BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H201820

THERESA J. JONES, EMPLOYEE **CLAIMANT**

CITY OF LITTLE ROCK,
SELF-INSURED EMPLOYER **RESPONDENT**

RISK MGMT. RESOURCES,
THIRD-PARTY ADMINISTRATOR **RESPONDENT**

OPINION FILED NOVEMBER 30, 2022

Hearing before Administrative Law Judge O. Milton Fine II on September 15, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 15, 2022, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on July 25, 2022. A prehearing order entered on July 26, 2022, 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, as amended, were properly set forth in the order.

Stipulations

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/self-insured employer/third-party administrator relationship existed at all relevant times.
3. Claimant's average weekly wage entitles her to compensation rates of $482.00/$362.00.

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 pulmonary injury under Ark. Code Ann. § 11-9-114 (Repl. 2012).
2. Whether Claimant sustained a compensable occupational disease under Ark. Code Ann. § 11-9-601 (Repl. 2012).
3. Whether Claimant is entitled to reasonable and necessary medical treatment.
4. Whether Claimant is entitled to temporary total disability benefits.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following an amendment at the hearing, read:

Claimant:

1. Claimant contends that she sustained a compensable injury to her lungs as a result of breathing exhaust that backed up into the cab of the truck she was driving at work.

2. Claimant further contends that she is entitled to reasonable and necessary medical treatment, and to temporary total disability benefits from December 2, 2021, to January 24, 2022.

Respondents:

1. Respondents contend that Claimant did not sustain a compensable injury on December 1, 2021, or at any other time while working for the respondent employer. There are no objective findings of an injury, nor is there evidence of an injury sustained in the coarse and scope of employment. Additionally, Claimant's need for treatment, if any, is due to chronic and preexisting conditions.

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 witnesses and to observe their 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's Proffered Exhibit 3 is admitted into evidence and will be given due weight.

4. Claimant has not proven by a preponderance of the evidence that she sustained compensable pulmonary injury by specific incident under Ark. Code Ann. § 11-9-114 (Repl. 2012).

5. Claimant has not proven by a preponderance of the evidence that she sustained a compensable aggravation of her pre-existing asthmatic condition.

6. Claimant has not proven by a preponderance of the evidence that she sustained a compensable occupational disease under Ark. Code Ann. § 11-9-601 (Repl. 2012).

7. Because of Findings/Conclusions Nos. 4-6, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment and temporary total disability benefits—are moot and will not be addressed.

PRELIMINARY RULINGS

Admission of Claimant's Proffered Exhibit 3

Respondents objected to the admission of this proffered exhibit, which purports to be a Certificate to Return to Work from Jacksonville Medical Care regarding Claimant, on the basis that it was not furnished to them at least seven days before the hearing.

The Prehearing Order reads in pertinent part:

> Exhibits and the identity of witnesses must be exchanged at least seven (7) days prior to the hearing. All depositions must be completed prior to the hearing. Medical reports must be exchanged at least seven (7) days prior to the hearing pursuant to Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl. 2012). Evidence not disclosed in compliance with this Order shall not be considered as evidence unless prior permission of the Commission is obtained and for good cause shown.

In turn, Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl. 2012) provides:

> Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing.

During the hearing, the following colloquy took place:

> JUDGE FINE: Well, and let me ask you, Ms. Jones, do you recall me discussing with you in our prehearing telephone conference that any medical records you wanted me to consider, you had to get a copy of them to Ms. Wood at least—or her office at least seven days before the hearing. Do you remember that?
>
> THE WITNESS: Yes, sir.
>
> JUDGE FINE: Did you do that?
>
> THE WITNESS: Ms. Woods [sic] should have had a copy because it was directly sent—taken to the City of Little Rock for my release to come to work. So Ms. Woods [sic] should have already had a copy of that, because that's my copy and **I gave the original to the City of Little Rock to Waste Management.**
>
> . . .
>
> JUDGE FINE: Are you saying the reason why you didn't [furnish a copy of the proffered exhibit to Respondents' counsel]

> is you understood the City of Little Rock already had a copy of this?
>
> THE WITNESS: Yes.
>
> JUDGE FINE: Ms. Wood, is it your representation as an officer of the court that you've not seen this?
>
> MS. WOOD: I have not, Your Honor, and the City certainly could have a copy of it, but there's been no formal discovery. I don't always get a copy of the personnel or medical file on every case, and I don't recall getting it from her family doctor's office, either.

(Emphasis added)

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' 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*.

I credit Claimant's testimony that she furnished the proffered exhibit to Respondent City of Little Rock at least seven days prior to the hearing, as the Prehearing Order and § 11-9-705(c)(2)(A) require. Thus, Respondents' objection is respectfully overruled. Claimant's Proffered Exhibit 3 is hereby admitted into evidence and will be given due weight. *See Coleman v. Pro Transportation, Inc.*, 97 Ark. App.

338, 249 S.W.3d 149 (2007)(pursuant to Ark. Code Ann. § 11-9-705(c)(3) (Repl. 2012)(administrative law judge has discretion to admit or exclude evidence).

CASE IN CHIEF

Summary of Evidence

The witnesses at the hearing were Claimant and Patricia Caldwell.

In addition to the Prehearing Order discussed above, the exhibits admitted into evidence in this case are Claimant's Exhibit 1, Driver's Vehicle Condition Reports, consisting of five pages; Claimant's Exhibit 2, nine photographs depicting the interior of the trash truck at issue; Claimant's Exhibit 3, a Certificate to Return to Work dated December 15, 2021, consisting of one page; Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of two index pages and 81 numbered pages thereafter; and Respondents' Exhibit 2, the written statements of Claude Pilgram and Landis Williams, Jr., consisting of one index page and two numbered pages thereafter.

Adjudication

A. Compensability

Introduction. Claimant has alleged that she sustained a compensable injury to her lungs as a result of her inhalation of exhaust that backed up into the cab of the trash truck that she drove as part of her job for Respondent City of Little Rock. Respondents dispute this.

Evidence. Claimant has a bachelor's degree in sociology and associate's degrees in business administration, hospitality and culinary arts. She was employed during the period at issue for Respondent City of Little Rock as an equipment operation

for its Solid Waste Division. Claimant began driving a trash truck there in October 2020. The trucks are diesel. Claimant related that beginning on November 28, 2021, she was having a problem with a particular truck. Because the "doghouse"—the console in the cab of the vehicle that separates it from the engine compartment—was not attached[1] to the floor, fumes were entering the cab. She described this:

> You have to move the doghouse to—when I'm driving, it slides over, so I have to kick it back before I could get to the pedal. And the bouncer would kick it over. It was not attached so it just kept moving around.

The fumes could be smelled. The "bouncer," who is the person who physically picks up items and places them into the truck, was riding in the cab as well and was cold-natured, so Claimant did not feel at liberty to leave the driver's side window of the cab rolled down for ventilation purposes. The passenger window would not roll down.

While Claimant initially testified that she first experienced and reported the fume problem to the city repair shop on November 28, 2021, there is not paperwork in evidence that corroborates this. She later changed this date to November 30, 2021. Two of the Driver's Vehicle Condition Reports dated November 30, 2021, support her testimony that she tried twice that day to get the issue addressed. At 7:40 a.m. that day, she reported that "[s]omething [was] smoking on [the] truck." When mechanics did not fix it, she returned their at 2:10 p.m. and informed them: "Fumes Backing up Inside

[1]Her testimony was that the photographs in her Exhibit 2 that show the doghouse attached to the floor by bolts and washers were taken later, after the bolts and washers were added.

Truck Cabin Help Please[.]" Claimant testified that "the smoke was really bad" on the 30th.

The following exchange took place:

> Q. So did you started experiencing any kind of health symptoms or anything from this, or—
>
> A. Started getting really bad headaches and then I started coughing real bad, so I—I just took the truck back and asked them to fix it. I was told to get back on the truck again. I started coughing, and I got sick.
>
> . . .
>
> Q. So you don't know the history of the doghouse condition in it. You just knew that that day it wasn't attached to the floorboard and that's why you reported it, is that—is that correct?
>
> A. No, I reported it 'cause I could smell the fumes, because I started coughing real bad and I—I got a really, really bad headache, so I was coughing to be point where I couldn't breathe.
>
> Q. All right.
>
> A. So that's why I had the window down.
>
> Q. All right. Now, when did that begin, your coughing and headache?
>
> A. That started on, I have to say, the 30th, because I got really sick over the weekend because I had coughed so bad the last day that I called my supervisor, which was Danny Cannon, and told him that I had—the fumes on the truck had made me sick and I'm throwing—I'm coughing so much I was throwing up.

According to Claimant, she was in the truck in question on November 30, 2021, from 8:20 a.m. until she returned to the repair shop at 2:10 p.m. Throughout that five hours, fifty minutes, the truck was running. The following exchange occurred:

> Q. Were you detecting the fumes coming into the truck that—during that entire period:

A. Yes, sir.

Q. Were you having symptoms that entire period?

A. I coughed the entire time.

The testimony of Claimant was that after she dropped off the truck to be repaired the afternoon of November 30, 2021, a co-worker took her to her vehicle. From there, she called her supervisor and informed him that she was too sick to work. The next day—December 1, 2021—she was still ill. She described what was occurring:

> I was coughing, I could barely breathe. I was sick. When I coughed—when I left work the day before, I was already sick and it—it just got worse. It didn't clear up, it got worse, so I went to the hospital . . . I had a rescue inhaler, so I used the rescue inhaler like I was—I was instructed to when I cough so hard I can't breathe. I used the rescue inhaler, but it was not giving me any relief as a normal—an asthma attack would, if I was having a regular asthma attack like I'm allergic to perfume, so I have a cough to certain smells, and I use a rescue inhaler.

On December 1, 2021, she saw Drew, the physician assistant to her primary care doctor, Mark Peterson, M.D., via a telemedicine appointment. She informed him that she had been having coughing, wheezing, and shortness of breath since the previous day. Although the record of the visit does not reflect it, she stated that she told him about the exhaust fumes.

Because the rescue inhaler was not alleviating her condition, she went to the emergency room of St. Vincent North. Again, although the records do not reflect it, she testified that she told treating personnel about the truck exhaust backing up. There, she was given a shot and underwent either an MRI or a CT scan of her chest. She ended up being admitted to the hospital. Claimant remained there until she was discharged on

December 7, 2021, at 5:00 p.m. While she was there, she was administered steroids. She stated that after her cough was brought under control, she began wheezing. As of the time of her discharge from St. Vincent, she was still suffering from wheezing and shortness of breath.

On December 28, 2021, Respondents had Claimant go to Concentra Clinic. As the record of that visit reflects, she mentioned that she had problems with exhaust at work.

Claimant acknowledged that she has been a smoker since age 19. While she is trying to quit, she still smokes three cigarettes a day. She has had an asthma diagnosis since 1996. Until the incident at issue, she had never been hospitalized for breathing difficulties. However, she admitted on cross-examination that she was treated in a hospital for pneumonia 17 years ago. But she has not been hospitalized since her discharge from St. Vincent North. Shown the record of her visit to Drew on September 15, 2021, that reflects that her cough had become worse in the past 5+ years, Claimant stated that those were his words, not hers. But she did agree that she presented with wheezing and shortness of breath on that date. Despite Claimant's medical records reflecting that she has a diagnosis of chronic obstructive pulmonary disease ("COPD"), she denied having this condition, stating: "I do have asthma, but it's classified as COPD . . . I would deny I have COPD. I would agree to asthma, but I would not say I have COPD." Her testimony was that the fume-induced breathing problems went away on January 14, 2022. That day, she again saw Drew, and informed him that she wished to return to work.

With respect to the truck at issue, No. 06F279, Claimant testified that while witness Patricia Caldwell had served on that truck with her, she did not do so on November 30, 2021.

Caldwell corroborated this. She stated that while she was not on 06F279 on November 30, she served as a bouncer on it earlier that month. According to Caldwell, during this period, there was a problem with this truck having fumes. She did not get sick from inhaling them because as a bouncer, she was outside of the truck much of the time. The witness added: "It smell[ed] like some type of exhaust."

The medical records in evidence reflect that in on November 7, 2017, Claimant represented to Dr. Peterson that she was still smoking half a pack of cigarettes each day despite stating that she quit the previous month. She was using an Albuterol inhaler.

As of December 28, 2018, she reported to CHI St. Vincent that she was wheezing—and had resumed using tobacco after quitting in January of that year. The report for that visit reflects that she reported that she had been diagnosed in 2010 as having asthma. Claimant presented with dyspnea and was positive for recent cough. Examination showed "diffuse expiratory wheezes."

Claimant again presented to CHI St. Vincent with dyspnea, along with shortness of breath, on March 13, 2019. She acknowledged that she was still smoking. Peterson wrote that the dyspnea was "[l]ikely indicative of chronic diastolic congestive heart failure." On November 26, 2019, she was diagnosed as having acute bronchitis after presenting with chest congestion and a productive cough.

As of October 27, 2020, she was still a smoker. After presenting to Dr. Peterson's office with a cough, congestion, and shortness of breath—but an examination showing only decreased breath sounds—she was assessed only as having a cough. She was still using inhalers, including Albuterol.

Claimant's September 15, 2021, visit—just over two months before the incident at issue—shows that she had "an established diagnosis of COPD . . . associated with dyspnea with exertion . . purulent productive sputum and wheezing." She reported that she had begun smoking again. Examination notes reflected "coarse breath sounds" in the upper lobe of her left lung. Claimant was assessed as having nicotine dependence and COPD. She was prescribed Spiriva.

On December 2, 2021, Claimant had a telemedicine visit with Dr. Peterson's clinic. The history portion of the record reads in pertinent part:

> Ms. JONES presents with cough. The cough has been present since yesterday. Respiratory symptoms include chest congestion, progressive, dry cough, shortness of breath and wheezing. Other symptoms include fever to 100.2 degrees, top of head headache, wheezing, chest pain and rhinorrhea.

Examination showed a "normal respiratory rate and pattern with no distress." She was assessed by Drew Siebenmorgen, P.A., as having an acute upper respiratory infection.

Claimant ended up going to St. Vincent the next day. The "Impression and Plan" portion of the record states that she has "Asthma/COPD," but was "doing pretty well, moving decent air . . . ."

The records of the December 3, 2021, hospitalization at CHI St. Vincent North do not appear to be in evidence. But Dr. Carle had access to them as part of his

independent medical evaluation, and he quoted extensively from them in his report. There were multiple references to Claimant suffering an "[a]sthma exacerbation," along with "[a]cute respiratory failure with hypoxemia, related to aspiration . . . ."

Similarly, in a later visit to Siebenmorgen on December 9, 2021, he notes in her history that she was "admitted and treated for asthma exacerbation on 12/03/21 . . . ." That same report shows that Claimant had been complaining of an acute upper respiratory infection for 10 days. Siebenmorgen noted that she had "expiratory wheezes in the apices," and diagnosed her as having "[s]evere persistent asthma with (acute) exacerbation." When Claimant went back to Siebenmorgen on December 15, 2021, she had "decreased breath sounds."

On December 28, 2021, Claimant went to Concentra Clinic and presented with respiratory issues. The history portion of the report reads:

> Patient states that while driving her work vehicle on 11/30/21 she noticed that strong exhaust fumes were pouring into the cab of the vehicle. She started to feel sick (headache, nausea, coughing, and sob [short of breath]). She informed her supervisor of the issues and the vehicle was taken into the shop for repair multiple times with the same issue when she received the vehicle back. She ultimately had to go to St. Vincent ER because the symptoms were getting worse on 12/2/2021 and admitted for acute exacerbation of asthma (records unavailable for review at this time). She received tx in the hospital and was discharged on 12/8/2021. Condition was stable, but continue[d] to be unable to return to work in full capacity. She has been under the care of her PCP and was given restrictions upon return to work.

The examination notes include:

> Pulmonary: Normal respiratory rate. Assessment of respiratory effort revealed normal rhythm and effort. Respiratory Findings: dry cough and occasionally. Evaluation of respiratory movements showed no abdominal breathing. Auscultation of the lungs revealed decreased breath sounds

> diffusely and slightly. [D]iffuse rales/crackles over the right lung. [N]o wheezing.

Claimant was assessed as having "[e]xposure to industrial fumes." The treating clinician, Miriam Lawrence, N.P., wrote: "The claimant can return to work with no restrictions on: 12/28/2021."

Lawrence was sent a questionnaire on December 30, 2021. Asked whether Claimant had reached maximum medical improvement for her alleged exposure to industrial fumes, Lawrence responded "yes," adding: "Suspect that the continued symptoms are related to an exacerbation of pre-existing asthma. It is believed that the industrial fumes initiated the exacerbation." Lawrence stated that any additional treatment would be for non-work-related issues. When asked about the presence of objective findings requiring additional treatment, she responded: "[Claimant] was noted to have slightly decrease[d] breath sounds & crackles. No other findings noted that require further treatment from a work standpoint."

Dr. Scott Carle, who is with Concentra, performed an independent medical evaluation on January 20, 2022. His report[2] reads in pertinent part:

> HISTORY OF CURRENT CONDITION:
>
> > This is a 58 year old black female who sates that she was driving a waste truck for the City of Little Rock about two months ago that was leaking engine fumes in the cab of her truck. The claimant states that she took her truck in several times to get this addressed. [A]nd despite this became ill on or around November 30, 2021. She went to work on the morning of December 1st but was having problems with nausea and

[2]In this report, reproduced at length in the opinion, Dr. Carle has employed a number of devices for emphasis, including the use of italics, underlining, and all capital letters. In order to highlight certain wording, I will use yet another tool: boldface type.

vomiting and left work. She had a tele-med visit that day with her PCP. She was diagnosed with an acute upper respiratory infection and started on antibiotics. She later went to the ED and was admitted to the hospital and was felt to have an acute respiratory infection. She was tested for flu and [C]ovid and was negative. She was admitted to the hospital for almost a week. She has since been seen by her PCP and seen by a pulmonary specialist. She has been released to return to work January 24th, 2022.

OUTLINE OF CURRENT TREATMENT:

This claimant has been given an inhaler which she was instructed to use up to twice daily as needed for cough, wheezing or shortness of breath.

PRE-EXISTING CONDITIONS:

Claimant has had "seasonal asthma" and sleep apnea for years prior to the case date. She states since moving to Arkansas, her asthma had not been a problem recently.

. . .

REVIEW OF SYSTEMS:

. . .

PULMONARY:

No current productive cough.

. . .

PHYSICAL EXAMINATION:

. . .

LUNGS:

Distant breath sounds without wheezing. Good air exchange.

. . .

MEDICAL SUMMARY:

This is a 58 year old female with a recent history of respiratory distress and subsequent hospitalization felt to be attributed to an acute upper respiratory infection. This claimant has a long history of respiratory problems to include a diagnosis of asthma and COPD. She is also, until

very recently, a smoker. She was hospitalized for a brief period and upon discharge, continued care under her group health carrier. She has been recommended to use an inhaler daily and to stop smoking. She is using the inhaler prn. She has several co-morbid health conditions that impacted her complaints and recent illness. No gradient for industrial exposure was appreciated during her evaluations nor was there evidence of engine leak found upon inspection [Dr. Carle is citing the handwritten statements of Claude Pilgram and Landis Williams, Jr., set out *infra*].

DIAGNOSTIC IMPRESSIONS (Causally related to work):

1. None, **there is no medical certainty the major cause of her recent illness was attributed to a workplace exposure**.

DIAGNOSTIC IMPRESSIONS (Not causally related to work):

1. Acute Upper Respiratory Infection
2. COPD
3. Morbid Obesity
4. Venous Hypertension
5. Diabetes
6. Obstructive Sleep Apnea
7. Nicotine use history/Smoker
8. Hypertension
9. Rheumatoid Arthritis
10. Osteoarthritis
11. Gout
12. Fatty Liver Disease
13. Chronic Sinusitis
14. Headaches
15. Cervical Spine Stenosis
16. Reflux
17. Vitiligo
18. Insomnia

ASSESSMENT AND ASSIGNMENTS

CAUSATION

Causation, as it relates to this case, will address only those impairments identified as described in the Guides based on measurable dysfunctions of organ or body parts apportioned to an occupational exposure.

The claimant did not appear to have a significant exposure at work that resulted in her recent illness.

MMI

Maximum medical improvement is the date at which, with reasonable medical certainty, that further deterioration or recovery is not anticipated. This assessment implies that a condition is permanent and static. One can either state that it has occurred or opine on it when it is expected to occur.

The claimant does not appear to have a permanent impairment apportioned to a workplace exposure regarding the respiratory system; the cardiovascular system; the ear[,] nose and throat; and the skin. Her recent illness was characterized as an Acute Upper Respiratory Infection. **While the claimant had reported unpleasant smells in her truck, there was not evidence of a leak found nor was there any medical documentation that supported a workplace exposure. I am unable to say that it was the major cause of her recent illness and hospitalization was attributed to a workplace exposure.** [Sic] It would be appropriate for this to continue under her group health carrier.

MANAGEMENT/DIAGNOSTICS/THERAPEUTICS/CASE ANALYSIS

. . .

IMPAIRMENT

. . .

This claimant indeed has an impairment related to her pulmonary system. **However, it is not causally related to a workplace exposure** and therefore does not warrant an assignment for a rating under comp. There is no permanent impairment associated to a workplace exposure.

. . .

ANSWERS TO SPECIFIC QUESTIONS:

1. Within a reasonable degree of medical certainty, based on medical record review and physical examination, do the reported symptoms represent more than 51%[3] related to her pre-existing Asthma/COPD/other medical conditions? *YES*

[3]This is not the same as "major cause," defined in Ark. Code Ann. § 11-9-102(14)(A) (Repl. 2012) as "more than fifty percent (50%) of the cause." Nonetheless, I note that Dr. Carle was simply responding here to a question that was inartfully posed to him using this phrasing. Elsewhere in his opinion, he opined concerning major cause or

2. Within a reasonable medical certainty, are the findings directly related [to] the mechanism of the injury? *NO*
3. Do you agree Ms. Jones reached MMI as of 12/28/21 for her reported work injury for diagnosis of Exposure to Industrial Fumes determined by M. Lawrence, APRN? *Non applicable as the major cause of her illness is felt to be idiopathic, not an exposure.*
4. Do you agree with RTW Full Duty status of 12/28/21 for her reported work injury? *I do not feel the claimant incurred a work injury.*
5. Do you agree the work restrictions documented by her PCP are due to a non-work-related medical issue? *Yes*
6. Within a reasonable medical certainty, was the hospitalization (12/6 – 12/8 2021[)] a direct result of her reported work injury [o]r more related to her underlying health issues? *This appears to be apportioned to a variety of group health conditions.*
7. Do you agree any follow up with Specialist would not be related to her reported work injury but to underlying medical issues? *Yes, continued care is appropriate under her group health.*

With respect to the non-medical records that are in evidence, Respondents introduced two handwritten statements pertaining to the incident at issue. Claude Pilgram wrote:

> 1-21-2022
>
> RE: UNIT NUMBER 06F279
> DRIVER REPORTED SMELLING EXHAUSE FUMES IN CAB. C.P. CHECKED EXHAUST SYSTEM AND DOGHOUSE INSTALLATION. NO EXHAUST LEAKS WERE FOUND AND DOGHOUSE WAS INSTALLED PROPERLY. C.P. TEST DROVE UNIT AND FOUND NO PROBLEMS WITH EXHAUST IN CAB.
>
> /S/ Claude Pilgram

Landis Williams, Jr., wrote:

1/21/2022

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the lack thereof, and I credit those opinions and specifically find that in so doing, he was using the statutory definition quoted above. *See infra*.

> I remember that #06F279 [d]id come [i]nto the shop and the driver had some complaints about it. I looked at the truck and did a check over it and did not find any exhaust leak, or no smells escaping into the cabin. But just to be sure I repositioned the cab [d]oghouse, which [l]eads to the engine compartment. It's an older truck, but it is diesel, so it will smell different tha[n] just a regular gas car. But no overpowering smell or anything like that. And [i]f I['m not mistaken the truck is still [i]n service and being used. Like I said [i]t's an old truck and no one like[s] to drive it. And [i]f they have to anyway then 9 times out of 10 that's the excuse that they use to try and get out of driving any of the older vehicles[.]
>
> Landis Williams Jr.
> /s/ Landis Williams Jr.

Discussion. With respect to the alleged injuries of this type that are caused by a specific incident, the applicable statute is Ark. Code Ann. § 11-9-114 (Repl. 2012). This reads:

> (a) A cardiovascular, coronary, **pulmonary, respiratory,** 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).

As shown above, Dr. Carle rendered the following opinion: "I am unable to say that it [exposure to exhaust fumes] was the major cause of her recent illness and hospitalization was attributed to a workplace exposure." (Sic) In addition, he answered "yes" to the following question: "Within a reasonable medical certainty, based on medical record review and physical examination, do the reported symptoms [her respiratory issues] represent more than 51% related to her pre-existing Asthma/COPD/other medical conditions [as opposed to her alleged workplace exposure to fumes or any other agent]?" In *Cooper v. Textron*, 2005 AR Wrk. Comp. LEXIS 32, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examining medical opinions concerning causation:

> Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. *See, Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

Based on my review of the totality of the evidence, I credit Dr. Carle's opinions. He could not opine that exposure to fumes was the major cause of the condition that led to her hospitalization. To the contrary, he gave the opinion that more than 51 percent of the reason for her respiratory condition that necessitated her stay at St. Vincent—the injury that she has alleged is compensable—was her pre-existing condition. In writing this, he analyzed the pre-existing nature of this condition, highlighted the fact that she was diagnosed as suffering from an "acute upper respiratory infection," and gave credence (as do I) to the two statements by City of Little Rock vehicle maintenance employees who refuted that there was an exhaust leak into the cab of the truck that Claimant operated. Because Claimant has not shown the "major cause" element, she cannot establish that she suffered a compensable pulmonary or respiratory injury by specific incident. It must fail from the outset.

Under the Arkansas Workers' Compensation Act, the employer takes the employee as the employer finds her, and employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990). A pre-existing infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). An aggravation is a new injury that is the result of an independent incident. *Maverick Transportation v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). As it is a new injury with an independent cause, an aggravation must meet the definition of a compensable condition. *Id*.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). 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; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

As discussed *supra*, Claimant can prove that she sustained a compensable injury only if she shows, inter alia, that an accident is the major cause of the alleged injury that she has sustained. But—again—she has not been able to do this. I credit Dr. Carle's opinion that the major cause of her lung/pulmonary/breathing issue is here pre-existing condition and not her job or anything that occurred at her job.

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).

In the case at bar, no recognizable link has been established between the type of job that Claimant performed—that of a trash truck driver—and the alleged lung disease that she has and was treated for via hospitalization in early December of 2021. Consequently, she has not met her burden of proof here.

In reaching these conclusions regarding compensability, I am not unmindful that the nurse practitioner at Concentra, Lawrence, wrote that she "suspect[ed]" that Claimant's "continued symptoms are related to an exacerbation of pre-existing asthma," and that "[i]t is believed that the industrial fumes initiated the exacerbation." But these statements were not given within a reasonable degree of medical certainty—as they must be. Granted, the Arkansas Supreme Court in *Freeman*, *supra*, noted: "This court has never required . . . that the magic words 'within a reasonable degree of medical certainty' even be used by the doctor." Yet the functional equivalent of those words has

to be used to convey that the opiner is adhering to this standard. "[S]uspected" and "believed" fall well short of that. Moreover, the opinion that Claimant's breathing issues "are related to an exacerbation of" her asthmatic condition is not the same as saying that the purported exacerbation is the major cause of that condition.

I find Claimant to be very sincere in her belief that her breathing of exhaust fumes in the trash truck caused her to develop new or enhanced lung/breathing problems. But any belief, no matter how sincere, is not a substitute for credible evidence. *Graham v. Jenkins Engineering*, 2004 AR Wrk. Comp. LEXIS 79, Claim No. F112391 (Full Commission Opinion filed March 12, 2004). In light of the evidence, only through speculation and conjecture could I find in her favor on this matter. However, I cannot engage in speculation and conjecture. *See Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). In sum, I am compelled to find, based on the foregoing, that Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury.

B. Remaining Issues

Because of the above finding, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment and temporary total disability benefits—are moot and will not be addressed.

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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Hon. O. Milton Fine II
Chief Administrative Law Judge