

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704533

KENNETH CARPENTER, EMPLOYEE	CLAIMANT
WESNER'S GRILL, EMPLOYER	RESPONDENT
COLUMBIA NATIONAL INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 9, 2009

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

Claimant represented by the HONORABLE EVELYN E. BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JERRY LOVELACE,
Attorney at Law, Springdale, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

The claimant appeals an Administrative Law
Judge's December 29, 2008 opinion that the claimant
failed to prove he suffered a compensable injury on
December 29, 2006, and on January 15, 2007. Based upon
our de novo review of the entire record, we find that
the claimant has proven that he suffered a compensable
injury on December 29, 2006 and on January 15, 2007, and
is entitled to medical benefits, and therefore, the
decision of the Administrative Law Judge is reversed.

I. HISTORY

The claimant was eighty years old at the time of the hearing. He had been working as a dishwasher on Saturdays for the respondent-employer restaurant. His previous occupation had been in a doctor's office. The claimant credibly testified that on December 29, 2006, he was working in the dishwashing area. Another employee was cleaning a 50-gallon plastic garbage tub in the sinks, using E-Z Kleen in a spray bottle, on the tub. E-Z Kleen was a grill cleaner. The claimant "was right at the end of that cleaning off the dishes to put in the rack to put them in the automatic dishwasher. So the spray was coming from my left, right into the - into the area that I was working." He was standing five feet from the man using the spray cleaner. Then the claimant moved to the exit side of the dishwasher to continue working. Above that area was a fan blowing hot air on the dishes to dry them. The E-Z Kleen vapor was blown onto the claimant. The claimant testified that "[a]t that time my eyes were burning and my skin was burning. And I used the rinse water faucet to wash off my - my arms. And then I took a damp towel and blotted it on my face." He was wearing short sleeves. When asked if he

reported it, he replied "maybe not immediately... But a day or so later I asked Kenny and his wife, particularly Kenny, if they had problems with this material burning their skin. And I think Ken told me that he had in the past a little burning sensation with using the spray material." Kenny was the owner-operator of the respondent-employer restaurant.

On January 15, 2007, he had the second exposure. The same person was cleaning the grills, using the E-Z Kleen spray to dissolve the grease and other material on the grills. The claimant was again working to the left of the automatic dishwashing machine rinsing the materials off the grills with the spray water. "Then the burning was even more persistent. About this time I started - or perhaps a little bit - coughing up blood. And I had t-shirts that had holes burned in them from the spray material." He reported this to Kenny, when Kenny, his wife and the claimant were sitting at a table in the restaurant. "And I reported this to them and I told them I was bleeding and I had before. And I also showed them a t-shirt with the holes that were eaten in the - in the t-shirt from this acid material." He told Kenny he was coughing up blood.

The claimant testified that he immediately felt burning of his skin and eyes upon exposure to the chemical. While he did not immediately seek medical attention, his symptoms developed over time, from the immediate burning to the cough and difficulty talking and swallowing. The exposures were on December 29, 2006 and January 15, 2007. The claimant testified that he went to Dr. Benson on January 23, 2007. The medical records show that Dr. Benson initially diagnosed the claimant with cough, congestion, dyspnea (difficulty breathing), fatigue, and laryngitis. He ordered a chest x-ray and lab work. At this visit, the claimant reported "mucus bloody, now throat yellow, laryngitis." He was positive for rash, positive for dermatitis lower lip. The doctor ordered a toxic panel from the lab, noting "E-Z Kleen," and that the claimant worked as a bus boy at Wesner's. He diagnosed a cough which could have been bronchitis versus exposure to E-Z Kleen, and congestion, secondary to the same. Dr. Benson also diagnosed fatigue, dermatitis ("mouth dry red"), and stomatitis - clinical. Stomatitis is inflammation of the oral mucosa, due to local or systemic factors, which may involve the buccal and labial mucosa, palate,

tongue, floor of the mouth, and the gingivae. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1585 (17th Ed. 1988).

On the following day, January 24, 2007, the claimant had chest x-rays, due to dyspnea and exposure to hazardous gases. The results were: "Follow up apical lordotic chest and PA chest would be helpful in excluding possible pulmonary nodule in right upper lobe. Minimal atelectasis or parenchymal scar in left lung base. Evidence of old granulomatous disease." The follow up x-ray was performed on January 29, 2007, due to the abnormal Chest X-ray: "nodule in the right upper lobe is not confirmed on repeat examination or lordotic views. Minimal scarring is suspected in this region."

The claimant returned to Dr. Benson on February 19, 2007 to follow up on "CXR - lab." CXR means chest x-ray, which the doctor ordered on January 23, 2007 along with lab work. The doctor's notes show the claimant reported no fever or hemoptysis, which is the expectoration of blood or of blood stained sputum according to DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 750 (17th Ed. 1988), and that the cough got better with time. The doctor observed that the claimant's throat, posterior pharynx was red and irritated. He reviewed the x-rays

and lab results. Dr. Benson assessed acute bronchitis and stomatitis.

On February 26, 2007, the claimant had a regularly scheduled dental appointment at Adair Dental Arts Clinic. A report from Dr. Adair's office states:

At his appointment he exhibited severe tissue irritation of his lips, cheek, tongue and throat areas. It appears that he has had these tissues severely chemically burned and tissue sloughing is present. Mr. Carpenter is quite uncomfortable from this tissue damage. Fortunately, at that point in time, no infection appeared in the sloughed area.

The office notes from that visit reflects that the claimant's tongue and throat tissue, along with his soft palate, was irritated from a chemical. The patient was "having problems from exposure." The tissue around his teeth was healthy. The notes reflected that the claimant was "having testing done on his throat. He has burned his throat from oven cleaner." The claimant testified that the blistering in his mouth occurred after he saw Dr. Benson and before this dental visit. The first visit to Dr. Benson was January 23, 2007.

The claimant received treatment up until three weeks prior to the hearing, all of which he has financed himself. The claimant saw Dr. Benson on August 20, 2007, to follow up on laryngitis. The doctor noted that

the claimant could not talk, that he had been away from the workplace chemical since February 2007. The claimant was positive for dysphagia and odynophagia. The claimant reported that his tongue felt scalded, thick and enlarged. He was "breathy - with exertion little more difficult than in past." Dr. Benson assessed laryngitis due to chemical exposure, dysphagia and dysphonia that have increased over last three to six months, and dyspnea on exertion, secondary to chemical exposure. Odynophagia is pain on deglutition. Deglutition is swallowing. Dysphagia is difficulty swallowing. Dysphonia is any impairment of voice or difficulty in speaking. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 440, 519, 1168 (17th Ed. 1988).

The claimant saw Dr. Black, an ear-nose-and-throat specialist, on August 22, 2007, for a consultation regarding chronic laryngitis and dysphagia.

This gentleman had a history of some sort of chemical exposure several months ago. I did review some records from his dentist. He apparently had a mouth burn. He has had difficulty talking or even swallowing since then. He can talk, but he has a lot of cracks and breaks in his voice, like dysphonia rather than hoarseness. He says when he swallows anything he has to chew a great deal, but he has a hard time swallowing.

On examination, the doctor observed "some

characteristics of dysphonia," but no other findings. His impression was dysphonia, possible muscle tension dysphonia or even spastic dysphonia, and dysphagia. He planned a barium swallow and a speech therapy consultation.

On August 31, 2007, the claimant underwent a barium swallow which showed:

Small sliding-type hiatal hernia. Mild gastric reflux demonstrated into the distal esophagus. Abnormal esophageal motility with incomplete stripping of esophagus by the primary peristaltic wave with large amounts of residual barium identified throughout the esophagus in which very little barium is cleared with additional swallows.

On September 17, 2007, the claimant gave the following information on a new patient form. He explained that his illness was caused by "exposure to corrosive chemical E-Z Kleen," a spray used for cleaning grills, and that his main problems were "burning skin, eyes, throat, loss of speech, tired occasionally disoriented. Nose bleeds, cough up blood, throat is painful, hard to swallow." The exposures were December 29, 2006 and January 15, 2007. He would lose his voice while talking, for two to five minutes. In a review of his current health, he checked these problems: weight loss, eye pain, blurred vision not corrected by glasses,

ringing of ears, frequent nose bleeds, difficulty swallowing, hoarseness, cough, coughing up phlegm, coughing up blood, hemorrhoids, decreased sex drive, neck pain, loss of coordination, memory loss, joint stiffness and pain, hay fever.

On September 19, 2007, the claimant saw Dr. Morse for a neurological evaluation, for the claimant's dysphagia, dysphonia, abnormal barium swallow, and old workers' compensation exposure to EZ Kleen grill cleaner on December 29, 2007 and January 15, 2007 while employed at Wesner's Restaurant. Dr. Morse noted that the claimant used the cleaner in a spray bottle, that the liquid got on his face, arms and shirt and that it burned holes in his shirt. The claimant developed some lesions on his arms and face and, a day or so later, developed coughing, nosebleed, shortness of breath, and difficulty speaking. He had no prior exposure. The claimant reported that he would lose his voice and also had a productive cough. He also reported difficulty swallowing, especially with solids, causing him to choke and have to spit up. Dr. Morse reviewed the claimant's studies and reports, including the barium swallow and the dentist's notes, and examined him. He reported:

He does have dysphonia and dysphagia. His voice is soft. He will be able to talk for 10-15 seconds and then it is as if he chokes up and cannot speak. He will cough and cough up phlegm. His voice will be soft for a short period of time and then return to baseline of being very soft.

Impression: This case is very difficult to put together. The patient was in his usual state of health until he had two chemical exposures. This was documented by his dentist who noted chemical burns in his mouth, throat and tongue. Subsequent evaluation by an ENT physician showed the lesions had resolved.

Dr. Morse did not find any primarily neurologic disorder present. There was no evidence of a disease that typically caused difficulty speaking and swallowing such as myasthenia gravis, motor neuron disease (ALS) or Parkinson's disease. Dr. Morse wanted to review the reports of the speech pathologist and gastroenterologist before making any further evaluation.

On October 1, 2007, the claimant saw Dr. Raza. He reported dysphonia, hoarseness of voice and dysphagia. He related the chemical exposure, resulting in burning of the mouth and that, after this exposure, he had been having a difficult time talking and swallowing. He reported that the pitch of his sound varies greatly during conversation. He noted some difficulty swallowing food. He described coughing and choking during the initial act of swallowing. He denied

any odynophagia or weight loss. Dr. Raza assessed:

Dysphonia, Dysphagia - his dysphagia appears to be most likely oropharyngeal in characteristics, especially with choking and coughing during the initial stages of swallowing. I remain concerned about neuromuscular causes of his dysphagia. His barium swallow has not shown any obstructive lesion of his esophagus.

Dr. Raza recommended a speech therapy consultation as has been initiated by Dr. Black, a neurological and rheumatological evaluation for possible neuromuscular diseases contributing to his dysphagia and dysphonia, and a modified barium swallow to assess for oropharyngeal dysphagia (which the claimant chose not to pursue, instead seeking a consultation with the gastroenterology clinic at University of Arkansas for Medical Sciences). Dr. Raza's progress notes reflect that the claimant experienced a burning sensation in tongue, choking with food, spasms on left side of body, some rectal bleeding, and changes in gait as well.

The claimant underwent the speech therapy evaluation on October 2, 2007. He again explained that he had a workplace exposure to a corrosive chemical. His goal was that he hoped to retain his speech. The diagnoses were dysphagia and dysphonia, based upon the following findings:

Patient is exhibiting possible pharyngeal

dysphagia characterized by coughing after oral intake and multiple swallows even for small bolus. Patient reports the following symptoms: food stuck in throat and gagging after solids. He is also exhibiting dysphonia characterized by breathy, hoarse vocal quality, voice fatigue, and lowered inflection control, and poor breath support.

A recommendation of further evaluation of the claimant's swallow function with MBS study was made to rule out risk of aspiration.

Dr. Benson's notes of October 22, 2007, show that the claimant was positive for dysphagia, his tongue felt hard, and he was positive for odynophagia.

On October 29, 2007, the claimant was seen at the Adair Dental Arts Clinic. All tissue, for color and consistency, was within normal limits. The following was observed:

Dry lips, tongue coated, small red spot lateral border tongue left; slight ridge in gum tissue, bilateral; tongue burns, mouth burns (gumline), feels like tissue peeling off, decreased feeling anteriorly.

The claimant returned to Dr. Benson on November 28, 2007 for a follow-up for a long-standing complaint of laryngitis, hoarseness, decrease in ability to swallow, as well as altered taste sensation felt to be chronologically associated with a corrosive chemical exposure that occurred at a previous restaurant where he had worked approximately one year prior. Dr. Benson

encouraged the claimant to pursue the workers' compensation claim, because "based upon chronologic factors, it would certainly appear that he chemical exposure is related to a lot of his current symptomatology." The claimant, on November 28, 2007, presented as a fairly healthy appearing elderly gentleman who appeared younger than his stated age, with the exception of the fact that he had a very difficult time talking and had to clear his throat frequently. During the appointment, the claimant had a cough and congestion at times, with "some difficulty handling routine oral secretions." Dr. Benson noted that the claimant had lost four pounds in one month. His impression was

1. Persistent cough, laryngitis, dysphagia, and stomatitis with abnormal sensations of the tongue as well as decreased taste secondary to previous corrosive chemical exposure at his last place of employment.
...
2. History of esophageal dysmotility, questionably and potentially related to recent chemical and corrosive exposure found on recent evaluation of upper GI.
3. Gastroesophageal reflux disease.

Dr. Benson repeated that "it certainly appears as though, on a chronological basis, that this gentleman has some significant problems since he was exposed to chemicals while on the job working in a restaurant

approximately one year ago."

The claimant saw Dr. Morse on November 29, 2007, who planned to check him for myasthenia gravis, as well as to put him on a prescription for Mestinon. He found no evidence of motor neuron disease. His examination was unchanged, and his impression remained dysarthria and dysphagia.

On December 21, 2007, Dr. Benson wrote that he was not certain whether the claimant's chronic and persistent cough, laryngitis, dysphagia, stomatitis and difficulty with speech will improve over time and resolve after his chemical exposure. "Often times with chemical exposures, given time, things will improve. However, this has now been going on close to a year post exposure and he continues to have persistent problems." Dr. Benson noted that the claimant "was really doing fairly well prior to this exposure and certainly by time line I feel all of his problems are most likely associated with this chemical exposure." Dr. Benson concluded by acknowledging that, because he was not an expert in this field, he could not comment on whether or not it might resolve in six months or even longer.

On January 21, 2008, Dr. Morse wrote that after reviewing the claimant's records, he recommended

that a neuromuscular expert evaluate him. Dr. Morse, as a general clinical neurologist, felt that it was very unlikely that the claimant had a neuromuscular disorder such as myasthenia gravis or motor neuron disease, as there are no real physical findings with regard to that. "I believe his symptoms are directly related to the chemical exposure he had at work." The doctor also commented that he did not believe the symptoms were "treatable in any way and further evaluation or testing would be unlikely to result in meaningful diagnostic or treatment options."

Dr. Black was deposed on August 26, 2008, and his deposition was made part of the record. Dr. Black is an otolaryngologist, which concentrates on the ears, nose and throat. He examined the claimant and reviewed diagnostic testing. He could not identify a cause of the claimant's problems. He observed dysphonia, which could have been a muscle tension type or a spastic type caused by nerve irritation. Diagnostic testing revealed gastric reflux, but the doctor's physical examination did not reveal visual evidence of it. The degree of dysphagia problems the claimant suffered could not be explained by reflux. The examination and barium swallow did not reveal a cause of the claimant's voice problems.

A Material Safety Data Sheet for E-Z Kleen oven and grill cleaner had a variety of warnings and cautions. Firefighters were warned to "wear protective clothing and self contained breathing apparatus." The cleaner is corrosive on inhalation, to skin and eyes and on ingestion. The cleaner presents an "acute health hazard" of corrosiveness to skin, eyes, and mucous membranes. The signs and symptoms of exposure are "immediate irritation and burning sensation followed by destruction of skin or eye tissue." Medical conditions generally aggravated by exposure are breathing disorders and dermatitis. The recommended emergency and first aid procedures are to remove the victim to fresh air and if needed immediately begin artificial respiration, to give oxygen if breathing is labored, to get emergency medical help, and to contact a physician immediately. These procedures also include flushing the eyes and skin with water and getting medical attention if symptoms develop and persist.

The Material Date Sheet also outlines Control Measures. For respiratory protection, NIOSH-approved masks suitable for acids should be worn. The type of protective gloves recommended are chemical resistant gauntlet-type gloves. The type of eye protection

recommended is chemical goggles or a full face shield. Other recommended protective equipment includes boots, aprons, drench showers, and eye wash as needed for protection against spills and/or splashes. The necessary work hygienic practices are to avoid contact with skin, eyes, and clothing; to, after handling this product, wash hands before eating, drinking or smoking, and if contact occurs, to remove contaminated clothing. Lastly, if needed, take first aid action.

Prior to the hearing, the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, and that on December 29, 2006, the relationship of employee-employer-carrier existed among the parties. The issues to be litigated at the hearing were limited to compensability and the claimant's entitlement to related medical. The claimant contended that he was injured on December 29, 2006, and January 24, 2007. The respondents contended that the claimant claimed was not injured while working as an employee of the respondent.

The Administrative Law Judge dismissed the claim after making the following findings:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted

on July 10, 2008, and contained in a pre-hearing order filed July 11, 2008, are hereby accepted as fact.

2. The claimant failed to prove by a preponderance of the evidence a causal or temporal relationship between the objective medical findings and his alleged work related chemical exposures.
3. The claimant failed to prove he suffered a compensable injury on December 26, 2006, and on January 15, 2007. [sic: December 29, 2006]

II. ADJUDICATION

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), 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 (4) (D), 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. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant's testimony as to the circumstances surrounding both exposures is consistent with his work duties and with the descriptions found in the histories in the medical reports. The claimant made a credible witness. Certainly, for an employee whose job was to wash dishes, the claimant's exposure to E-Z Kleen while washing dishes on both occasions arose out of and in the course of his employment. Similarly, the claimant's testimony is sufficient proof by a preponderance of the evidence that the injury was caused by a specific incident, identifiable by time and place of occurrence, one on December 29, 2006 and one on January 15, 2007, at the respondent-employer restaurant.

The claimant proved by a preponderance of the evidence that the chemical exposures in December and January caused internal or external physical harm to the body which required medical services or resulted in disability, and that medical evidence supported by objective findings established the injuries. The medical records show that the claimant saw Dr. Benson for the express purpose of treating symptoms related to the exposure on January 23, 2007, eight days after the second exposure. Eight days is not an unreasonable length of time between an incident and medical

treatment. The initial diagnoses were cough, congestion, dyspnea (difficulty breathing), fatigue, and laryngitis. He was positive for rash, positive for dermatitis lower lip. Dr. Benson diagnosed a cough which could have been bronchitis versus exposure to E-Z Kleen, and congestion, secondary to the same, as well as fatigue, dermatitis ("mouth dry red"), and stomatitis - clinical. The rash, dermatitis, and stomatitis are all objective findings, outside the control of the claimant. The claimant related his symptoms to his workplace exposure to E-Z Kleen. On July 19, 2007, Dr. Benson clearly stated his opinion that "in review of records I do believe the time course and symptoms may represent a chemical induced presentation or reaction which I treated in February January 2007!!" The claimant proved that the exposures of December 29, 2006 and January 15, 2007 were compensable injuries for which he is entitled to medical benefits.

The Commission does note that there is a suggestion in the testimony that the claimant sought treatment from Dr. Benson for hypertension on February 9, 2007, but the Commission specifically finds that the evidence does not support such a suggestion. The medical records from the February 9, 2007 visit do not

reflect in any way that the claimant was seen for hypertension. None of the medical records reflect any diagnosis of hypertension. While under examination by the respondents' attorney, the claimant was asked if he was seen on February 19, 2007 on a follow-up for his hypertension, and his response was "un-huh." Then he was asked if he saw Dr. Benson on February 9, 2007 for his high blood pressure, to which the claimant stated, "No, I don't think so. I think that was just part of the work before. But I was originally seen, and that's why he ordered the chest x-ray to be done. This was just a previous..." On review of the medical records, it is clear that what the claimant was trying to explain was that he was seen on January 23, 2007 by Dr. Benson for bloody mucus, laryngitis and stomatitis. There is no notation on that record of hypertension whatsoever. The claimant underwent blood work and chest x-rays, and was seen by Dr. Benson for a follow up of that diagnostic work on February 19, 2007. Again, there is no notation of hypertension anywhere in the February 19, 2007 record. The Commission specifically finds that the claimant was not seen for hypertension on January 23 or February 19, 2007.

The Commission also notes that the material

handling sheet detailing precautions and warnings for the use of E-Z Kleen does not list known chronic consequences. The fact that the sheet identifies no chronic consequences does not defeat the claimant's claim, especially where the claimant did not have prior problems, where his problems developed closely in time to the exposures and were observed closely in time to the exposures, and where there is no other explanation for the problems he continues to experience.

The Full Commission finds that the medical care that the claimant received from January 23, 2007, through the date of the hearing was reasonable and necessary treatment of the injuries he suffered as a result of the exposure to E-Z Kleen on December 29, 2006 and January 15, 2007. There is a continuous thread of causation from the initial exposures to the problems the claimant currently has. The claimant is entitled to continued reasonable and necessary medical treatment, as his dysphagia and dysphonia, cough, stomatitis and esophageal dysmotility have not resolved.

In conclusion, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he suffered a compensable injury on December 29, 2006 and January 15, 2007 when he was

exposed on those dates to E-Z Kleen, a corrosive cleaner which caused immediate and long-lasting symptoms. The medical care he received was reasonable and necessary. The claimant is entitled to continuing reasonable and necessary medical care of his compensable injuries.

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. Sec. 11-9-715 as amended by Act 1281 of 2001. For prevailing on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. Sec. 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.