ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-1298

	Opinion Delivered APRIL 22, 2009
PHARMERICA APPELLANT	APPEAL FROM THE WORKERS' COMPENSATION COMMISSION,
V.	[NO. F508000]
MARLENE SERATT APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

This is the second appeal in this workers' compensation case. Appellee Marlene Seratt was awarded benefits by the Commission related to injuries arising out of carbon monoxide exposure at work culminating on June 8, 2005. Her employer, appellant Pharmerica, appealed the award on several bases. In the first appeal, *Pharmerica & SRS v. Seratt*, 103 Ark. App. 9, __ S.W.3d __ (2008), we reversed and remanded for additional findings of fact upon which to perform appellate review concerning (1) statutory notice of injury to the employer, and (2) whether Seratt suffered an occupational disease within our Workers' Compensation Act. The Commission reconsidered the claim anew and made the necessary findings of fact, again awarding Seratt benefits. Appellant appeals a second time contending that Seratt's claim was barred for failing to provide the required ninety-day written notice of occupational disease to her employer, and barred for failing to show that any maladies she might be suffering were causally related to her carbon-monoxide exposure. We affirm.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *See Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W.2d 1 (1999). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case de novo. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). A finding of a compensable injury cannot be based on speculation or conjecture. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). However, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Hill v. Baptist Med. Ctr.*, 74 Ark. App. 250, 48 S.W.3d 544 (2001). Furthermore, any compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002).

Where the condition involved is a disease (as opposed to an accidental injury), the claim is compensable only if the disease is an "occupational" one as defined in our Workers'

Compensation Act, and the claimant proves by a preponderance of the evidence a causal connection between the employment and the disease. *See* Ark. Code Ann. §§ 11-9-102(4)–601(e) (Repl. 2002). An "occupational disease" is defined as any disease that results in disability or death that arises out of or in the course of the occupation or employment. Ark. Code Ann. § 11-9-601(e)(1) (Repl. 2002). 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).

As we stated in the prior opinion, appellee worked as a pharmacy technician and had for several years. In the pharmacy building, a faulty water heater leaked not only water but also carbon monoxide. On June 8, 2005, pharmacy employees were becoming ill with headaches, so the pharmacy manager called the Rogers fire department. The building was evacuated. The employer, pursuant to a form titled "Authorization for Treatment," directed appellee to the Arkansas Occupational Health Clinic in Lowell, Arkansas, for a medical evaluation, with the hand-written notation "whatever is appropriate to treat the associate." At that clinic, she was initially evaluated for what was believed to be mold exposure due to the water leaking from the water heater. She was ultimately seen by Dr. Gary Moffitt at that clinic in June 2005. In Dr. Moffitt's letters to the employer, he notes that he was examining Seratt "at the request of and authorization by PharMerica."

The employer had a professional investigation completed on the pharmacy air-quality in late June 2005, where it was learned that the water heater had leaked carbon monoxide

into the workspace and needed to be replaced. In appellee's claim, the pre-hearing order issued by the ALJ stated that the issue to be litigated was "compensability of the claimant's injuries due to carbon monoxide[.]" Appellee contended that she was injured on June 8, 2005, suffering injuries to her eyes, nose, throat, lungs, and brain. Her main complaints were that she had persistent headaches, burning in her nose/throat/chest, photophobia, memory loss, shaking, confusion, difficulty breathing, difficulty multitasking, and anger issues. She said she suffered from none of those problems prior to her employment in the pharmacy.

At the hearing, appellant's counsel made an opening statement in which he contended that it was "hard to decide just which slot this kind of claim falls into in the current Workers' Compensation Act," noting that this was possibly an occupational disease case. Appellee's counsel made her opening statement in which she stated that there was acute exposure on June 8 but that the employees had been exposed to this gas over a greater period of time. Appellant asserted that it had provided extensive care for its employees and that any maladies appellee might be suffering were due to long-term smoking and typical allergies.

The Commission found that the employer had actual notice of appellee's workplace injury, that appellee had shown objective medical findings to support the existence of an occupational disease, and that her injury was causally related to her work-based exposure.

In this second appeal, appellant first challenges the finding that adequate notice was provided to the employer. It points to Arkansas Code Annotated section 11-9-603(a)(2)(A) (Repl. 2002), which requires that written notice of an occupational disease be given within ninety days after the first distinct manifestation of the disease; such notice must be given by

the employee or someone on her behalf. The ninety-day statutory period does not begin to run until the employee knows or should reasonably be expected to know that he is suffering from an occupational disease. *See Quality Service Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991). However, failure to give notice shall not bar any claim if the employer had knowledge of the injury; if the employee had no knowledge that the condition or disease arose out of and in the course of his employment; or if the Commission excuses the failure on the grounds that, for some satisfactory reason, the notice could not be given. Ark. Code Ann. § 11-9-701(b)(1) (Repl. 2002). Here, the Commission determined that the employer had knowledge of the injury, in light of its referral of its employee for medical attention and treatment contemporaneous with the June 8, 2005 workday.

In light of the purpose of the statutory notice provisions, we hold that substantial evidence supports the Commission's determination that the employer knew of the injury, such that the mandatory written notice under section 11-9-603 was excused. The authority of the Commission to excuse the failure to give notice under the statute relating to an injury pursuant to Ark. Code Ann. § 11-9-701 also applies to the failure to give notice of occupational disease as required under Ark. Code Ann. § 11-9-603. *See Quality Serv. Railcar v. Williams*, *supra*.

Appellant's other argument on appeal is that the Commission's decision lacks substantial evidence to support the existence of objective findings of injury or of any causal connection between objective findings and exposure to carbon monoxide at work. Although Ark. Code Ann. § 11-9-601 does not define the distinction between "accidental injury" and

"disease," one widely accepted distinction is that occupational diseases are generally gradual rather than sudden in onset. *Johnson v. Democrat Printing and Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997); *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994). Appellant herein contends that to the extent that appellee had any objective findings (nasal swelling and polyps, elevated carbon-monoxide blood levels), those were indicative of long-term smoking and allergies, unrelated to work exposure.

The Commission provided in the first instance a discussion of the existence of the aforementioned objective findings to support the existence of an injury. The Commission then found that those findings were causally related to her work-based exposure to carbon monoxide, not her smoking or allergies. A causal connection is generally a matter of inference to be drawn from all the evidence. *See Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

While there were certainly expert opinions to the contrary, the Commission deemed credible the opinion of Dr. Petty, a general practitioner in Rogers, Arkansas. Dr. Petty wrote a letter on August 31, 2006, stating:

> This letter is in regard to Aurora Cortez, Marlene Seratt, and Daniel McMillan. Based upon their symptoms and the chronological order that these events took place, I believe with medical certainty that the above patients suffer from delayed neurological sequelae due to prolonged carbon monoxide exposure and subsequent poisoning.

Dr. Petty attached medical literature in support of his opinion. The Commission was entitled to rely upon this opinion, and it provided a substantial basis for the Commission's finding on causation.

Reviewing the arguments on appeal under the proper standards, we hold that substantial evidence supports the award of benefits in this instance.

Affirmed.

PITTMAN and GRUBER, JJ., agree.