BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G503367

KATHERINE CHILCUTT, EMPLOYEE **CLAIMANT**

SUMMIT HOUSE APARTMENTS, EMPLOYER **RESPONDENT**

TRAVELERS CASUALTY & SURETY COMPANY, CARRIER **RESPONDENT**

OPINION FILED MARCH 18, 2021

Hearing before Administrative Law Judge O. Milton Fine II on February 4, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

Respondents represented by Mr. Tod C. Bassett, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On February 4, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on November 30, 2020. A prehearing order entered on December 1, 2020, pursuant to the conference was admitted without objection as "Commission Exhibit 1." At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in "Commission Exhibit 1." They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer relationship existed on or about January 1, 2015, and at all relevant times.

3. Respondents have controverted this claim in its entirety.

4. Claimant's average weekly wage of $440.00 entitles her to compensation rates of $293.00/$220.00.

Issues

At the hearing, the parties discussed the issues set forth in "Commission Exhibit 1." The following were litigated:

1. Whether Claimant sustained a compensable injury.

2. Whether Claimant is entitled to reasonable and necessary medical treatment.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that she started work for respondent employer in October 2014. A two-filtered mask was to have been provided to her; but this was not done. As a result, she suffered headaches and sinus infections from cleaning dumpsters at work.

Respondents:

1. Respondents contend that Claimant has been approved for Social Security disability benefits for a number of years. She has also been a

Medicare beneficiary for a number of years. In her telephonic deposition that was taken in connection with her other claim against Respondents (G503368), she testified that she tries to work every year to supplement her income to the extent that the law allows. Claimant was hired by Respondent employer on November 26, 2014. Her alleged injury date for this particular respiratory claim is January 1, 2015. She reported a second claim against the same respondents on January 22, 2015 regarding an incident that allegedly caused injury to her fingers and wrists when she was cleaning the inside of an elevator and its doors closed. Claimant quit her job on January 29, 2015. Then, on March 9, 2016, she filed a Form AR-C concerning the alleged elevator incident through her counsel on that claim, Andy Caldwell. She has never been represented by counsel on the instant claim. Claim No. G503368 was in litigation for three (3) years before settling on January 19, 2020. One month later, on February 19, 2020, Claimant wrote the Commission, asking that the closed file on the instant claim be reopened.

2. The medical records show that Claimant has been a pack-a-day smoker for almost forty (40) years. She has a medical history that involves chronic respiratory illnesses such as shortness of breath, sinus infections, and symptoms associated with seasonal allergies. The Form AR-4 reflects a single $25.00 charge that was for the payment for medical records to discover the history of her respiratory problems from her

personal general practitioner physician and allergist. These records revealed that she was actively treating for the same or similar symptoms throughout 2014 and leading up close in time to her employment with respondent employer. Medicare paid for the 2014 medical charges associated with the treatment of her personal medical condition; and it also paid for the disputed charges that were incurred subsequent to January 2015. In fact, CMS has advised Respondent carrier in writing that it agrees with its disputed charges, is not claiming any of its payments made as conditional payments, and is seeking no reimbursement from the carrier.

3. Claimant is not entitled to receive a hearing to seek the type of benefits that she is claiming in her prehearing questionnaire response. She has previously negotiated a number of settlements of claims from automobile accidents; and she is mistaken that there is a right to a jury trial in workers' compensation cases. Even if the compensability of the claim could be proven by a preponderance of the evidence, it would be a medical-only claim with no other benefits that Claimant would be personally entitled to receive. There has never been an indemnity issue to consider. The disputed medical bills have been paid by Medicare; and CMS has waived any lien to Travelers for the reimbursement of them.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury.
4. Claimant has not proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of her alleged injuries.

PRELIMINARY RULINGS

Admission of Claimant's Proffered Exhibit 1

At the hearing, Claimant moved for the admission of this proffered exhibit, which consists of copies of her medical records. The prehearing order in this matter reads in pertinent part:

> Medical records must be arranged in chronological order (not grouped by provider) and be paginated. A comprehensive index must be included with each set of medical records submitted, and must contain separate entries for each provider and visit**.** Non-medical exhibits must also have an index. Only medical records which are relevant to the issues being

> litigated should be submitted. Further, the parties are advised that exhibits should not be highlighted, underlined, or contain any marginal notations. If exhibits are altered in any fashion, it will be necessary to substitute those pages before the transcript is prepared. **Failure to comply with the above directives may result in sanctions, including the exclusion of the medical records from evidence.**

(Emphasis added)

This proffered exhibit is grossly in violation of the above provisions. It is not in chronological order; in fact, it is not in any discernible order (chronological, reverse chronological, by provider, etc.) whatsoever. Also, the proffered exhibit is not paginated. Finally, as Claimant admitted at the hearing, she physically altered numerous pages of the proffered exhibit by adding numerous marginal notations and stars/asterisks. When asked why she violated the dictates of the prehearing order, Claimant responded that she did not read the order. But she was instructed at the prehearing telephone conference to review it carefully.

Pro se litigants are held to the same standards as licensed attorneys. *E.g.*, *Arnold v. Pitts*, 2020 Ark. App. 549, 2020 Ark. App. LEXIS 615; *Meachum v. Cross County Sch. Dist.*, 2006 AR Wrk. Comp. LEXIS 140, Claim Nos. F501662, F501663 & F501072 (Full Commission Opinion filed April 12, 2006). *Meachum*, *supra*, dealt with a *pro se* claimant's exhibits being admitted over the objections of the respondents, despite the fact that they were not furnished to the respondents at least seven (7) days prior to the hearing, in violation of Ark. Code Ann. § 11-9-705(b)(2)(A) (Repl. 2002). Even though an administrative law judge has the discretion under § 11-9-705(b)(3) to

nonetheless admit the evidence, the Full Commission found that it was improper for the judge to have done so in this case. The Commission wrote:

> We find that the respondents were clearly prejudiced by the Administrative Law Judge allowing these medical records into the record. The Commission's rules of procedures in claims must be applied equally to each and every party. ***Pro se*** **claimants should be held to the same standard and must adhere to the same rules as the respondents.** The Administrative Law Judge had made it clear to the claimant that the Legal Advisor Division could help her. It is also clear that the claimant was warned by the Administrative Law Judge that she would have to comply with the prehearing order.

(Emphasis added)

Claimant was advised during the prehearing telephone conference that she should contact the Legal Advisor Division with any questions. In addition, she was apprised that she should read the prehearing order because it would govern how the hearing was conducted. But she elected not to do so, and proffered an exhibit that is substantially out of compliance with said order. I have the discretion to admit or exclude the evidence in question. *See Coleman v. Pro Transportation, Inc*., 97 Ark. App. 338, 249 S.W.3d 149 (2007). But after due consideration, despite the fact that Respondents did not object to the admission of Claimant's Proffered Exhibit 1, I am hereby excluding it from evidence per the terms of the prehearing order because of the extensive violations detailed above.

ADJUDICATION

Summary of Evidence

Claimant was the sole hearing witness.

Along with the prehearing order discussed above, the other exhibit admitted into evidence in this case was Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and seventeen (17) numbered pages thereafter.

A. Compensability

Introduction. Claimant has argued that she suffered compensable injuries as a result of cleaning trash chutes at work without aid of a breathing mask. Respondents dispute that she suffered a compensable injury of any type.

Standards. Claimant has not specified the legal theory under which her purported injuries fall. In order to prove the occurrence of an injury caused by a specific incident or incidents identifiable by time and place of occurrence, a claimant must show that: (1) an injury occurred that arose out of and in the course of her employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings that cannot come under the voluntary control of the patient; and (4) 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). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Id*. The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415 (citing *Smith v. Magnet Cove Barium Corp*., 212 Ark. 491, 206 S.W.2d 442 (1947)).

With regard to regular injuries sustained by gradual onset, Ark. Code Ann. § 11-9-102(4)(A)(ii) & (*a*) (Repl. 2012) reads:

> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident and is identifiable by time and place of occurrence, if the injury is:
>
> (*a*) Caused by rapid repetitive motion.

In addition to rapid repetitive motion, a claimant seeking workers' compensation benefits for a gradual-onset injury must prove that: (1) the injury arose out of and in the course of her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(A)(ii) & (E)(ii) (Repl. 2012). In *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), the Arkansas Supreme Court held that there is a two-part test for determining whether an injury is caused by rapid repetitive motion: (1) the tasks must be repetitive; and (2) the repetitive motion must be rapid. If the first element is not met, the second is not reached. *Id.*; *Westside High School v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Moreover, "even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." *Malone*, *supra*.

With respect to pulmonary injuries sustained by specific incident, the applicable statute is Ark. Code Ann. § 11-9-114 (Repl. 2012). This reads:

> (a) A cardiovascular, coronary, <u>pulmonary</u>, <u>respiratory</u>, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a

> compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.
>
> (b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternatively, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.
>
> (2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof. (Emphasis added) *See Mountain Home Mfg. v. Hafer*, 66 Ark. App. 127, 991 S.W.2d 127 (1999).

(Emphasis added)

Alleged gradual-onset lung injuries are analyzed under the test for an occupational disease. *See, e.g., Ring v. Stone & Sons Monument*, 2005 AR Wrk. Comp. LEXIS 188, Claim No. F305003 (Full Commission Opinion filed May 10, 2005). In defining this cause of action, Ark. Code Ann. § 11-9-601(e)(1)(A) (Repl. 2012) provides:

> (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.

A causal connection between claimant's job and the disease must be established, by a preponderance of the evidence. *Id*. § 11-9-601(e)(1)(B). In setting parameters concerning such a claim, the statute further reads:

> An employer shall not be liable for any compensation for an occupational disease unless . . . [t]he 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. This includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his or her employment[.]

Id. §11-9-601(g)(1)(A). 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). Such diseases are generally gradual rather than sudden in onset. *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994).

If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000); *Hubley v. Best West. Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The test is whether a causal connection between the two (2) episodes exists. *Sword*, *supra*; *Jeter v. McGinty Mech*., 62 Ark. App. 53, 968 S.W.2d 645 (1998). The existence of a causal connection is a question of fact for the Commission. *Koster v. Custom Pak & Trissel*, 2009 Ark. App. 780, 2009 Ark. App. LEXIS 947. It is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). A finding of causation need not be expressed in terms of a reasonable medical certainty where supplemental evidence supports the causal connection. *Koster, supra*; *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

The determination of a witness's credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Discussion. Claimant's hearing testimony was that she began working at Respondent Summit House, an apartment building, in October of 2014. In December of that year, she was told that she had to clean the trash chutes on the floors to which she was assigned. She stated that she began having symptoms in January 2015 that she attributed to the "bacterial pathogens" (her phrasing) that were in the chutes. Asked to describe her symptoms, she responded: "My sinuses hurt, my head hurt, my ear hurt, my chest was hurting, but I kept working and kept working and kept working until I—I turned green." Later, she specified that it was her face, neck, and upper chest that turned green; and she added that her exposure to the chutes caused her to develop dysentery as well. The sinus infections she allegedly developed affected her eyes.

Whatever theory or theories are applicable to Claimant's alleged compensable injuries, the existence of such injuries has to be established by objective, measurable findings. But none of her medical records in evidence are contemporaneous with the alleged onset and progression of her symptoms on and after January 2015. The records end in September 2014, which was before—per Claimant's testimony—she

began working at Summit House. Per the index in Respondents' Exhibit 1, pages 16-17 of that exhibit pertain to a visit that Claimant had with Dr. Anil Badhwar in "10-2014." This is the same month that Claimant, by her hearing testimony, began her tenure with Summit House—but prior to the onset of her alleged symptoms. But a closer examination of this report shows that the date thereon is actually "1-8-14," and that the top quarter of the date has been cut off. This means that this report, like the other records in evidence, relates to Claimant's condition before she started her Summit House job. Thus, there are no objective findings of Claimant's alleged injuries in the evidentiary record.

Regardless, this particular report reflects that Claimant presented to Dr. Badhwar with allergy symptoms that she represented began six (6) years before; her job was not even mentioned. To the extent there are objective findings of any sort in this report, only through speculation and conjecture could I tie them to her cleaning trash chutes at Summit House. But this I cannot do. *See Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). Consequently, Claimant has not proven that she sustained a compensable injury. Her claim must fail at the outset.

B. Reasonable and Necessary Medical Treatment

Introduction. As part of her claim for initial benefits, Claimant has alleged that she is entitled to treatment of her alleged injuries. Respondents, in turn, have denied responsibility for said treatment.

Standards. Under Ark. Code Ann. § 11-9-508(a) (Repl. 2012), an employer shall provide for an injured employee such medical treatment as may be necessary in

connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove, by a preponderance of the evidence, that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, *supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Discussion. Because Claimant has not proven that she suffered any compensable injuries, she cannot, and has not, proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of any of them.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim for initial benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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Honorable O. Milton Fine II
Chief Administrative Law Judge