

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612410

KIMBERLY JONES, EMPLOYEE

CLAIMANT

HEALTHPARK HOSPITAL,  
SELF-INSURED EMPLOYER

RESPONDENT

**OPINION FILED NOVEMBER 7, 2008**

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable occupational injury in the form of Hepatitis while working for the respondent employer. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a registered nurse. On September 28, 2006, the claimant received a needle stick to her middle finger. The claimant did not immediately report this needle stick but was instructed to do so because Ms. Freyman, the respondent employer's infectious control risk manager, overheard the claimant talking about it and instructed her to report it. The claimant underwent a blood test and tested positive for Hepatitis C. The patient was also tested but those test results were negative. On October 2, 2006, the claimant was told that her tests results demonstrated she was positive for Hepatitis C.

At the time of the September 28, 2006, incident, the claimant completed all of the necessary documentation and indicated that she was stuck by a needle on that date. However, after she tested positive and the patient involved tested negative the claimant attempted to try to "figure out" where she got Hepatitis C. The claimant never reported any alleged exposures before this September 28, 2006, incident. The claimant did not fill out an incident report

nor did she tell Ms. Freyman about any alleged previous exposures. Nevertheless, the claimant stated that she had several other potential exposures. The claimant stated that before Christmas in 2005 she had a needle stick through a glove while giving an IM injection. She indicated that in the first part of 2006 she had blood splash in her eye. The claimant washed her eye out but sought no further medical treatment. The claimant testified that a patient vomited on her in approximately May of 2006. Further, in the summer of 2006 the claimant indicated that she worked with a patient allegedly known to have Hepatitis C. The claimant failed to report any of those prior alleged exposures.

The claimant acknowledged during her hearing testimony that she knew how to report injuries and needle sticks. Specifically, the claimant had been a charge nurse and explained that other people had reported injuries to her so she was intimately familiar with the procedure. She also signed the Employee Handbook acknowledging her receipt of the policy regarding needle sticks. In addition, she was re-

educated in a Round Robin each year that was an annual re-education.

The claimant went to work for the respondent employer in October of 2002 and she tested negative for Hepatitis C at that time. However, Hepatitis C has an unknown incubation period. The hospital routinely will test the patient, with the patient's permission, as well as the employee who was exposed to determine whether or not there has been an exposure to Hepatitis C.

An "occupational disease" is any disease resulting in disability or death that arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury. Ark. Code Ann. § 11-9-601(e)(1)(A) (Repl. 2002). An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question. Sanyo Mfg. Corp. v. Leisure, 12 Ark. App. 274, 675 S.W.2d 841 (1984). A causal connection between the occupation or employment and

the occupational disease must be established by a preponderance of the evidence Ark. Code Ann. §11-9-601(e) (1) (B).

Ordinary diseases of life to which the general public is exposed are not compensable. Ark. Code Ann. § 11-9-601(e) (3) (Repl. 2002). Moreover, 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). An occupational hazard is quite different from occupational diseases defined in §11-9-601.

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. Osmose Wood Preserving v. Jones, 40 Ark. App. 190, 843 S.W.2d 875 (1992); Sanyo, supra. Further, 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, supra.

In our opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable occupational injury at work. The claimant acknowledged that she did not know when the exposure occurred. She knew of the policies concerning injuries at work through orientation, Employee Handbook, and the annual Round Robin training reaffirming these policies. The claimant acknowledged that she knew of these policies, but yet she never notified her employer of the alleged incidents where she might have been exposed to Hepatitis C. It was not until the claimant was overheard talking about the September 28, 2006, incident, by Ms. Freyman that the claimant reported the September 28, 2006, needle stick.

The claimant contends that there was no other way she could have contracted Hepatitis C except through the alleged exposures at work. However, the burden of proof is upon the claimant to prove the compensability of her claim.

The claimant has produced no other evidence of these alleged exposures through documentation or witnesses. The claimant must show a relationship between contracting the disease and her occupation. In this case, the claimant has failed to do so. In fact, the claimant admitted that she did not know where or how she contracted Hepatitis C. She "thinks" she was exposed to it at work but cannot prove it. In our opinion, this is conjecture and speculation. 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The only testimony we have regarding any evidence to make a determination that the claimant's exposure was at work is the claimant's own testimony. Claimant's testimony simply is not sufficiently credible to support a finding that her injury arose out of and in the course of her employment. Arnold v. Dino's, Inc., Full Commission Opinion, August 1, 2002 (Claim No. F001514); Riley v. Craighead Nursing Center,

Full Commission Opinion, January 13, 1998 (Claim Nos. E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion, December 12, 1998 (Claim No. E700104); Mooney v. Monday & Associates, Full Commission Opinion, August 15, 1996 (Claim No. E410794).

Therefore, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury in the form of Hepatitis C. Specifically, we find that the claimant has failed to prove a causal connection between a work exposure and her ultimate diagnosis by a preponderance of the evidence. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion reversing the Administrative Law Judge's award of benefits for the claimant's compensable occupational injury. After a de novo review of the record, I find that the claimant has met her burden of proof and would award benefits accordingly.

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). The burden of proof is by 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. Osmose 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. 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."

Here, the claimant began her employment with the respondent in October 2002. The claimant was required to take a pre-employment blood test which returned negative for Hepatitis C. On September 28, 2006, the claimant reported a needle stick and instituted the testing protocol where both the patient and the person reporting the needle stick are tested. On October 2, 2006 the claimant received the news that although the patient involved in the needle stick incident had tested negative, the claimant had tested positive for Hepatitis C.

The claimant testified to numerous incidents involving indicative of Hepatitis C infection during her employment with the respondent. The claimant testified that in December 2005 she had a needle stick through her glove while she was giving an intramuscular injection. The claimant testified that in the first part of 2006, blood splashed in her eye while she was emptying a Duval drain. The claimant testified that in May 2006, a patient vomited

on her. The claimant testified to an incident in August or September 2006, when a large amount of blood splashed on her uniform. And the claimant testified to yet another incident in the summer of 2006 when a known Hepatitis C patient was treated in the emergency room for abscesses. The claimant testified that the Hepatitis C patient's abscesses were drained and there was blood everywhere that the claimant cleaned. The claimant also testified that the metal clips used to hold ACE bandages on joint replacement patients, often covered in blood, often punctured her gloves.

Despite the claimant's frequent exposures to blood and bodily fluids and the risk of Hepatitis C infection, she did not report any of the above-discussed incidents, and did not engage in the hospital's testing protocol. As to this fact, the claimant testified: "It's a big hassle to report it. You have to go through testing; you have to get permission from the patient for them to be tested; and you have to put the patient through it."

While I may agree with the majority that the claimant lack common sense and has exhibited an almost

complete disregard for the hospital's testing protocol neither fact is an appropriate basis for denying this claim. The claimant credibly testified that she is employed in an occupation where the hazards and exposures to Hepatitis C are greater than other work environments. The claimant also credibly testified about numerous blood and fluid exposures during her employment between November 2005 and September 2006, including one exposure involving a patient known to be positive for Hepatitis C. The statute does not require that the claimant prove the exact date of exposure, and to the extent that the majority is requiring the claimant to do so, the majority has erred as a matter of law.

Furthermore, the claimant credibly testified that her family has tested negative for Hepatitis C and she has not had blood or fluid exposures outside of work. Based on the claimant's credible testimony, lack of any testimony regarding other potential exposures outside of work and the medical record, I find that the claimant has proved by a preponderance of the evidence that she contracted Hepatitis

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C, an occupational disease, at work, and is entitled to workers' compensation benefits.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner