

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510658

TIMOTHY BUNCIK, EMPLOYEE	CLAIMANT
AMERICAN STANDARD, INC., EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, CARRIER	RESPONDENT

OPINION FILED MAY 5, 2008

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE MICHAEL MAYTON, Attorney at Law, 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 March 16, 2007.

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. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$385.00 for temporary total disability and \$289.00 for permanent partial disability.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the form of polyneuropathy while working for the respondent. Based on the information in this record the claimant has failed to prove a causal connection between his employment and the occupational disease.

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 that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 Hood dissents.

DISSENTING OPINION

The majority opinion affirms and adopts the opinion of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury while working for the respondent. The majority specifically finds that the claimant failed to prove a causal connection between his

employment and the occupational disease, polyneuropathy. After a de novo review of the record, I find that the claimant proved by a preponderance of the evidence that he sustained a compensable disease in the form of polyneuropathy while working for the respondent. I find that the claimant proved, by a preponderance of the evidence, a causal connection between his employment and his occupational disease, and is entitled to temporary total disability benefits from March 28, 2004 until a date yet to be determined. Therefore, I must respectfully dissent from the majority opinion.

The claimant testified that he began working for the respondent-employer, Air Systems, in 1997, as an assembler of large air conditioning and heating units, some as large as houses. The claimant was responsible for building and cleaning these units. The chemical used for cleaning was called "DoALL". This solvent contained Toluene and Butoxyethanol. According to the claimant, he worked in closed areas with no ventilation and was constantly exposed to the toxic vapors of the solvent from 1997 through 2000.

The claimant began to have serious medical problems as a result of this exposure, which, "started to actually peak from 2002 up to 2004". During this time, the claimant began stumbling and falling, so he went to see Dr. Wendell Ross, who tested him for diabetes, aids, and other possible illnesses. When all of those tests came out negative, Dr. Ross sent the claimant to Dr. William Griggs, neurologist, who ran an EMG and NCV studies, which demonstrated "mixed motor and sensory polyneuropathy of uncertain etiology". On February 11, 2004, the claimant consulted with Dr. Ross about the test results and realized that his problems were the result of chemical exposure in the workplace. On February 11, 2004, Dr. Ross began to treat the claimant for polyneuropathy of both lower extremities and stated on October 6, 2005, the following:

Mr. Buncik suffers an idiopathic neuropathy, proven by electromyographic evidence. I think it could be stated that there is a strong possibility this neuropathy developed after Mr. Buncik had worked around chemicals at the plant where he was employed.

On October 26, 2005, Dr. Ross said:

I could state with a reasonable degree of medical certainty that I knew toluene could produce neurological abnormalities, that I am not an expert in the area, but that certainly it is within the realm of possibility that the toluene could have contributed to or caused his idiopathic neuropathy.

The functional capacity evaluation questionnaire completed by Dr. Ross on October, 26 2005 indicates that the claimant is extremely limited in his ability to sit, stand, and walk. His ability to lift, stoop, crouch, and climb were also very limited as well as his ability to reach, handle, and finger. And Dr. Ross said on the questionnaire that the claimant would likely miss more than four days per month because of the neuropathy.

On July 11, 2006, Dr. Ross said:

It remains my studied opinion that Mr. Buncik is unable to do any kind of gainful employment because of the neuropathy and probable intermittent claudication and peripheral artery disease in both of his lower extremities and is completely and totally disabled.

The claimant was terminated on March 28, 2004, and he attributed this to the fact that he was stumbling and falling on the job, and because he was seeking medical assistance for these problems. It was the claimants testimony that he discussed the situation with his supervisor, Steve Tate, before he was terminated on March 28, 2004. The claimant filed his claim for workers' compensation benefits on or about October 6, 2005.

The majority denied this claim, based solely on the finding that the claimant had failed to prove a causal connection between his employment and the occupational disease, polyneuropathy. Ark. Code Ann. §11-9-601(e)(1) provides:

(e)(1)(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 flows or unavoidably results from an injury as that term is defined in this chapter.

(e)(1)(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

While the burden of proof for occupational diseases, found at Ark. Code Ann. §11-9-601(e)(B), was changed from "clear and convincing evidence" to "a preponderance of the evidence" by Act 1281 of 2001, changes in the burden of proof have been determined to be procedural rather than substantive changes, immediately applying to existing causes of action heard after the passage of the Act even if the injury occurred prior to passage. Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987); Wade v. Mr. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Marrable v. Southern LP Gas, Inc., 25 Ark. App. 1, 751 S.W.2d 15 (1988).

Applying the law to the facts of this case, I find that the claimant met his burden of proof in establishing a causal connection between his employment and the occupational disease. It is undisputed that the claimant was exposed to extremely toxic chemicals, Toluene and Butoxyethanol, through his use of the cleaning solution, DoALL. It is equally undisputed that the exposure continued for a prolonged period of time under hazardous conditions

requiring the claimant to work in closed areas with no ventilation. The diagnostic studies show undeniable objective findings to support the diagnosis of polyneuropathy. The opinions of the claimant's treating physician establish within a reasonable degree of medical certainty that the condition was related to the chemical exposure and there is no evidence, medical or otherwise, suggesting an alternative etiology. Under these circumstances, the claimant has clearly met his burden of proof by a preponderance of the evidence that his occupational disease is casually related to the chemical exposure in his employment.

While the majority opinion does not address the issue, the respondent argues on appeal that the statute of limitations bars recovery in this case. The statute of limitations for occupational diseases is found at Ark. Code Ann. §11-9-702(a)(2), which states:

A claim for compensation for disability on account of injury which is either an occupational disease or occupational infection shall be barred unless filed with the commission within two (2) years from the date of the last injurious

exposure to the hazards of the disease
or infection.

While the above-quoted statute requires the filing of a claim within two years from the date of last injurious exposure to the hazards of the disease, Ark. Code Ann. §11-9-702(g) provides an exception for "latent injury", as follows:

(G) (1) A latent injury or condition shall not delay or toll the limitation periods specified in this section.

(2) However, this subsection shall not apply to the limitation period for occupational diseases specified in subdivision (a) (2) of this section.

In Quality Service Railcar v. Williams, 36 Ark. App. 29, 820 S.W.2d 278 (1991), the Arkansas Court of Appeals considered the effects of a latent occupational disease on the claimant's obligations to give statutory notice of injury required by Ark. Code Ann. §11-9-603(a) (2) and Ark. Code Ann. §11-9-701. In this case, the claimant's occupational disease was diagnosed in 1975, but the claimant did not realize that his condition was work-related until 1986, by which time the reporting requirements of Ark. Code

Ann. §11-9-603(a)(2) had long since expired. The Commission excused the claimant's failure to comply with the reporting requirements of the statute and the Court of Appeals affirmed, stating:

The Commission found that the claimant was not aware, until he attempted to return to work in January 1986 and was not able to do so, that he suffered from a disease cognizable under workers' compensation. The Commission relied on DeSoto, Inc. v. Parsons, 267 Ark. 665, 590 S.W.2d 51 (Ark. App. 1979), for the rule that the time period for notice to the employer begins to run from "the first distinct manifestation of a disease cognizable under workers' compensation, not the first distinct manifestation of the disease". Although the Parsons case quoted with approval the following statement by the Commission: "Claimant was not in a position to give notice of injury because she wasn't aware, until notified by her union, that she had a claim cognizable under workers' compensation." We think the rule stated by the Commission in the present case is correct. Another way to express the same rule is found in Woodard v. ITT Higbie Mfg. Co., 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980), where the court said, "the statute does not begin to run until the employee knows or should reasonably be expected to be aware of the extent or nature of his injury." We also agree the evidence in this case supports the

finding that it was not until January 1986, when the claimant was unable to continue working, that he realized he was suffering from an occupational disease, and it is not disputed that the employer learned on March 3, 1986, that the claimant was contending his condition was work related. Moreover, the Commission found that any failure to give timely notice of claimant's occupational disease was excusable. The Commission said the evidence shows that the employer had as much knowledge of the causal connection between the claimant's work and his disease as the claimant did. Under the case of Peerless Coal Co. v. Gordon, 237 Ark. 152, 372 S.W.2d 240 (1963), the authority of the Commission to excuse the failure to give notice under the statute relating to an injury (now Ark. Code Ann. §11-9-701) would also apply to the failure to give notice of occupational disease as required under Ark. Code Ann. § 11-9-603. We affirm the Commission's finding that any failure to give notice was excusable.

It follows that, if latent injuries excuse the notice requirement of Ark. Code Ann. §11-9-603(a)(2) and Ark. Code Ann. §11-9-701, then the existence of a latent injury will extend the filing of claims under Ark. Code Ann. §11-9-702(a)(2). This is especially true since Ark. Code Ann. §11-9-702(g) unequivocally provides that latent

occupational disease injuries may delay or toll the limitation periods specified in Ark. Code Ann. §11-9-702.

Was the claimant's occupational disease "latent" so as to "delay or toll" the statute of limitations in this case? The undisputed evidence of record indicates that the claimant first realized that he had a work-related injury on February 11, 2004, when Dr. Ross reviewed with the claimant the diagnostic studies performed by the neurologist. The record is totally devoid of any evidence suggesting that the claimant was aware that his disease was "cognizable under workers' compensation" before February 11, 2004.

Accordingly, the claimant would be allowed two (2) years from that date in order to file a claim for benefits (February 11, 2006). Therefore, I find that the claimant filed a timely claim for benefits when he formally registered his claim with the Commission on October 8, 2005.

On another point not addressed by the majority opinion, respondent argues that the claimant failed to satisfy the requirements of Ark. Code Ann. §11-9-601(g) (1) (B), which provides that an employer shall not be

liable for any compensation for an occupational disease unless disablement results within one year after the last injurious exposure to the disease in the employment.

Following the logic and dictates of Quality Service Railcar, supra., the claimant would be required to prove disablement within one year from the date his disease became "cognizable under workers' compensation". Because the claimant became disabled on March 28, 2004, a little over a month after he realized that he had a work-related injury, the claimant satisfied the requirements of Ark. Code Ann. §11-9-601(g) (1) (B).

Finally, respondent raises a defense based on the claimant's failure to give notice within ninety (90) days after the first distinct manifestation of the occupational disease in accordance with Ark. Code Ann. §11-9-603(a) (2) (A), another issue not addressed in the majority opinion. As discussed earlier, the claimant would be excused from providing this notice until "the first distinct manifestation of a disease cognizable under workers' compensation, not the first distinct manifestation of the

disease". Quality Service Railcar v. Williams, supra. Since the claimant first realized that he suffered from a work related condition on February 11, 2004 and the employer was made aware of this fact sometime before March 28, 2004, the claimant has complied with the ninety (90) day notice provision of Ark. Code Ann. §11-9-603(a)(2)(A).

Because the compensability of the claim was denied, the majority opinion did not reach the issue of the claimant's entitlement to temporary total disability benefits. With regard to this claim, the claimant will be entitled to temporary total disability benefits as long as he remains in the healing period and unable to work. 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).

The claimant has not worked since March 28, 2004. He continues to undergo treatment designed to improve his

condition. Dr. Ross said that the claimant was unable to do any kind of gainful employment. The functional capacity evaluation shows extreme limitation in every conceivable job requirement. Under these circumstances, the claimant has proved that he remains in the healing period and unable to work since March 28, 2004.

Based on a de novo review of the record, I find that the claimant proved by a preponderance of the evidence that he sustained a compensable occupational disease, and that he should be awarded temporary total disability benefits from March 28, 2004, until a date yet to be determined as well as medical expenses associated with the treatment of his injury. Therefore, I must respectfully dissent from the majority opinion denying the compensability of this claim.

PHILIP A. HOOD, Commissioner