

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306412

RAYMOND L. WHEELER (DECEASED), EMPLOYEE	CLAIMANT
GDx AUTOMOTIVE, EMPLOYER, EMPLOYER	RESPONDENT NO. 1
GENCORP, INC./CRAWFORD & COMPANY, TPA	RESPONDENT NO. 2
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 17, 2008

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

Claimant represented by HONORABLE AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, 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 October 30, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.

2. The employee-employer-carrier relationship existed on November 15, 2001 and at all other relevant times.

3. Claimant's average weekly wage was \$550.00; his temporary total disability rate is \$367.00; and his permanent partial disability rate is \$275.00.

4. Respondent #1 controverts this claim.

5. Dr. Morris Cranmer never examined Claimant.

6. Claimant's claim is barred by the applicable statute of limitations, Ark. Code Ann. § 11-9-702(a)(2). Claimant transferred out of a position requiring the use of chemicals into a new position effective March 5, 2001. In this new position, Claimant did not work with these same chemicals. Thus, his last injurious exposure to the hazards of the occupational disease occurred no later than March 5, 2001. Claimant's claim for compensation was filed no earlier than June 16, 2003. This date is more than two years from the date of the last injurious exposure.

7. Since Claimant's claim is barred by the applicable statute of limitations, it is not necessary to discuss his entitlement to benefits or the other issues remaining in this claim.

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

I must respectfully dissent from the Majority's opinion. The original claimant in this case, Raymond Wheeler, filed a claim alleging that, because of job-related

chemical exposures, he developed a chronic, and ultimately fatal, liver disease. By the time of the hearing, Mr. Wheeler had died and the claim is being pursued by his wife. The Majority found that the respondent had established that the statute of limitation was a bar to the claim. In my opinion, the Majority's decision is a clear error and should be reversed. I am also of the opinion that the evidence developed at the hearing establishes that the claimant sustained a compensable occupational injury in the form of toxic chemical exposure that caused him to develop liver disease. Consequently, I find that the claimant's widow is entitled to spousal dependency benefits and reimbursement of funeral expenses, and that the respondent is liable for all medical treatment the claimant received for his liver condition.

The claimant went to work for the respondent employer in July 1977. For most of the next 24 years, the claimant was employed in their product development department, which involved the fabrication of rubber gaskets, seals, and similar parts, which either became

templates for the respondent's mass production or were custom jobs for particular customers. During the course of the claimant's job duties, he frequently came in contact with a variety of chemical solvents and adhesives, most commonly toluene, benzene, xylene, and others.

In March 2001, the claimant left the product development department and became a maintenance man on the respondent's production lines. This involved the repair of equipment, installation of dies, and similar duties. In this new job, the claimant's coworker, Anthony Galloway, indicated that some contact with toluene and chemicals still occurred, though not as frequent or as intensive as in the product development area. Also, the manufacturing facility was an open area and fumes from such chemicals were detectable throughout the plant.

On or about November 16, 2001, the claimant underwent an episode of esophageal bleeding. After this episode, the claimant underwent a number of tests and it was determined that he was suffering from chronic liver disease.

The claimant did not work after November 15, 2001. A claim for benefits was filed by the claimant on June 20, 2003.

The Majority, by affirming and adopting the Administrative Law Judge's opinion, held that the applicable statute of limitations was set out in Ark Code Ann. §11-9-702 (2) (A) and provides as follows:

" 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."

The Majority erroneously found that the claimant's job assignment in March 2001 ended his exposure to injurious chemical toxins. Therefore, his claim filing in June 2003 was more than two years after his last injurious exposure. In my opinion, the Majority's determination is in error.

In evaluating this issue, it is important to note that the statute of limitation is an affirmative defense which the respondent bears the burden of proving. Johnson v. Elkhart Production Corporation, Full Commission Opinion,

March 28, 1995 (D303314). Therefore, in order to prevail on the statute of limitations defense, the respondent must prove that at no time between March 2001 and June 20, 2001 was the claimant exposed to any of the toxic chemicals which caused his liver disease. There is little testimony on this point. But what there is, suggests that the claimant would have been exposed to these chemicals during the course of his work day even after March 2001.

The testimony of the claimant was preserved in a deposition taken before his death. He was not asked about chemical exposures after March 2001. However, in response to a question about his duties after that time, he described his job as follows:

"A. Die Setter. It was actually supposed to be if they want you for a die setter today, they'll use you for a die setter today. If they want you to make samples tomorrow, you'll make samples tomorrow."

The above answer suggests that the claimant did, from time to time, return to product development and resume making samples. While the statement is certainly not definitive on that point, the burden is on the respondent to

establish the statute of limitations defense. At most, the claimant's testimony indicates that he was still working in the respondent's facility well within two years prior to the filing of his claim and it suggests that he was still, from time to time, being exposed to injurious chemicals.

The other witness who testified as to the claimant's employment in the March-through-June time period was Anthony Galloway. Mr. Galloway testified that he began working in the product development department with the claimant in 1977. He stated that the two of them worked together doing essentially the same job until they were both transferred into similar equipment maintenance jobs or, as Mr. Galloway described it, as a "tool tech." Mr. Galloway testified that the claimant was not involved in using glue, but that in the manufacturing process, many of the chemicals such as toluene and others were used, especially in the extrusion department. Also, Mr. Galloway explained, given the open design of the plant, the odor of these chemicals was present throughout the facility. He also stated that the claimant was a "trouble shooter" which supports the

claimant's testimony that he would, from time to time, work in other areas of the plant, including product development.

Since the burden is on the respondent to establish that the claim for benefits was not filed within two years of the claimant's last injurious exposure, I believe that the respondent cannot assert the statute of limitations defense. At best, they have shown that the claimant was not exposed to the same level of chemical toxins between March and June 2001, as he had been for the previous 24 years. However, I believe that the testimony of the claimant and Mr. Galloway does establish that the claimant still, from time to time, would have been exposed to toluene and other solvents or adhesives, even after leaving the production department. Therefore, I find that the respondent failed to meet their burden of establishing that the statute of limitations is a bar to the claimant's claim for benefits.

The Majority did not discuss the compensability of the claim since finding that the statute of limitations was a bar to further proceedings. However, I believe that a review of the record establishes beyond question that the

claimant's fatal liver disease was the result of job-place exposures to a variety of chemicals.

All of the physicians who treated the claimant were of the opinion that his liver condition was caused by industrial chemical exposure. His hepatologist, Dr. Carolyn Riely of the University of Tennessee Medical Group in Memphis, Tennessee, stated her opinion in two letters. The first of those is dated January 7, 2002, in which she first outlined the claimant's various symptoms and physical problems. In that letter, Dr. Riely stated: "My impression is that Mr. Wheeler has liver disease, which I strongly suspect is due to chemical exposure at his work place." In a second letter, dated January 17, 2006, Dr. Riely acknowledges that it is difficult to prove that someone had liver disease as a result of industrial exposure. However, she had experience in this area and noted that there was no evidence of any other form of liver disease in the claimant. She concluded her letter with the following statements:

"The final thing that makes me quite certain that this is an industrial exposure is the fact that his daughter has very similar liver disease, and is

now awaiting liver transplantation in our program. I would be very interested to know if there are other factory workers in this particular factory who had similar liver disease. One of the things so distressing about Mr. Wheeler's case is that the disease in the liver has progressed even though he is no longer being exposed to putative toxins."

Dr. Riely's comments regarding the claimant's daughter was prompted because of her prior employment with the respondent employer, where she also had some exposure to the same chemicals the claimant was exposed to during his long working career with this employer.

Another of the claimant's physicians was a Dr. Greg Neaville, an internist with the White River Diagnostic Clinic in Batesville. In a letter dated May 5, 2003, he likewise stated his belief that the claimant's condition was the result of an industrial chemical exposure. His letter stated as follows:

"It is my strong opinion that chemical exposure in the workplace resulted in cryptogenic cirrhosis in Mr. Raymond Wheeler. He is presently suffering from the consequences of liver failure and there appears to be strong evidence that

the only cause could be chemical exposure. This is in congruence with the opinion of his hepatologist, Dr. Riely of the University of Tennessee in Memphis."

In addition to the opinions of Dr. Riely and Dr. Neaville, an evaluation of the toxicity of the chemicals the claimant was exposed to was carried out by Professor Carl Andrew Brodtkin, a researcher who had published studies on toxic chemicals in the workplace. In Mr. Brodtkin's letter of April 21, 2005, he stated as follows:

"I am writing in response to your correspondence of April 12, 2005. Please find enclosed an updated CV, detailing my experience and qualifications. Please note in the publications and research funding sections of my CV that solvent-induced liver injury has been an active area of my research since the early 1990s. In addition to peer-reviewed research articles on occupational liver disease, I have published a number of book chapters on this subject, including a chapter in our recently released Textbook of Clinical Occupational & Environmental Medicine, 2nd Edition (Saunders & Elsevier, 2005).

I have had an opportunity to review Material Safety Data Sheets (MSDS) for products used by Mr. Wheeler in his work at GDx, provided by Mr. Michael Prascik

(Hartley & O'Brien). Collectively, these products contain numerous chemical agents with intrinsic and dose-related hepatotoxicity, known to cause liver injury in occupational settings."

I believe that the opinions of Drs. Riely and Neaville, as well as the findings and conclusions of Professor Brodtkin, leave little doubt that the claimant's job-place chemical exposures were the cause of his chronic liver disease, and that this is more than sufficient evidence to meet the claimant's burden of proof. I make that statement even though I am aware that, under the statute in effect during the time the claimant was employed with the respondent employer, a claimant was required to establish a compensable occupational injury by clear and convincing evidence (See Ark. Code Ann. §11-9-601 (e), which was amended by Act 1281 of 2001 to provide that a claimant's burden of proof was by a preponderance of the evidence). Considering that Drs. Riely and Neaville believed that the claimant's liver condition was chemically induced, and the analysis of Dr. Brodtkin established that the chemicals in use at his place of employment were likely to cause the claimant's

liver disease, I do not see how the evidence can be any clearer or more convincing that the claimant's chronic liver condition was job related.

In contesting this case, the respondents rely almost entirely upon the opinions of Morris Cranmer, who identifies himself as a "medical researcher and educator." Mr. Cranmer's evaluation of the claimant's liver condition and his opinion as to its causation was based upon the depositions of the claimant and some of his coworkers, as well as a review of the claimant's medical records. Mr. Cranmer, who never examined or even saw the claimant, was of the opinion that the cause of the claimant's liver condition was either the claimant's fault, or was caused by some condition unrelated to his employment. However, after reviewing Mr. Cranmer's report, I note that it has numerous factual errors and misstatements which substantially undercut his conclusions' believability.

On the first page of his report, Mr. Cranmer states: "There are some statements that can be made with relative certainty." He then goes on to list five points.

The first two points are that exposure to toluene did not cause the claimant's liver disease and that the other chemicals being used at the respondent employer were "very likely not the cause" of the claimant's liver condition. His remaining three points are that the claimant's liver disease could have been diagnosed earlier and that, if so, it could have been treated sooner with a more effective therapy, and that the claimant's physical condition contributed to the severity of his liver problems. Most of Mr. Cranmer's report asserts that the claimant's "chronic obesity" and his use of alcohol were the primary cause of the claimant's liver condition. He also implies that the claimant was at fault, in that, he did not undergo a liver biopsy sooner. He also flatly states that the chemicals the claimant was using at work could not have caused his liver condition. In my opinion, almost all of Mr. Cranmer's conclusions are not only wrong, but preposterous.

In the first place, the Material Safety Data Sheets, which are compiled by the product manufacturers at the direction of the federal government, copies of which

were made part of the record, clearly state that the development of chronic liver conditions are associated with the use of the products. That was also the conclusion of Professor Brodkin in his analysis of the data sheets and the related material. In fact, Dr. Brodkin has previously published articles and books on the association of chronic liver failure with the use of the type of chemicals the claimant was in regular contact with for approximately 24 years. That Mr. Cranmer's report is in error on that basic fact is more than sufficient to call the entire report into question. However, Mr. Cranmer makes several other errors in regard to the claimant's condition.

Mr. Cranmer repeatedly emphasizes that the claimant's obesity and poor physical condition substantially contributed to the development of his ultimately fatal condition. However, the claimant's medical records, which indicate that he had been seeing a doctor for a number of years for various health problems, never described him as being obese. According to the testimony of the claimant's wife, Mr. Galloway, and statements from the claimant

himself, he was approximately 5'11" tall and weighed approximately 220 to 240 pounds. No one characterized him as being "chronically obese." While it is possible that the claimant was somewhat overweight, there is no indication from any of his doctors that this was a serious health condition.

Mr. Cranmer also substantially misstates the claimant's use of alcohol. The claimant's deposition, as well as the testimony of his wife and his coworker, Mr. Galloway, indicate that the claimant had stopped drinking in 1977. In fact, Mr. Galloway, who has been acquainted with the claimant since that year and had socialized with him frequently, stated that he had never seen the claimant take a drink of any alcohol during the time he knew him. The claimant, in his deposition, testified that before quitting, he drank occasionally on weekends, but had not been a heavy drinker since his teenage years. That statement was corroborated by his wife's testimony at the hearing.

In reviewing the body of Mr. Cranmer's report, I note that he provides considerable information on the connection between alcoholism and heavy drinking and the development of cirrhosis of the liver. However, there is no indication that the claimant was an alcoholic or was a particularly heavy drinker. All of the evidence in the record is to the contrary. The claimant did not drink any alcohol for approximately 29 years proceeding his death and, prior to that time, he had been, at most, a moderate drinker. There is simply no evidence that the claimant's consumption of alcohol in any way caused his liver affliction. In fact, in reviewing Mr. Cranmer's report, it states that liver problems associated with the use of alcohol will improve once drinking is stopped or reduced. Presumably, even if the claimant's drinking had caused him to begin to develop a liver condition, this problem should have improved in the decades following his cessation of alcohol use. However, Dr. Riely's report indicates that his condition had continued to deteriorate even after he stopped working. Clearly, that suggests that the deteriorating

process of the claimant's liver was not the result of alcohol, but was caused by a more powerful toxin.

The only portion of Mr. Cranmer's report that might have some basis in fact is his assertion that, had the claimant's liver condition been diagnosed earlier, a more effective treatment plan could have been developed. However, even if that is true, such would not have any bearing on the compensability of the claim. That is, merely because the claimant's job-related condition developed several years before it was diagnosed has no bearing on the fact that it is, nonetheless, caused by the claimant's employment. Accordingly, I find that Mr. Cranmer's report is of little probative value and should be ignored.

It is my opinion that the claimant has established, by clear and convincing evidence, that his fatal liver condition was the result of job-related exposure to a variety of toxic chemicals at his place of employment. Further, it is my belief that the respondent did not meet their burden of establishing that the claim was not filed in a timely manner. I believe that the claim was filed within

two years of the claimant's last injurious exposure. On that basis, I find that the evidence establishes a compensable occupational injury and that it resulted in the claimant's eventual death. The respondent should, therefore, be liable for all reasonable and necessary medical treatment the claimant underwent for this condition and his spouse should be awarded appropriate dependent and funeral expenses.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner