

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508000

MARLENE SERATT,  
EMPLOYEE

CLAIMANT

PHARMERICA,  
EMPLOYER

RESPONDENT

HARTFORD INS CO OF THE MIDWEST,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2008

Upon review before the FULL COMMISSION in 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

The Arkansas Court of Appeals has reversed and remanded the above-styled case to the Commission. *Pharmerica v. Seratt*, CA-08-83 (Ark. App. June 18, 2008). The Full Commission again finds that the claimant proved she sustained a compensable occupational disease. We find that the respondent-employer had knowledge of the injury.

I. HISTORY

Marlene Mignon Seratt, age 43, testified that she began working for PharMerica in about August 1998. Ms. Seratt

testified that she was a delivery driver and then became a technician. The claimant testified that a water heater in the building had leaked "from the time that I had started working there....There were several other technicians that worked there at the same time and so we all took turns emptying out a little plastic water catcher."

Dr. Corwin Petty saw the claimant on April 29, 2005 at which time it was noted, "nasal mucosa red and edematous especially on the right." The claimant was assessed with acute sinusitis, histoplasmosis, fatigue, headache, fibromyalgia, and hypothyroidism. The claimant was prescribed medications.

The claimant testified on direct examination:

Q. Now, what happened to you on June 8<sup>th</sup> of 2005?

A. I arrived at work. I proceeded to start doing my job. But before that, the night before we left, there was a little water spot on the carpet by where I worked. That morning when I went in, it was huge and it had spread to this other piece of carpet which they laid down on top of the carpet for us to walk on or work on....It smelled horrible....

Q. Had you made any complaints prior to June 8<sup>th</sup> about the leaking of the water heater?

A. Yes....

Q. So as you began work that morning, did you have any problem doing your work?

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....

Q. Were you having any problems actually getting your work done?

A. Yeah. I was having a hard time concentrating. My hands got to shaking and they were shaking so bad that I was having a hard time holding bottles....

Q. And did you at some point get to leave work?

A. Yeah. We did leave work to go to the emergency room.

The record contains a Rogers Fire Department Incident Report dated June 8, 2005: "Arived (sic) on the scene all personal (sic) where (sic) out of the building at the front door. Talked to manager Amanda Johnson of Pharmerica. Everyone in office has been having headaches she stated. She showed us is (sic) the northwest corner of building a wet spot in the floor....We looked in the mech. room and could see water dripping down into the return air platform. We took the cover off the furnace and there was one inch of water under platform. The problem appeared to be a stopped up condensation drain line...."

The record contains a Form AR-3, Physician's Report, dated June 9, 2005. The description of accident in the Report indicated that the claimant reported water seeping through a carpet on June 7<sup>th</sup>, and that mold was detected on June 8<sup>th</sup>. The claimant reported headache, burning nose and eyes, and chest congestion. The claimant was diagnosed with "Mold Exposure."

Max Beasley, ANP, saw the claimant on June 9, 2005:

At the request of and authorization by PharMerica, we are seeing Ms. Marlene Seratt. Ms. Seratt presents today for evaluation of mold exposure. Ms. Seratt says that on 06-08-05 they noticed a spot of water on the carpet which she demonstrated being around 18-24 inches. She said some time later they noticed that the wet spot had increased in size being six feet in diameter. She said the fire department came out and investigated and found that they have a "mold problem" and the employees were reportedly instructed to evacuate the building. According to Ms. Seratt, they spoke with their supervisors down in Little Rock who told them they have seven more hours of work to complete and encouraged them to continue working....She started having headache, burning of the nose, throat and the chest. She had some cough....Ms. Seratt says that she has had a history of having H.pylori and at times still takes Nexium. She has been treated for the H.pylori....

Nose - she has anterior nasal turbinate swelling and mild pallor....Lungs are clear to auscultation bilaterally....We obtained a chest x-ray which shows lymphadenopathy present which is possibly due to histoplasmosis exposure. Spirometry was within normal limits.

Ms. Beasley assessed Mold exposure and planned a referral to Dr. Moffitt.

The record contains an Authorization for Treatment for the company PharMerica and the patient Marlene M. Seratt, dated June 9, 2005. The record indicates that Bettie Harkey signed the authorization and wrote, "whatever is appropriate to treat the associate."

Dr. Gary L. Moffitt examined the claimant on June 13, 2005 and reported, "At the request of and authorization by PharMerica, we are seeing Ms. Marlene Seratt. Ms. Seratt is seen today for recheck for exposure to mold....I reviewed her chest x-ray. Dr. Berestnev had thought that there might be some adenopathy, but I really don't see this. There are some calcified nodules that appear to be consistent with previous histoplasmosis, but I see no evidence of any active infiltrates. I have also reviewed her spirometry and it appears to be normal....At this point in time, the most important thing I feel is for us to know if any mold is growing and exactly what type it is....I would recommend that she avoid going into the building that has the mold for the time being."

Dr. Moffitt reported on June 23, 2005, "I can't say that I know why Ms. Seratt is having the symptoms that she

is having. Many of the symptoms she is complaining of seem similar to the symptoms she has been describing prior to this exposure. Also, there is no objective medical evidence at this time of any disorder....I think it would also be reasonable for her to be evaluated by a pulmonologist to see if there is any evidence of issues from mold exposure....I think Ms. Seratt may continue to work with the same restrictions."

John Minden, a professional engineer, provided an Inspection Report to a representative of the respondent-employer on June 29, 2005:

On Monday June 27<sup>th</sup> two HVAC systems and a water heater were inspected at the PharMerica facility. The building is located at 412 North 2<sup>nd</sup> Street, Rogers Arkansas. The inspection was performed by me and Brian Eoff (an Arkansas licensed mechanical contractor).

The purpose of the inspection was to access (sic) the condition of the HVAC (heating ventilation and air conditioning) systems and their involvement with water damage reported within the facility....

Conclusions:

1. Water damage and removal/repair of water damaged materials was readily apparent in and around the Mechanical room plenum. The water heater and the AHU coil condensate drain are both potential sources for this damage. (The water heater was reported to have been recently fixed after a "prolonged" leak (of an accessory tank). Contractor records/invoices or occupant records would be required to verify this information.
2. The AHU coil condensate drainage pipe was effectively plugged. It is probable that during

continuous air conditioner operation the drainage pipe would fill up and overflow the condensate pan. (No secondary overflow shut-off switches were present on either HVAC until that we inspected that day).

3. The natural gas fired water heater has a significant flue gas leakage problem. CO was measured in concentrations up to 267 PPM (parts per million) in the Mechanical room.

4. The Mechanical room plenum (negative pressure portion of HVAC system) is not sealed airtight and the coil to furnace interface (positive pressure portion of HVAC system) has leakage (into the Mechanical room). Simultaneous operation of the Mechanical room air conditioner and water heater will cause water heater flue gases into the plenum and discharged into the pharmacy space.

5. No Outside Air (OSA) inlets are present in either of the two HVAC systems inspected....

Mr. Minden's recommendations included repairs to prevent water leakage and to improve indoor air quality.

Kristy K. Walker, a PA-C in Dr. Petty's office, assessed carbon monoxide poisoning and headache on June 29, 2005.

Dr. David L. Brown, a neurological specialist, reported to Dr. Petty on July 1, 2005:

I saw Ms. Seratt today with a chief complaint of carbon monoxide poisoning causing headaches, fatigue, body pain, memory problems, sinus problems, and shortness of breath....

Dr. Petty did an arterial blood gas on her 6/29/05 which showed a carbon monoxide level of 7.3 with normal between 0.5 and 1.5. The patient has not re-entered the work area since approximately 18 days previously....

Ms. Seratt has a large constitution of symptoms to include headache, photophobia, sore throat, weakness, muscle aches and pains. Many of these symptoms predate her acute intoxication of carbon monoxide. It is very obvious the patient is quite concerned about all of these symptoms and is fearful of long-term residual. If indeed the patient has had some type of chronic injury, I know of no anecdote (sic) for these problems. I did decide since it was so obvious this is going to be a long-term worker's comp issue to go ahead and do a MRI to see if there is any evidence of basal ganglia injury in that she does state she is incoordinated (sic) and always dropping things. I found no objective findings of basal ganglia abnormalities....

As far as I can tell, many of the symptoms would not be related to carbon monoxide poisoning. I am unaware of any kind of chronic symptoms of muscle aches and pains that would be related to carbon monoxide poisoning....

The interpretation from a Pulmonary Function Report dated July 6, 2005 was "Normal spirometric values indicate the absence of any significant degree of obstructive pulmonary impairment and/or restrictive ventilatory defect."

Dr. Brown informed Dr. Petty on July 11, 2005, "Her MRI was reviewed with her. I see no basal ganglia infarcts which can occur with acute poisoning. I did read on poison. There is a poorly understood more chronic CO2 intoxication syndrome which has more cognitive type symptoms....I elected not to try to treat her at the present time because I do not think until the anger with the company resolves, we are not likely to have success with the medication."

Dr. Edwin Whiteside, an allergist/immunologist, diagnosed the claimant with Allergic rhinitis on July 13, 2005.

Dr. Reginald J. Rutherford, a neurologist, consulted with the claimant on July 20, 2005 and reported, "Ms. Seratt's neurological examination is normal." Dr. Rutherford planned referral for further studies.

Dr. Judy White Johnson, a neuropsychologist, evaluated the claimant on August 17, 2005 and informed Dr. Rutherford, "In summary, the 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. There is no indicator in the findings of 'brain damage' or traumatic injury."

Dr. Rutherford noted on August 18, 2005, "I have received the report of the MRI study of the brain which proved normal....Ms. Seratt was advised that there was no evidence of neurological injury or dysfunction and that further follow up with myself was not required. In my opinion she may resume full unrestricted work duties. There is no recommended permanent partial impairment rating."

A pre-hearing order was filed on October 31, 2005. The claimant contended that she "was injured on June 8, 2005.

She has had injuries to her eyes, nose, throat, lungs and brain due to exposure to carbon monoxide and nitrogen dioxide." The respondents contended that the claimant "did not miss enough time from work to qualify for TTD. She was not injured in the course and scope of her employment. There are no objective medical findings. There is no medical opinion with any degree of certainty regarding causation. Since the claimant did not sustain a compensable injury, she is not entitled to a change of physician. The claimant has to prove a compensable injury to get any benefit."

The parties agreed to litigate the following issues:  
"1. Compensability of the claimant's injuries due to carbon monoxide poisoning and mold. 2. Related medical."

An MRI of the claimant's brain on November 4, 2005 was normal. A CT of the head on or about November 4, 2005 was normal.

Dr. Petty stated on August 31, 2006, "This letter is in regards to Aurora Cortez, 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 current Occupational Safety and Health Administration permissible limit for CO exposure in workers is 50 ppm averaged over an 8-hour work day[.]”

After a hearing, an administrative law judge (ALJ) filed an opinion on December 29, 2006. The ALJ found, in pertinent part: “3. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury while working for the respondent on June 8, 2005. See discussion above.” The ALJ therefore denied the claim and the claimant appealed to the Full Commission.

The Full Commission filed an opinion on November 30, 2007 and found that the claimant proved she sustained a compensable injury. The respondents appealed to the Court of Appeals. The Court has reversed and remanded for additional findings of fact.

## II. ADJUDICATION

### A. Occupational disease - causation

Ark. Code Ann. §11-9-601(Repl. 2002) 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 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....

(3) No compensation shall be payable for any ordinary disease of life to which the general public is exposed....

(g)(1) An employer shall not be liable for any compensation for an occupational disease unless:

(A) The disease is 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 or her employment....

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).

In the present matter, the Full Commission again finds that the instant claimant proved she sustained a compensable occupational disease. The claimant testified that she began working for the respondent-employer in 1998 and the claimant testified that a water heater had leaked in the building from the time of her employment. The claimant occasionally assisted other employees in emptying water which was leaking from the water heater. Dr. Petty examined the claimant in April 2005 and noted red, edematous nasal mucosa. The

claimant testified that, after arriving at work on June 8, 2005, she began experiencing an acute headache with burning in her nose and throat. The claimant was taken to the emergency room. A fire department incident report dated June 8, 2005 identified dripping water from a furnace in the claimant's work area. Max Beasley, ANP, examined the claimant on June 9, 2005 and assessed "mold exposure." A professional engineer, John Minden, provided the respondent-employer with an Inspection Report on June 29, 2005. Mr. Minden explicitly reported that carbon monoxide was measured from a leaking water heater in the respondents' premises. Kristy K. Walker, PA-C, assessed the claimant as carbon monoxide poisoning and headache on June 29, 2005.

The Full Commission finds that the instant claimant proved she sustained a compensable occupational disease pursuant to Ark. Code Ann. §11-9-601. The claimant proved by a preponderance of the evidence that she was exposed to carbon monoxide at work, and that this exposure caused the claimant's headaches and symptoms in her nose and throat culminating on June 8, 2005. The claimant established a compensable occupational disease by medical evidence supported by objective findings, including nasal turbinate swelling and edema. We also note Dr. Petty's report of June

29, 2005 showing an elevated carbon monoxide level in the claimant's blood. We find that exposure to carbon monoxide at work was the cause of the claimant's findings and not other factors such as cigarette smoking or non-work related allergies.

The Full Commission finds that the instant claimant proved by a preponderance of the evidence a causal connection between her employment and the occupational disease. The occupational disease arose out of and in the course of the claimant's employment with this respondent-employer. We recognize that the claimant's exposure to carbon monoxide was not necessarily characteristic of her occupation as a pharmacy technician. However, exposure to carbon monoxide from a leaking water heater was characteristic of the claimant's employment in this particular case. The claimant's employment placed her at an increased risk of developing symptoms from carbon monoxide exposure. The Full Commission therefore finds that the claimant's condition was compensable. *See, Crossett School Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1985).

B. Notice

The Court of Appeals has directed the Commission to address the issue of statutory notice. Ark. Code Ann. §11-

9-603(a)(2)(A) (Repl. 2002) provides, "Written notice shall be given to the employer of an occupational disease by the employee, or someone in his or her behalf, within ninety (90) days after the first distinct manifestation thereof." The ninety-day statutory period does not begin to run until the employee knows or should reasonably be expected to know that she is suffering from an occupational disease. See *Quality Service Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991). Failure to give notice shall not bar any claim if the employer had knowledge of the injury; if the employee had no knowledge that the condition or disease arose out of and in the course of her employment; or if the Commission excuses the failure on the grounds that, for some satisfactory reason, the notice could not be given. Ark. Code Ann. §11-9-701(b) (Repl. 2002).

The Full Commission finds in the present matter that the respondent-employer had knowledge of the injury. Max Beasley noted on June 9, 2005 that she was treating the claimant "at the request of and authorization by PharMerica." Ms. Beasley documented the claimant's reported exposure to fumes at work. The record also contains an "Authorization for Treatment for the company PharMerica and the patient Marlene M. Seratt, dated June 9, 2005." A

company representative signed the authorization and wrote, "whatever is appropriate to treat the associate." Dr. Moffitt noted on June 13, 2005 that he was examining the claimant at the request of and authorization by the respondent-employer. The preponderance of evidence demonstrates that the respondent-employer had knowledge of the leaking water heater and the culminating incident on June 8, 2005.

Based on our *de novo* review of the entire record, and in accordance with the remand from the Court of Appeals, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable occupational disease. The claimant proved that the respondent-employer had knowledge of the injury and disease. The Full Commission has already awarded fees for legal services in our November 30, 2007 opinion reversing an administrative law judge's decision.

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's finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. I am still of the opinion 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.

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 carboxyhemoglobin 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 claimant's 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. In my opinion, a thorough review of 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.

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KAREN H. McKINNEY, Commissioner