

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610226

JOSE SALGUERO, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 2, 2008

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

Claimant represented by the HONORABLE JAMES EVANS, JR., Attorney at Law, Springdale, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 25, 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 of this claim.
2. On October 13, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate based on an hourly wage of \$10.97 having worked forty hours per week which would entitle (sic) him to an average weekly wage of \$438.80. This would entitle him to a temporary total disability rate of \$293.00 and a permanent partial disability rate of \$219.00.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury due to chemical exposure while working for the respondent in January 2005 and again in August 2005.
5. 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 October 25, 2007, 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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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury due to a chemical exposure in January of 2005 and again in August of 2005. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer in the chrome plating department. The claimant worked from August of 1999, until the plant closed in August of 2006. The claimant testified that in January 2005, an employee placed a fan near a vat of chemicals, blowing the fumes toward the claimant, causing a burning sensation to his throat and nose. He did not know what kind of chemicals were in the vat, but indicated that the person using the fan was wearing protective gear. He testified that the incident was reported to his supervisor, Jeff Linson, who gave the claimant and other employees masks to wear. The employees then returned to the same environment and continued working. Initially, the claimant testified that he went to the company doctor, Dr. Thorn, two weeks later; followed by a visit to the Fayetteville Diagnostic Clinic. However, there

are no records of any appointments and on cross examination, he admitted that he did not see a doctor at this time. He does not allege any further medical visits until October.

The claimant also testified that in August 2005, while at work, he began smelling fumes that irritated his nose, throat and chest, and caused coughing and breathing difficulties. He stated that he went with Mr. Castro and another employee to report the incident to human resources. The claimant testified that "yellow water" spilled onto the concrete floor, and that it was some time before it was cleaned up. He was unable to say what type of chemical was inhaled, but stated that the people cleaning the substance were wearing protective gear. Shortly thereafter, the claimant contends that his symptoms worsened and using co-worker Danial Huaracho as an interpreter, he reported the incident to his supervisor. In October, he was seen by the plant doctor, by a physician at the Diagnostic Clinic, and by a physician at University of Arkansas Medical Sciences. He testified that he drove himself to Little Rock for the appointment with UAMS. The claimant testified that Larry Massey instructed him to wear a

mask while working, but he only wore it for a short time because it was hot.

Aside from his medical appointments, the claimant's condition has not caused him to miss work, but he contends that he was forced to continue working in order to support his family. Although the claimant stated that the first doctor he saw for his chemical exposure was Dr. Thorn on October 19, 2005, he admitted to seeing Dr. Merle Baker for bronchitis one week earlier, on October 11, 2005.

Three co-workers testified on behalf of the claimant: Danial Huaracho, Pedro Castro, and Abdillio Mendoza. Danial Huaracho testified that he occasionally worked in the chrome plant with the claimant, and acted as interpreter for him on several occasions. He testified that he and the claimant were working near a drum filled with hydrochloric acid when an employee named Augustine, who worked in solution maintenance, placed a fan near the claimant, blowing fumes toward the claimant. He did not act as interpreter in regard to this incident, and Augustine was not presented as a witness.

Mr. Huaracho also testified that, on another occasion, a pipe had popped off and chemicals had

spilled "all over" where people were working. Mr. Huaracho stated that the three or four employees in the area went to human resources to report the incident, but nothing was done. He testified further that the claimant complained of breathing problems which he reported to his supervisor, Jeff Linson, using Mr. Huaracho as a translator, on approximately ten occasions. Although he also testified as to the claimant's medical appointments, on cross examination, Mr. Huaracho admitted that all of his information was as a result of translating for the claimant and he had no actual knowledge of the medical care.

Pedro Castro worked with the claimant for seven or eight years. He testified that he was present during the incident with the fan. Contrary to Mr. Huaracho's testimony, Mr. Castro stated that there was no one working with the chemical at the time, but indicated that the air filtration system had malfunctioned. According to him the room began to fill with fumes causing irritation of the throat and difficulty swallowing in the three employees in the area, including the claimant. On cross examination, he acknowledged that the same fumes were present all of the time, but that they were worse during that incident. He

also admitted that the ventilation fans were working properly during that time. Mr. Castro testified that the incident lasted for three days. He acknowledged that protective clothing was available for the employees to use, but that use of the equipment was at the discretion of each employee. He testified that he reported the incident to his supervisor, Jeff Linson, and Mr. Linson indicated that he would take care of it. He was unable to testify as to what type of chemical was involved. He stated that he recovered from his symptoms shortly thereafter and has had no further problems. Mr. Castro was not present during the burst pipe incident and could not offer any testimony as to that.

Abdillio Mendoza testified that he worked with the claimant for three years. Mr. Mendoza stated that in 2004, an employee blew fumes toward the claimant with a fan, and that he reported the problem to Mr. Linson. Mr. Mendoza also testified that on another occasion, a hose leaked chemicals, but he did not know what kind of chemicals. He stated that he accompanied the claimant to the doctor after the claimant began coughing.

Jeff Linson, the claimant's supervisor; Lynn Pate, laboratory manager for the respondent employer, and Larry Massey, safety manager for the respondent

employer, testified for the respondent employer. Mr. Linson testified that he has worked for the respondent employer for ten years, and at the time of the claimant's alleged exposures was the plating supervisor. However, at the time of the hearing, Mr. Linson worked in solution maintenance. He stated that chemicals in the plant are stored in 12-foot high tanks with catwalks running alongside them. A hoist is used to lower wheels into the chemicals in the tanks. Mr. Linson explained that chemicals are added to the tanks in two ways; in some tanks, valves are opened to allow chemicals to enter; and in others, chemicals are added from barrels on the catwalk. Mr. Linson stated that when an incident is reported to him, he fills out a report and if the employee wishes to see a physician, arranges it with Larry Massey.

Mr. Linson testified that in October 2005, the claimant reported that there were severe fumes in his work area and that he was experiencing throat irritation and chest pain. Mr. Linson went to the area in question, but did not smell any odor. He observed a pipe with a leaky seal, dripping a small amount of deoxidizer onto the floor. At the time in question, approximately two gallons had leaked onto the concrete. Deoxidizer, he

explained, is a solution containing nitric acid, phosphoric acid, and alumina HG.

Mr. Linson also stated that at that same time, the claimant told him that carbon from either a barrel or a filter had been blown into him in January. Mr. Linson was not told about this incident prior to October and no other complaints of fumes were ever made. He testified that carbon does not emit vapor or fumes and if blown, would distribute powder-like particles. He testified further that he has been around carbon often and it has no odor associated with it. Mr. Linson testified that he sent the claimant to Dr. Thorn when the incident was reported to him in October 2004. Upon the claimant's return. Mr. Linson was informed that the claimant was supposed to wear a mask while working. The claimant wore the mask on the first day and briefly on the second, but stopped because he did not like to wear it.

Mr. Linson testified as to the hazards of hydrochloric acid and muriatic acid inhalation, but stated that the chemical leaking from the pipe was not hydrochloric acid or muriatic acid. He also clarified that the employees in the area were not standing in the leaky product; they were approximately 25 feet from the

spill. He stated that when the leak was reported to him, he reported it to solution maintenance to clean it up. It was cleaned up in three days. Although the claimant and his co-workers state that the spill was yellow, Mr. Linson stated that it was white and that the claimant and his co-workers were not in an area where they could view the chemical.

Although the barrels of chemicals have warnings written only in English, Mr. Linson explained that they are not stored in the areas where the claimant worked, but were kept in a separate area and brought to the tanks through a plumbing system.

Lynn Pate testified that he worked in the field of environmental sciences for fourteen years, including working as a laboratory manager for the respondent employer for seven years. He has a Bachelor of Science in chemistry. Mr. Pate testified that he is familiar with the chemicals in the area that the claimant alleges exposure. He explained that the deoxidizer that was leaking from the pipe can cause burns to the skin if actual physical contact is made. He also stated that if the solution interacts with metal, it becomes aerosolized and gives off fumes; however, if it does not contact metal, it does not give off fumes.

He further testified that the chemical dripping onto a concrete floor, such as here, would not emit any vapors.

In regard to the incident in January, Mr. Pate testified that the carbon is a charcoal and cellulose substance that does not emit vapors. He stated that if the carbon is blown and inhaled, only dust would be breathed in.

Mr. Pate testified that the plant is equipped with an air filtration system that consists of a hood over each tank. Any fumes escaping the tanks are pulled into the system and purified. Although these tanks are in the area in which the claimant worked, one would have to be on the catwalk in order to access the top of the tanks. Although Mr. Pate acknowledged that he was not in the area when the leak in question occurred, he stated that the leak was on the deoxidizer tank which does not contain hydrochloric or muriatic acid. He also testified that if a physician were to call the plant inquiring about potential exposure, he would be read the MSDS sheet for hydrochloric and muriatic acid unless it could be accurately indicated where in the plant the exposure occurred.

Larry Massey testified that he has worked at the respondent employer for seventeen years and is

currently the safety supervisor. He stated that the respondent employer equips its employees with pumps that sample the air as the work. The pumps are then sealed and sent to a lab for testing in order to verify the quality of the air. Additionally, area monitoring is conducted of the air around the chemical tanks. Mr. Massey stated that he had never taken an air sample that indicated a problem in the environment. He was unable to state whether the claimant had ever worn an air sampler, or when the 2005 sampling was conducted.

Mr. Massey stated that on October 14, 2005, he learned of the leaky pipe and the claimant's alleged exposure and filled out a report. He then went to the area in question and observed deoxideizer dripping onto a concrete floor. He could not smell any fumes, but notified solution maintenance to clean it up. He testified that the claimant wanted to see a doctor so he made an appointment for the claimant with Dr. Thorn. Dr. Thorn's office told him that the claimant was to wear a dust mask upon his return to work. He provided the claimant with a mask, but the claimant did not wear it because it was uncomfortable. Mr. Massey testified that he never received a report of an incident in January 2005.

The claimant contends that he sustained a compensable injury to his respiratory system when he was exposed to chemicals in January and October 2005. The respondents contend that the claimant was not exposed to any chemicals in January, but if he was, it was carbon charcoal, and that the chemical he was exposed to in October was not hazardous.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in January of 2005. The claimant alleged that he was exposed to a chemical at that time when another employee inadvertently blew fumes towards him while pouring a drum of chemical into a tank. The medical records do not support the claimant's testimony. He initially stated that two weeks after the incident he was seen by Dr. Garland Thorn, the plant physician, and once by the diagnostic clinic. However, the claimant admitted on cross examination that he did not seek medical care until ten months after the incident in October of 2005. The claimant did not see Dr. Thorn until after the alleged second exposure in October of 2005. Dr. Thorn's notes from October of 2005 fail to mention a previous exposure. In fact, there is not mention of any exposure. The records merely recite

the symptoms and note a suspicion of esophagitis. The first mention of the January incident appears in the December 2005 medical records of Dr. Eckles. The claimant reported that he had recovered from it.

Further, there are no records to support the claimant's contention that he properly reported the incident in January of 2005. The claimant contended that he immediately reported the incident to his supervisor, Jeff Linson. There is no accident report on file with the respondent employer and Mr. Linson testified that he did not hear about this incident until October of 2005 when the claimant reported the second incident. Mr. Massey testified that all incident reports go through him and he was unaware of a report of the claimant's alleged exposure in January of 2005.

Moreover, the chemical content the respondent employer uses does not support the claimant's allegations. The claimant testified that when the fumes were blown toward him, the employee was pouring the chemical from a drum into one of the tanks causing the fumes to rise over the top of the drum. However, Mr. Massey testified that although chemicals are added from the drums to the tanks, they are added through a drum pump which is a fully enclosed system. The drums

are not opened and dumped into the tanks and fumes cannot escape during the process. Ergo, it is impossible for an exposure to happen the way the claimant alleged. Furthermore, even if the chemical in that area of the plant were blown towards the claimant, the record reveals that the chemical in that area is not hazardous when inhaled, but is merely carbon charcoal. Mr. Huaracho, the claimant's co-worker who was present during the incident said he believed the chemical to be hydrochloric acid. However, Mr. Huaracho acknowledged that he was not a chemist and offered absolutely no basis for his belief. Mr. Massey and Mr. Pate, who has a degree in Chemistry, testified that the hydrochloric acid is not located in that area where this alleged exposure occurred. Mr. Linson testified that chemical in that area of the plant is carbon and that carbon does not emit vapor or fumes; and if blown, would distribute benign powder-like particles. Mr. Pate also testified that he was familiar with the chemical in the area that the claimant alleged exposure and that it is carbon, a charcoal and cellulose substance that does not emit vapors. He also stated that if the carbon were blown at the claimant, it would be inhaled as dust.

The only indication that the claimant was exposed in January of 2005, is a medical record twelve months after the alleged exposure stating that the substance was hydrochloric muriatic acid. This does not mean that the claimant was actually exposed to hydrochloric muriatic acid. Mr. Pate explained that when a physician calls the plant requesting information relating to a chemical exposure, the physician is automatically read the MSDS sheet for hydrochloric and muriatic acid unless the physician can accurately pinpoint the area of the plant in which the suspected exposure occurred. This is a precautionary measure designed to alert physician as to the potential worse-case scenario.

The claimant's witnesses testified that the employee involved in the January incident was wearing protective clothing. Mr. Castro testified that protective equipment was available for every employee and it was left to each employee's discretion as to whether it was used. Whether or not an employee opted to wear the protective equipment is not indicative of the level of toxicity of the chemicals, but merely a personal preference. The claimant chose not to wear protective gear and this is consistent with his failure

to wear a protective mask even after he was ordered to do so by Dr. Thorn. In short, there is absolutely no evidence to support the claimant's contention that he sustained a chemical exposure in January of 2005. The mechanics of the chemical containment system, as well as the chemical in the area in question not being hazardous are indicative that there was no exposure. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable exposure of January of 2005. The decision of the Administrative Law Judge should be reversed.

The claimant also contends that he sustained a chemical exposure in August of 2005 from a ruptured pipe. There are no records to support an incident in August. However, there was indications that a pipe was leaking on October 14, 2005, and the claimant was seen by the company physician for the first time on October 15, 2005. Therefore, since there was no report of anything until October I must assume that this is the incident to which the claimant is referring. Even though there was a pipe leak on October 14, 2005, the claimant cannot prove by a preponderance of the evidence that he sustained a compensable injury due to that leak.

The claimant offered testimony of co-workers who stated that they were unable to identify what the chemical was. However, Mr. Linson and Mr. Massey both testified that they went to the area in question and observed a pipe with a leaky seal dripping a small amount of deoxidizer onto the floor. Mr. Linson explained that deoxidizer is a solution containing nitric acid, phosphoric acid and alumina HG.

Mr. Pate testified that the properties of deoxidizer can cause burns to the skin only if actual physical contact is made. He also stated that if the solution interacts with metal it becomes aerosolized and gives off fumes. If it does not contact metal it does not give off any fumes. In this case there was no contact with metal as the chemical was dripping onto a concrete floor. Therefore, there would be no emission of vapors. Mr. Massey and Mr. Linson also both testified that they did not smell any odor.

The record contains numerous inconsistencies regarding the onset of the claimant's symptoms. The claimant alleges he first experienced symptoms in January of 2005 and the symptoms worsened in August of 2005. However, the claimant did not seek medical attention until October of 2005. When he did see

Dr. Thorn on October 24, 2005, the claimant reported the onset of his symptoms two weeks prior, i.e., October 10, 2005. The claimant also visited the Ear Nose and Throat Clinic on October 11, 2005. Three days before the pipe began to leak on October 14th. He was diagnosed with bronchitis at that time. On December 6, 2005, Dr. Eckles noted that the claimant said that he had recovered from the January exposure, but experienced symptoms after the August 2005 exposure. As stated previously, it appears that this has to be the October 2005 exposure. Dr. Eckles also observed, "it is unusual to have this degree of pain and inflammation so far out from the exposure period." Furthermore, the medical records dated December 16, 2005, from Washington Regional Medical Center make no mention of an exposure in either August or October, but indicate that the claimant's symptoms had been ongoing since January. The notes from UAMS from July of 2007 also note that the claimant had been experiencing symptoms for two years after exposure to chemical fumes for one minute. These overall discrepancies, coupled with the fact that the chemicals in the area were not caustic, and the exposure in January could not have happened as described, simply casts doubt on the claimant's credibility. It is well settled that

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 Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Arkansas Code Annotated section 11-9-704(b)(6)(A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c)(2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility as being constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations.

Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. In addition, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995)

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 275 (1994). Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally

hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). However, the findings fo the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d (1987). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately

protects the claimant's right of due process of law."

Id.

In my opinion, the claimant's description of what happened, coupled with the medical records, as well as the testimony of the respondent employer's employees, I find that the claimant has failed to meet his burden of proof. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner