

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H303552

KYLE McKAUGHAN, EMPLOYEE CLAIMANT

U OF A DIVISION OF AGRICULTURE,
EMPLOYER RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
CARRIER/TPA RESPONDENT

OPINION FILED NOVEMBER 6, 2024

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

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

Respondents represented by the HONORABLE ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed May 23, 2024. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 14, 2023, and contained in a Pre-hearing Order filed August 18, 2023, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form of cancer developed

as a result of his employment with the respondent, with his last exposure date of January 27, 2023.

3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to medical treatment as he was unable to prove his occupational disease in the form of cancer compensable.
4. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as he is unable to prove his alleged occupational disease compensable.
5. The claimant has failed to prove his attorney is entitled to an attorney's fee in this matter.
6. The respondent's issue of lack of notice as a defense is moot.
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits under A.C.A. §11-9-527 as the claimant is unable to prove that he sustained a compensable occupational disease.

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.

Therefore, we affirm and adopt the May 23, 2024 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.

SCOTTY DALE DOUTHIT, Chairman

MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

The Administrative Law Judge (hereinafter referred to as “ALJ”) found that the Claimant failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form of cancer, that the Claimant failed to prove by a preponderance of the evidence that he is entitled to medical treatment, that he failed to prove by a preponderance of the evidence is entitled to temporary total disability benefits as a result of his form of cancer, that Claimant has failed to prove his attorney is entitled to an attorney’s fee, and that the Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits

under Ark. Code Ann. § 11-9-527. After conducting a thorough review of the record, I would reverse the ALJ's findings.

1. History

Claimant was diagnosed with two very rare forms of cancer, multiple myeloma and chronic lymphocytic leukemia and passed away on December 11, 2023. Prior to his death, Claimant filed an AR-C alleging that his cancer is an occupational disease he received as a result of his employment with the Respondent. Claimant began working for the Respondent in February of 2011 and began working as a safety officer for the Respondent in 2014. As a safety officer, Claimant was responsible for chemical and waste disposal, signing waste manifests, and completing and signing annual ADEQ waste reports. (Resp. Ex. 2, p. 3). Testimony in the record reveals that Claimant was exposed to various pesticides as a part of his employment duties. Upon experiencing unusual symptoms, the Claimant sought medical care at the emergency department of his local hospital. Diagnostic testing was performed including a full-body PET scan. During one of the initial examinations Dr. Patrick Travis, an oncology specialist and Claimant's authorized physician, specifically asked the Claimant "Do you work with chemicals?" As a result, the Claimant, or Claimant's wife, obtained a partial manifest of chemicals Claimant was in

contact with. This information revealed that Claimant's employment with the Respondent kept him in direct contact with chemicals including methyl bromide, thien carbazole-methyl, diuron, paraquat dichloride, glyphosate, benzovindiflupyr, bifenthrin, and acetochlor. (Cl. Ex. 2 p. 89). After reviewing this information, Dr. Travis, stated that these are either listed as "carcinogens, potential carcinogens, or under investigation [as carcinogens]." *Id.* Methyl bromide is invisible to the naked eye, and an outdated soil fumigant. (Resp. Ex. 1. P. 3). The Claimant testified in his deposition that five or six bottles of methyl bromide were found on campus, and he was tasked with disposing of them. "Well, one of them was leaking a little bit, had this foam coming out of it. And I didn't have the proper PPE at the time, but then I went and got the proper PPE to shut off the valve." Dr. Travis testified that he spoke extensively with the Claimant about the Claimant's position with the Respondent. (Travis Deposition, p. 14).

Claimant's authorized physician and oncologist, Dr. Patrick Travis opined in two separate letters, and in his deposition that Claimant's exposure to toxins as a result of his employment with the Respondent caused Claimant's cancers. In a letter dated November 3, 2023, Dr. Travis stated:

After visiting with Mr. McKauguan extensively
and reviewing the chemical exposures he has

had, it is clear that this was secondary to work exposure leading to malignancies. Mr. McKaughan is at this point completely and totally disabled. He has months of recovery from his nearly life-ending treatment, a treatment required because of his dual malignancies. These malignancies will define his life for the foreseeable future.

And further: "I want to state again, had Mr. McKaughan not spent such an extensive time exposed to these carcinogenic chemicals this would not have happened"

In his deposition, Dr. Travis unequivocally stated:

I think that having two separate clones, two separate B-cell clones that likely became malignant in close proximity to each other, that it was some toxin exposure that led to that. I think it would be unlikely to find a case where you would support that it was just a de novo occurrence.

Finally, in a February 19, 2024 letter, Dr. Travis stated:

Mr. McKaughan developed two aggressive B-cell malignancies. They were diagnosed simultaneously and the speed with which they were progressing suggests that they occurred at the same time. The development of both at the same time makes an outside exposure inciting carcinogenesis likely. No one else in his family or close proximity developed a malignant process. Therefore, it would not be an exposure common to the household. Mr. McKaughan worked with a series of toxic chemicals at the time of development of these malignancies. It is my medical opinion that these exposures led to the development of his malignancies. For many years there was an ongoing battle over cigarettes being a cause for lung carcinoma. The questions were raised as to how you could prove that these patients, who smoked, did not have other exposures. Intuitive reasoning and common sense lead us to realize that cigarettes

were directly linked to lung cancer long before it was accepted as true.

Respondent acquired an independent medical examination (hereinafter referred to as "IME") of the Claimant's medical records by Dr. Henry Simmons, Jr. a toxicologist. The purpose of this IME was to evaluate the toxicological causation opinions rendered by Dr. Travis regarding the Claimant's death. As a toxicologist, Dr. Simmons found that "the etiology of his concomitant multiple myeloma and chronic lymphocytic leukemia is unknown and that to link it to workplace chemical exposure as described in the materials that I reviewed is speculation."

As stated above, the ALJ found that the Claimant did not prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form of cancer and therefore was not entitled to medical treatment, temporary total disability, and benefits under Ark. Code Ann. § 11-9-527. Following this decision, a Notice of Appeal was filed on behalf of the Claimant.

2. Adjudication

- a. The Claimant proved by a preponderance of the evidence that he sustained a compensable occupational disease in the form

of cancer as a result of his employment with the Respondent, with Claimant's last exposure being January 27, 2023.

An Occupational Disease 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." Ark. Code Ann. § 11-9-601(e)(1)(A). A causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-601(e)(1)(B).

When medical opinions conflict, the Commission may resolve the conflict based on the record as a whole and reach the result consistent with reason, justice, and common sense. *Barksdale Lumber v. McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977). It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

In the case at hand, two very conflicting medical opinions are given. Dr. Travis was Claimant's oncologist throughout the Claimant's cancer diagnosis and stated that Claimant's multiple myeloma and chronic lymphocytic leukemia were not naturally occurring dual malignancies and both cancers were rare. Dr. Travis is a practicing oncologist who oversaw

all of Claimant's treatment and understands the current oncological interpretation of multiple myeloma and lymphocytic leukemia. Further, Dr. Travis was aware of all of Claimant's medical history as a result of being the Claimant's authorized physician and was also thoroughly familiar with the Claimant's position with the Respondent. As a result, Dr. Travis was in the best position to and can credibly determine whether Claimant's cancers were the result of his employment with the Respondent. Dr. Travis explained in his deposition that the Claimant's multiple myeloma and lymphocytic leukemia were not the result of regular environmental exposure, smokeless tobacco, age, or genetics and instead resulted from his exposure to dangerous chemicals at his place of employment with the Respondent. Therefore, I find that Dr. Travis's medical opinion should be given more weight, and that Claimant was exposed to the specific carcinogens listed above in the course and scope of his employment with the Respondent.

Further, I find that Dr. Travis's medical opinion provides a sufficient causal connection between Claimant's multiple myeloma and lymphocytic leukemia and his employment with the Respondent. Therefore, I find that Claimant proved by a preponderance of the evidence that he sustained a

compensable occupational disease as a result of his employment with the Respondent.

- b. As a natural consequence of proving by a preponderance of the evidence that Claimant sustained a compensable occupational disease, Claimant is therefore entitled to medical treatment for his of such occupational disease.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant bears the burden of proving that she is entitled to additional medical treatment. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). 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).

The Arkansas Court of Appeals has held a claimant may be entitled to additional medical treatment even after the healing period has ended, if said treatment is geared toward management of the injury. See *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex*, supra.

As Claimant passed away on December 11, 2023, and giving due consideration to the evidence in the record, I find that Claimant's medical treatment for his compensable occupational disease from January 27, 2023, until the date of his death was reasonable and necessary.

- c. The Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable occupational disease.

Temporary total disability benefits are appropriate where the employee remains in the healing period and is totally incapacitated from earning wages. *Ark. State Highway Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

Dr. Travis saw Claimant on February 20, 2023 for an assessment of Claimant's occupational disease. At that time, Dr. Travis determined that Claimant was unable to continue working due to his occupational disease

and filled out the “Certification of Health Care Provider for Employee’s Serious Health Condition under the Family and Medical Leave Act.” (Cl. Ex. 1., p. 8). Dr. Travis certified that Claimant’s condition started on February 6, 2023, and would last until the life of the Claimant.

Therefore, I find that Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 6, 2023, until the date of his passing on December 11, 2023. In the event the Respondent paid temporary total disability benefits, or salary payments for this period, the Respondent should be given an offset for those amounts.

- d. The Claimant has proved by a preponderance of the evidence that he is entitled to benefits under Ark. Code Ann. § 11-9-527 as he sustained a compensable occupational disease.

Ark. Code Ann. § 11-9-527 states that if death results from an injury the employer shall pay the actual funeral expenses, not exceeding the sum of six thousand dollars (\$6,000). As a result of Claimant’s compensable occupational disease, he passed on December 11, 2023. Therefore, I find that Claimant proved by a preponderance of the evidence that he is entitled to benefits under Ark. Code Ann. § 11-9-527 in relation to his funeral expenses.

Additional benefits under Ark. Code Ann. § 11-9-527 being weekly benefits to a widow, children, or other listed relatives following a determinacy of dependency on the Claimant's income. A determination as to the beneficiaries who were wholly and actually dependent on the Claimant and entitled to such additional benefits under Ark. Code Ann. § 11-9-527 must be made. Therefore, I would remand this issue back to the ALJ.

- e. The Claimant's attorney is entitled to an attorney's fee as a result of these findings.

For prevailing on this appeal before the Full Commission, Claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2012), including a fee on the entire temporary total disability benefits awarded. For prevailing on appeal to the Full Commission, the Claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

For the reasons stated above, I respectfully dissent.

M. SCOTT WILLHITE, Commissioner