In fact, Dr. Moffitt stated that

a normal level was 1.5 but that it was not uncommon for a smoker to have levels up to 10. The claimants was 7.3. Further, Dr. Rutherford noted that the claimant's level was normal in light of her cigarette smoking. It is axiomatic that the objective medical findings must be causally related to the alleged compensable injury. A bruise on the cheek while objective medical evidence is not sufficient to establish the compensability of a herniated cervical disc. While one may show that a fall resulted in both the bruise and the herniated disc, each is a separate injury, requiring objective medical evidence to establish causation. While the claimant admittedly proved the existence of objective medical findings associated with the common allergy, there is no evidence whatsoever that these findings are in any way causally related to carbon monoxide or nitrogen dioxide poisoning. Thus, the claimant may have proven the existence of a reaction to the mold, but she has not proven the compensability of carbon monoxide or nitrogen dioxide poisoning.

Furthermore, the evidence in the record demonstrates that the claimant had a history of allergies, fibromyalgia, sinusitis, histoplasmosis,

fatigue and asthma prior to the exposure. The claimant has a long history of numerous medical problems for which she was being treated and taking a variety of medications prior to June 8, 2005. The claimant has a long history of heavy cigarette smoking which her various physicians have recommended that she stop due to the affect they are having on her multiple symptoms.

The claimant has the burden of proving by a preponderance of the evidence the compensability of his claim. Jordan v. Tyson Foods, 51 Ark. App. 100, 911 S.W.2d 593 (1995); Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995). For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (Supp. 2005), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16),

establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See also, Ark. Code Ann. §11-9-102(4)(E)(i)(Supp. 2005); Freeman v. ConAgra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001); Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997), see also, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744).

After weighing the evidence impartially, without given the benefit of the doubt to either party, I am constrained to find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable occupational disease that is established by objective medical findings. A thorough review of all the evidence fails to disclose the existence of any objective medical evidence establishing

a compensable injury. The claimant has many medical problems that require treatment but none of these problems, in my opinion, are related to a work related injury.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner