

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-WC-01526-COA

JAMES D. ROMINE

CLAIMANT/APPELLANT

VERSUS

ALLIED WASTE NORTH AMERICA, INC. A/K/A BFI

AND

AMERICAN HOME ASSURANCE COMPANY

EMPLOYER/CARRIER
APPELLEES

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

BRIEF OF EMPLOYER AND CARRIER (APPELLEES)

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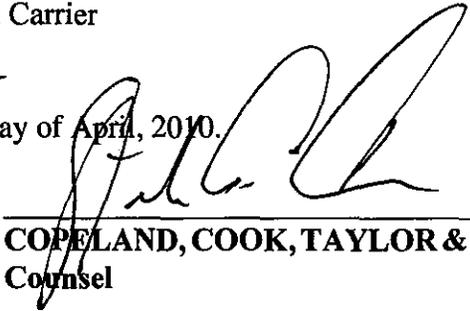
EMPLOYER/CARRIER
APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Allied Waste North America, Inc., Employer, and American Home Assurance Company, Carrier, certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Commissioners may evaluate possible disqualification or recusal.

1. James Romine - Claimant
2. Robert H. Tyler - Counsel for Claimant
3. Allied Waste North America, Inc a/k/a BFI - Employer
4. American Home Assurance Company - Carrier
5. Stephen A. Anderson and M. Jason Sumrall, Copeland, Cook, Taylor & Bush, P.A. -
Of Counsel for Employer and Carrier

SO CERTIFIED this the 15th day of April, 2010.



COPELAND, COOK, TAYLOR & BUSH, P.A. Of
Counsel

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Statement of the Issues

The issue on appeal is whether the substantial credible evidence supports the findings of the Administrative Judge, as affirmed by the Commission and Circuit Court of Jackson County, that Claimant's current condition at issue is not related to his workers compensation accident of May 21, 2002 and/or Claimant's alleged date of accident of August 6, 2002 and that Claimant did not sustain a work-related accident and/or injury on August 6, 2002.

In number form, the issues to be determined by the Court are

- (1) Whether the finding of the Administrative Judge, as affirmed by the Full Workers Compensation Commission, that Claimant's current condition is not causally related to the work-related injury and/or accident of May 21, 2002 is correct as a matter of law and based upon substantial, credible evidence;
- (2) Whether the finding of the Administrative Judge, as affirmed by the Full Workers Compensation Commission, that Claimant did not suffer a work-related injury and/or accident on August 6, 2002, and that Claimant's current condition is not causally related to this alleged injury and/or accident is correct as a matter of law and based upon substantial, credible evidence.¹

¹ As Claimant alleges that a single neurological condition is causally related to either or both dates of alleged injury, the causation aspect of this claim for both dates is addressed together below in the "Argument" Section.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Tribunals Below

The first Petition to Controvert alleges that on May 21, 2002, while employed as the driver of Employer's garbage truck, he was exposed to toxic and hazardous materials while collecting garbage. This first Petition to Controvert indicates that Employer and Carrier furnished medical treatment for the May 21, 2002 exposure.

The second Petition to Controvert alleges that on August 6, 2002, while employed as the driver of Employer's garbage truck, he was exposed to toxic and hazardous materials while collecting garbage. This second Petition to Controvert indicates that Employer and Carrier did not furnish medical treatment for the August 6, 2002 exposure.

Both Petitions to Controvert allege that as a result of these exposures, Claimant sustained injury to his neurological system which has caused him to suffer a severe involuntary movement disorder (dystonia).

On February 6, 2008, after a thorough review of the medical and lay testimony and after a thorough review of Mississippi case law on chemical exposures, the Administrative Judge entered her Order finding that Claimant's current condition is not causally related to the May 21, 2002 exposure and that Claimant did not suffer a work-related accident/injury on August 6, 2002.

On July 2, 2008, the Full Workers Compensation Commission affirmed without further discussing the Order of the Administrative Judge.

On August 21, 2009, the Circuit Court of Jackson County found that the conclusion of the Administrative Judge and the Commission that Plaintiff failed to satisfy his burden of proof in establishing a work related injury is supported by substantial evidence and therefore affirmed the

findings of the Commission.

(ii) Facts

The Claimant testified on his behalf in this cause. Claimant testified that on May 21, 2002 he was exposed to toxic chemical while collecting garbage. Tr. p. 10.² He testified that at the time of the incident, he was on the back of the truck and after he activated the truck's packing or compression mechanism, he smelled fumes and could not catch his breath. Tr. p. 11. Claimant testified that at the time of the incident he did not recognize the smell of the substance he inhaled. Tr. p. 12.

Claimant testified that upon smelling the fumes he fell to his knees and had his coworker contact their supervisor. Tr. p. 10. Thereafter, Claimant testified, he began coughing and was taken to the office of Dr. Rickey Chance. Tr. p. 12. After being released by Dr. Chance, Claimant testified, he started coughing worse and he was taken to the hospital where he stayed overnight. Tr. p. 12. Claimant testified that following his release from the hospital he missed one day of work and thereafter returned to work at his usual position. Tr. p. 12.

Claimant testified that he sustained a second exposure on August 6, 2002. Claimant testified that he picked up black bags, threw them in the truck and upon compressing the trash, he immediately smelled what he believed to be muriatic brick acid and ammonia. Tr. p. 13, 15. Claimant testified that upon smelling the chemical, he ran away from the truck. Tr. p. 13.

Claimant testified that his supervisor was notified of the incident and they were instructed to immediately report to the landfill. Tr. p. 14, 16. Claimant testified that he climbed into the cab

² "Tr." will hereinafter refer to the transcript from the hearing on the merits followed by the page number referenced.

where he could still smell the fumes. Tr. p. 15. Upon arriving at the landfill and dumping the truck, Claimant testified, they found a muriatic brick acid bucket and a container for pool chemicals. Tr. p. 16. Following the incident, Claimant testified that he returned and completed his route. Tr. p. 16.

Claimant testified that following the second alleged accident his shoulder began hurting and locking up on him. Tr. p. 16. Claimant testified that some time thereafter, he was lying in bed and his right big toe started moving by itself. Tr. p. 17. Claimant testified that he was taken to the emergency room after these symptoms began and that by the time he arrived at the hospital both of his legs were moving by themselves. Tr. p. 18. Claimant testified that the involuntary movements eventually moved to his arms and head. Tr. P. 18.

The records of Dr. Rickey Chance indicate that Claimant reported to his office *prior to both alleged dates of accident* on April 18, 2002 and it is noted as follows: “As a summary, this patient presented to the clinic on this date with a diagnosis of *headache, dizziness and elevated blood pressure.*” Exhibit 1, April 18, 2002 report (See page numbered 20 of 67).³ An MRI was conducted on April 25, 2002 which Dr. Terry Smith would later interpret as showing a cyst in the left insular area of Claimant’s brain. See Exhibit 6, August 15, 2002 Report of Dr. Terry Smith.

The records of Dr. Chance indicate that Claimant reported again to his office on May 21, 2002 alleging that while working for BFI garbage, he inhaled chemicals. Exhibit 1, May 21, 2002 report. The records of Dr. Chance indicate that Claimant reported to Biloxi Regional Medical Center emergency room later that same day complaining that he had inhaled Clorox and potential chemical bromine. Exhibit 1, May 21, 2002, History and Physical Report. The Discharge Summary indicates

³ Therefore, contrary to the assertions by Claimant, there is a documented history of hypertension prior to both alleged dates of exposure.

that Claimant was discharged 24 hours after admission with the diagnosis of acute pneumonitis secondary to chemical exposure and asthmatic bronchitis secondary to chemical exposure. Exhibit 1, May 21, 2002 Discharge Summary.

The records of Dr. Chance indicate that Claimant next sought treatment on August 12, 2002 with complaints of toes locking up and that over the ensuing 24 hours he developed a severe dystonia involving his head, and all four extremities. Exhibit 1, August 12, 2002 report. This is the first noted complaint of any involuntary movement condition.

The deposition of neurologist Dr. Richard Gorman was taken on December 4, 2003 and entered into evidence as Exhibit 4. Dr. Gorman testified that he initially saw Claimant on August 13, 2002 at the referral of his primary care physician, Dr. Chance, for a movement disorder. Exhibit 4, p. 8, 9. Dr. Gorman testified that Claimant related his symptoms as starting the previous Saturday night while lying in bed. Exhibit 4, p. 9. The symptoms, Dr. Gorman testified, were reported as his left toes started cramping, then both toes started cramping, then his feet started uncontrollably moving, his legs had tremors and then he developed athetoid, or snake-like writhing movements. Exhibit 4, p. 9.

The first MRI that was ordered by Dr. Gorman and performed at Biloxi Regional is dated August 13, 2002. Exhibit 1, August 13, 2002 MRI report. The testimony of Dr. Gorman indicates that he ordered a repeat MRI scan of the brain as the first MRI scan was performed without gadolinium, to see if an enhancement would pick up any inflammatory areas. Exhibit 4, p. 16. This *repeat* MRI was performed on October 8, 2002 which report shows a finding in the left basal ganglia representing a hemangioma or lacunar infarct. Exhibit 2, October 8, 2002 MRI report. ***Although there were MRI studies performed in both April and August of 2002, the October 8, 2002 MRI***

report indicates that there are no comparison studies available. Exhibit 2, October 8, 2002 MRI report.

In regards to the October 8, 2002 MRI, Dr. Gorman's report cites the lesion noted in the MRI report but states the finding of "no acute change." Exhibit 2, October 30, 2002 report. Once again, *there is no indication in the records or in the testimony of Dr. Gorman which indicates he performed a comparison between the October 8, 2002 study and the prior studies.*

Although Dr. Gorman testified that in his opinion the etiology of Claimant's symptoms was toxic exposure, Dr. Gorman specifically testified *that there is no objective medical findings to correlate with his diagnosis of secondary dystonia as a result of toxic exposure.* Exhibit 4, p. 52.

In regards to the MRI studies, *Dr. Gorman testified on cross examination that there was a cystic area in the left basal ganglia seen in the October 8, 2002 MRI, but Dr. Gorman testified that he did not know what that finding indicated as he did not have a prior study.*⁴ Exhibit 4, p. 39. Specifically, Dr. Gorman testified "we did have that one MRI scan in the left basil ganglia that little cystic area that we didn't know what it meant. We didn't have a prior." Exhibit 4, p. 39.

A review of the totality of the records and testimony of Dr. Gorman indicate that he did not evaluate and or determine if any difference existed between the MRI studies performed in April 2002, August 2002, and October 2002; that he performed no research in the scientific literature regarding whether or not there is any link between the chemicals to which Claimant alleged he was exposed and the Claimant's dystonia condition; that he could not identify a specific chemical or concentration to which Claimant was exposed which would have caused dystonia; and *that he could not give any objective medical evidence establishing a causal link between Claimant's employment*

⁴ Again, although two prior MRI studies had been performed.

*and movement disorder/dystonia.*⁵

The medical records of Biloxi Regional Medical Center indicate that a second neurology opinion was provided by Dr. Gregory Redmann on August 15, 2002. Exhibit 6, August 15, 2002 report of Dr. Redmann. The report of Dr. Redmann does not indicate a history of exposure to toxic fumes and provides no opinion as to the causal connection of Claimant's diagnosis of dystonia to the exposures Claimant alleges in the scope of his employment. Exhibit 6, August 15, 2002 report of Dr. Redmann.

The report of Dr. Terry Smith indicates that he was called in for consultation on August 16, 2002 following a finding of a cyst in the left internal capsule on an MRI of Claimant's brain. Exhibit 6, August 25, 2002 report. Dr. Smith's report indicates that an MRI performed the previous April also shows the presence of the cyst and upon review and comparison Dr. Smith believed that the cyst had not changed between the two studies. Exhibit 6, August 25, 2002 report. Because he did not see a change in the size of the lesion at that time, Dr. Smith did not believe at that time the lesion to be the source of Claimant's problems. However, *Dr Terry Smith was not involved in evaluating/reviewing subsequent diagnostic testing performed on the Claimant to include the MRI studies that were performed on Claimant's brain on October 8, 2002.*

The records of Dr. Jayaraman Rao indicate that he first saw Claimant on August 30, 2002. Exhibit 8, August 30, 2002 report. A history of exposure to ammonia and pool chemicals is indicated. Exhibit 8, August 30, 2002 report. At that time, Dr. Rao diagnosed Claimant with dystonia *of unknown etiology*. Exhibit 8, August 30, 2002 report. A September 6, 2002 report of

⁵ This is the crux of the case which Claimant entirely glosses over, choosing instead to only discuss the opinions of Dr. Kalnas.

Dr. Rao once again indicates that Claimant has dystonia of *unknown etiology* and recommends that Claimant increase his dosage of Artane as tolerated. Exhibit 8, September 6, 2002 report.

The last report of Dr. Rao dated November 4, 2002 indicates that Claimant was beginning to have hallucinations and that a recent MRI and EEG were negative. Exhibit 8, November 4, 2002 report. Once again, Dr. Rao's notes include his diagnosis of dystonia of *unknown etiology*. Exhibit 8, November 4, 2002 report

The medical records of Dr. Jianhua Zhu in Bowling Green, Kentucky were entered as Exhibit 3. These records include a letter to Dr. Gorman dated January 15, 2003 following initial examination of Claimant. Exhibit 3, January 15, 2003 letter. The history included is that Claimant inhaled ammonia and muriatic acid while collecting garbage. Exhibit 3, January 15, 2003 letter. At that time Dr. Zhu diagnosed Claimant with secondary generalized dystonia *but did not give an opinion as to the etiology of the condition*.

The records indicate that Claimant was examined by Dr. Zhu on April 30, 2003 at which time *Dr. Zhu indicated that he had reviewed the record and noticed a discrepancy regarding what Dr. Gorman indicated was shown by the MRI and a report from another MRI the same day indicating the presence of a left sided cyst*. Exhibit 3, April 30, 2003 report.

In an August 1, 2006 notation in the records of Dr. Zhu, it is indicated that Claimant wished to set the deposition of Dr. Zhu. Exhibit 7. In response, Dr. Zhu indicates that *"I could only comment on what he has at present; any relationship to the initial alleged poisoning only has speculative rather than substantial power."* Exhibit 7.

The report of Dr. John Fang, Neurologist at Vanderbilt University, indicates that he examined Claimant on February 6, 2003. Exhibit 9. Dr. Fang's report indicates that symptoms such as

Claimant's can sometimes be seen with Huntington's or Wilson's disease. Exhibit 9.

The October 29, 2004 report of Dr. Jonas Kalnas is attached to the deposition of Dr. Kalnas as an exhibit. Exhibit 5, exhibit 2. Dr. Kalnas is a specialist in Occupational and Environmental Medicine at Vanderbilt University. Exhibit 5, exhibit 1. The report of Dr. Kalnas further provides a comprehensive summary of the records of Biloxi Regional Medical Center, Dr. Rickey Chance, Dr. Richard Gorman, Dr. Gregory Reddmann, Dr. Terry Smith, Dr. Jayaraman Rao, Dr. Jianhua Zhu, Dr. John Fang and various radiologists. Exhibit 5, exhibit 2. Additionally, the report of Dr. Kalnas addresses the opinion of Dr. Gorman as included in both the records of Dr. Gorman and Dr. Gorman's deposition testimony. Exhibit 5, exhibit 2.

Following his summary of the medical records and deposition testimony of Dr. Gorman, Dr. Kalnas provides a general discussion of dystonia and chorea movement disorders. Exhibit 5, exhibit 2. Dystonia, Dr. Kalnas states in his report, results from an abnormality in the basal ganglia, an area in the brain where some of the messages that initiate muscle contractions are processed. Exhibit 5, exhibit 2. Dr. Kalnas discusses that dystonia can be either primary or secondary. Exhibit 5, exhibit 2. Primary dystonia, he indicates, has no connection to disease or injury and is also referred to as idiopathic dystonia. Exhibit 5, exhibit 2. Secondary dystonia, he notes, is also known as acquired dystonia and occurs as a result of damage to the basal ganglia such as birth injury, certain infections, certain drugs, heavy metal or carbon monoxide, trauma, stroke or underlying neurologic disorders. Exhibit 5, exhibit 2.

Dr. Kalnas notes that some toxic substances are known to cause neurological damage and may cause movement disorder *after repeated or prolonged exposure over a period of months or years*. Exhibit 5, exhibit 2. Such symptoms, Dr. Kalnas indicates, develop gradually as exposure

accumulates. In contrast, Dr. Kalnas states that with a stroke, infarct, or hemorrhage of a vascular formation such as a hemangioma, onset of movement disorders is abrupt. The chemicals or substances which Dr. Kalnas indicates are known to cause dystonia (movement disorder) are manganese, carbon disulfide, cyanide, carbon monoxide, methanol, disulfuran, 3-nitropropionic acid, wasps stings, alcohol and toluene. Exhibit 5, exhibit 2.

In concluding that Claimant's symptoms were not brought about by any of the chemicals to which he alleges he was exposed (Clorox or chlorine, bromine, muriatic or hydrochloric acid, and ammonia), Dr. Kalnas discusses that none of these chemicals are indicated in the scientific literature to cause dystonia (movement disorder) symptoms. Exhibit 5, exhibit 2. Further, Dr. Kalnas emphasizes that *dystonia or chorea only occur after prolonged repetitive exposure to chemicals* and that Claimant's history of exposure would not be indicative of the history expected if his symptoms were caused by chemical exposure. In further ruling out other known chemicals that cause dystonia, Dr. Kalnas discusses that the facts are not consistent with exposure to manganese, toluene, carbon monoxide, or chronic alcoholism, and also discusses what would be expected for symptoms to arise as result of exposure to each of these.

After ruling out chemical exposure as the cause of Claimant's symptoms, Dr. Kalnas discusses his opinion that the Claimant's symptoms are explained by the lesion shown on the progression of MRIs performed which lesion, he states, represents hemangioma or lacunar infarct. Exhibit 5, exhibit 2. Dr. Kalnas notes that in reviewing the series of CT and MRI scans from April 02, August 2002, and October 2002, a lesion at the left basal ganglia was noted to increase in size from 8 millimeters on April 12, 2002, to a 5 by 10 millimeter lesion seen on August 16, 2002, and

a 12 millimeter lesion seen on October 8, 2002.⁶

In further support of his conclusion that Claimant's symptoms are related to the lesion seen on the radiological studies, Dr. Kalnas cites the history of Claimant's high blood pressure as well as the family history of atherosclerotic heart disease and hypertension. He notes the medical literature that shows hypertension as being one of the precursors to hemangioma and/or lacunar infarct.

In discussing how he arrived at his conclusions, Dr. Kalnas also includes in his report a detailed description of the step by step scientific methodology he used in reaching his diagnosis.

In conclusion, Dr. Kalnas states in his report that to a reasonable degree of medical certainty, Claimant's exposure to chemical substances suspected to be chlorine, bromine, hydrochloric acid and ammonia while picking up garbage did not cause Claimant's movement disorder that started on August 10, 2002. Rather, Dr. Kalnas opines, with medical and scientific support, that in his opinion, to a reasonable degree of medical probability, that the lesion in Claimant's basal ganglia indicated by the radiographs discussed above is the cause of Claimant's movement disorder. These types of lesions, Dr. Kalnas states, can be congenital and/or the result of hypertension.

The deposition testimony of Dr. Kalnas was taken on September 10, 2007 and was entered into evidence. Exhibit 5. At his deposition, Dr. Kalnas testified on direct examination that since his report of October 29, 2004, he had the opportunity to review additional records of Dr. Zhu at Gilbert Neurology Clinic. Exhibit 5, p. 12. In response to the question as to whether these additional records had an impact on his prior opinion, Dr. Kalnas testified that the new records

⁶ Claimant asserts that the onset of symptoms prior to the last noted increase of size shows this increase in size is not responsible for Claimant's symptoms. This statement is rank speculation by the author of Claimant's Brief, who is not a medical expert, and there is no medical evidence presented by Claimant to support this assertion. Further, *Dr. Gorman specifically testified that he did not know what the finding of the lesion in the MRI meant.*

reinforce his opinion stated in the October 29, 2004 report because the findings of MRIs ordered by Dr. Zhu in 2005 and 2006 indicate that the size of the brain lesion causing the movement disorder decreased. Exhibit 5, p. 12, 13.

In further support of his opinion, Dr. Kalnas testified to Claimant's history of high blood pressure and family history of hypertension and heart disease indicating that 75% of patients with lacunar infarcts have high blood pressure. Exhibit 5, p. 14, 15. In addition, Dr. Kalnas reiterated that both lacunar infarcts as well as hemangiomas are known to cause movement disorders. Exhibit 5, p. 18.

In specifically addressing the opinion of Dr. Terry Smith as to whether the lesion seen in the radiographic films was causing Claimant's symptoms, Dr. Kalnas noted that Dr. Smith's opinion was limited in that his opinions/review of the medical information in this case did not include review/evaluation of the October 8, 2002 MRI study. Exhibit 5, p. 25, 26, 38. Dr. Kalnas testified it was the October 8, 2002 study which was interpreted to show a 50% increase in size of the lesion in the basal ganglia. Exhibit 5, p. 25.

Finally, specifically addressing the more recent 2005 and 2006 MRI studies, Dr. Kalnas testified that the reports indicate a smaller lesion but the appearance of damaged brain tissue. Exhibit 5, p. 32, 33. In explaining this process, Dr. Kalnas testified that what usually happens with such lesions is that after the initial bleeder expansion in size, the blood is absorbed, the lesion gets smaller, but the damage that was caused around the area of the hemorrhaged hemangioma or the lacunar infarct remains. Exhibit 5, p. 32. As already indicated, Dr. Kalnas testified that these findings support his conclusion as to the cause of Claimant's condition because the changes in size of the lesion further support the presence of a hemangioma or lacunar infarct.

On cross examination, Dr. Kalnas was asked several questions in regards to performing a physical examination on Claimant. In response, Dr. Kalnas first testified that he agreed with the other doctors that Claimant had a movement disorder. Exhibit 5, p. 41. Dr. Kalnas testified that after reviewing the deposition of Claimant and all of the medical evidence to perform a causation analysis and excluding the alleged exposures as the cause of his symptoms, an interview or examination of the Claimant would not have contributed anything further to his analysis. Exhibit 5, p. 41. Dr. Kalnas testified that had he been asked to give an impairment rating or a description of Claimant's disabilities then he would have wanted to see the Claimant. Exhibit 5, p. 41.

Finally, Dr. Kalnas testified regarding the scientific method he used to exclude toxic exposure as the cause of Claimant's symptoms and to diagnose the lesion in the basal ganglia as the cause. Exhibit 5, p. 26-35. In conclusion, Dr. Kalnas testified that his opinion to a reasonable degree of medical probability, as indicated in his prior report, was that Claimant's condition was not caused by exposure to chemical substances suspected to be chlorine, bromine, hydrochloric acid and ammonia while picking up garbage during the scope of his employment and that such symptoms were rather the result of a lesion in Claimant's basal ganglia. Exhibit 5, p. 39, 40.

SUMMARY OF THE ARGUMENT

The burden of proof in any workers compensation claim *is on the Claimant*. The Mississippi Supreme Court has discussed on several occasions what must be established for a claimant to prove causation in a chemical exposure case such as the present. The Order of the Administrative Judge, as affirmed by the Full Workers Compensation Commission, discusses these cases at length and correctly applied their holdings to the present matter.

As discussed by the Administrative Judge, the Claimant failed to meet his burden of proof by putting forward credible evidence to establish the causation element of his claim. On the other hand, as the Administrative Judge found, the expert for Employer and Carrier provided credible medical testimony to rebut the speculative causation opinion of Dr. Gorman and explain the non-work related etiology of Claimant's condition.

ARGUMENT

I. Standard of Review

Appellate courts review fact findings of the Commission based on the standard of substantial evidence. Miss. Code Annotated §71-3-15 (1972, as amended); Walker Manufacturing Co. v. Cantrell, 577 So. 2d 1243, 1246, 1247 (Miss. 1991). Fact findings of the Commission can be reversed only if such findings are manifestly wrong, arbitrary and capricious or not supported by substantial evidence. Raytheon Aerospace Support Services v. Miller, 861 So. 2d 330, 335 (Miss. 2003); Georgia Pacific Corp. v. Gregory, 589 So. 2d 29, 1250 (Miss. 1992).

When considering questions of law, on the other hand, the Commission is accorded no deference and appellate review is de novo. ABC Mfg. Corp. v. Doyle, 749 So. 2d 43, 45 (Miss. 1999).

II. **The Determination of the Administrative Law Judge/Full Commission that Claimant's condition is not causally related to either date of May 21, 2002 or August 6, 2002 is correct as a matter of law and based upon the substantial, credible evidence and the determination of the Administrative Law Judge/Full Commission that Claimant sustained no work-related injury and/or accident on August 6, 2002 is correct as a matter of law and based upon the substantial, credible evidence.**

As in any workers compensation claim, Claimant has the burden of proving by a preponderance of the evidence (1) an accidental injury; (2) arising out of and in the course of employment and (3) a causal connection between the injury and the claimed disability. Moore v. Independent Life and Accident Ins. Co., 788 So.2d 106 (Miss. Ct. App. 2001); Hedge v. Leggett & Platt, Inc., 641 So. 2d 9, 13 (Miss. 1994).

The Mississippi Supreme Court and the Mississippi Court of Appeals have addressed the causation element for a "chemical exposure injury" in several cases as cited by the Administrative

Judge. See Sperry Vickers, Inc. and Liberty Mutual v. Honea, 394 So.2d 1380 (Miss. 1981); Sharpe v. Choctaw Electronic Enterprises, 767 So.2d 1002 (Miss. 2000). The most recent case discussed by the Administrative Judge in her opinion is Hensarling v. Casablanca Construction Co., 906 So.2d 874 (Miss. Ct. App. 2005), which is factually similar to the present case.⁷ Since the Order of the Administrative Judge, the Court of Appeals has affirmed a decision in favor of the employer and carrier in a chemical exposure case in Langford v. Southland Trucking, LLC, 2010WL 918339 (Miss. Ct. App.) which is also similar to the present case.

In Hensarling, the claimant alleged that he developed neutropenia due to his exposure to toxic chemicals, termite, and pest control treatments within the scope of his employment. Id. at 875. The medical evidence before the Commission in Hensarling consisted of Dr. Bearman, a family practice physician who testified that he did not form an opinion as to the etiology of Claimant's condition; Dr. Smith, a hematologist and oncologist who testified that he was not able to determine any particular chemical that caused the claimant's condition; and Dr. Cox, a toxicologist who testified that the claimant's condition was causally related to co-trimoxazole, a medication which the claimant was taking for an unrelated condition. Id. at 877-88. Although the Administrative Judge found that the conditions which the claimant alleged were compensable, the Full Commission reversed the finding of the Administrative Judge which finding of the Full Commission was affirmed by the Court of Appeals.

The Court of Appeals specifically distinguished Hensarling from Honea and Sharpe cited

⁷ Notably, Hensarling v. Casablanca Construction Co., 906 So.2d 874 (Miss. Ct. App. 2005) is the primary case which the Administrative Judge discussed at length and which the Claimant did not even cite, much less distinguish, in his Brief.

above.⁸ *Id.* at 878. The Commission and Court of Appeals stated that unlike in *Sharpe*, there was no identifiable chemical exposure during Hensarling's employment and that Hensarling "*failed to present evidence of any substance to which he was exposed during the performance of his duties which could cause neutropenia.*" *Id.* Further, the Commission and Court of Appeals, citing the holding in *Honea*, stated that *in order to recover workers compensation benefits, "injuries must be proven by credible medical evidence rather than by mere speculation..."* *Id.* The Commission and Court of Appeals went on to find that Hensarling failed to put forward credible evidence to prove the causal relationship between his employment and his injuries and found that *the only credible medical evidence regarding causation supported the finding that the Claimant's condition was caused by co-trimoxazole, the medication which he was taking for an unrelated condition.* *Id.*

Coming back to the case at bar, the medical evidence presented by Claimant and Employer/Carrier is nearly identical to the evidence before the Commission and Court of Appeals in *Hensarling*. As the Administrative Judge correctly noted, there is no opinion as to causation provided by Dr. Chance, Dr. Redmann, Dr. Rao or Dr. Fang. Specifically, Dr. Rao diagnosed Claimant with dystonia of unknown etiology and Dr. Fang stated that Huntington's Disease, Wilson's disease or exposure to carbon monoxide could cause Claimant's symptoms. Dr. Zhu, Claimant's most recent treating physician, stated that an opinion as to whether Claimant's condition is causally related to the alleged exposures would be speculative.⁹

⁸ And *Sharpe* was cited by the Claimant in his Brief.

⁹ Dr. Smith never treated Claimant for dystonia, and only interpreted MRI studies performed on Claimant's head in April 2002 and August 2002. As discussed by Dr. Kalnas, Dr. Smith did not have the benefit of reviewing subsequent MRI studies, particularly the October 2002 study, which document the

To correlate the case at bar with Hensarling, these doctors fill the role of Dr. Bearman who did not have an opinion as to the etiology of Claimant's condition.

We are therefore left with the opinions of Dr. Gorman and Dr. Kalnas regarding whether Claimant's dystonia is causally related to chemical exposure while working for Employer.

Although Dr. Gorman opined that Claimant's condition was caused by exposure to a toxic substance, he did not provide any scientific studies or any objective medical evidence whatsoever establishing a link between exposure to the chemicals to which Claimant alleged he was exposed within the scope of his employment and the dystonia symptoms which Claimant subsequently developed. Furthermore, Dr. Gorman testified that there are no objective medical findings to correlate his diagnosis of secondary dystonia with exposure to a toxic substance. See Deposition of Gorman p. 52, lines 2-10; p. 59, lines 12-22. ***Considering the opinion of Dr. Gorman alone, even without the rebutting opinion of Dr. Kalnas, Claimant failed to present credible medical evidence of any substance to which he was exposed during the performance of his duties which could cause dystonia. See Hensarling, 906 So.2d at 878.***

To once again correlate the case at bar with Hensarling, Dr. Gorman fills the role of Dr. Smith, who testified in Hensarling that he was not able to determine any particular chemical that caused the claimant's condition.

Dr. Kalnas, however, fills the role of Dr. Cox who in Hensarling provided credible medical evidence to establish the cause of the claimant's condition was a medication the claimant was taking for an unrelated condition rather than the chemical exposure which the claimant alleged.

more drastic changes in size of the lesion. It was on the October 2002 study on which Dr. Kalnas particularly relied in concluding Claimant's symptoms to be caused by either a hemangioma or lacunar infarct as shown on the films.

Dr. Kalnas described his methodical research citing multiple scientific authorities which document the relation of dystonia to chemical exposure and he explained the facts leading to his conclusion that Claimant's history is *not indicative of exposure to any of these substances known to cause dystonia*.¹⁰ Nevertheless, as Dr. Cox did in *Hensarling*, Dr. Kalnas put forth credible medical evidence establishing the cause of Claimant's dystonia to be the non-employment related condition of either a lacunar infarct or hemangioma..

Dr. Kalnas documented the growth of the lesion shown in Claimant's basal ganglia and gave testimony regarding the causal relation of this lesion to Claimant's dystonic symptoms. There is no evidence in the record to contradict the opinion of Dr. Kalnas which he bases on the radiological findings.¹¹ Dr. Kalnas notes that the October 2002 MRI study showing a 50% increase in size of the lesion is the determinative study, yet the report of the reviewing radiologist shows he did not have a prior study for comparison at the time. In addition, *the subsequent report of Dr. Gorman wrongfully states that the October 2002 MRI shows no change*.

The opinion of Dr. Kalnas, which he arrived at after exhaustive review of scientific studies on chemical exposure and dystonia, and after exhaustive review of the medical records, is the only credible medical evidence which actually accounts for an objection review of research of the chemicals to which Claimant alleges he was exposed. Further, the opinion of Dr. Kalnas is the only credible affirmative medical evidence explaining the etiology of Claimant's condition which

¹⁰ Again, Claimant entirely glosses over this aspect of the opinion of Dr. Kalnas in his brief which is actually the crux of the case, i.e. whether the dystonia is causally related to Claimant's employment. Instead, Claimant repeatedly refers to Dr. Kalnas as a "retained expert" in an effort to hide the proverbial ball.

¹¹ As previously indicated, Dr. Gorman even testified that he did not know what the radiological findings meant.

establishes that Claimant's symptoms are the result of either a lacunar infarct or hemangioma, neither of which were caused by the Claimant's work activity or environment.

Claimant completely ignores the fact that he had the burden of proof, including the burden of proving that the condition at issue is causally related to his employment. See Manning v. Sunbeam-Oster Household Products, 979 So.2d 736, 740 (Miss. Ct. App. 2008) (citing Hedge v. Leggett cited supra). Claimant does not address or distinguish Hensarling as cited by the Administrative Judge establishing the necessary proof of causation in chemical exposure cases.

The Mississippi Court of Appeals and the Mississippi Supreme Court have stated that where there is conflicting medical evidence, the credible evidence is controlling. Manning, 979 So.2d at 744-45 (citing Hardaway v. Bradley, 887 So.2d 793 (Miss. 2004)). The Administrative Judge correctly determined that Hensarling directly controls what constitutes credible evidence in a chemical exposure case such as the present case. Therefore, the Administrative Judge correctly determined that the credible medical evidence shows that Claimant's condition is not causally related to a chemical exposure within the course and scope of his employment and therefore correctly denied Claimant's claims.

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that his medical condition for which he seeks benefits per the Mississippi Workers' Compensation Act is causally related to either alleged exposure in May 2002 or August 2002. Instead, the preponderance of the medical evidence establishes that Claimant suffered either a hemangioma or lacunar infarct which is the cause of his condition.

Furthermore, The Claimant failed to prove by a preponderance of the evidence that he

sustained a work related injury/accident on August 6, 2002 (The Employer and Carrier submit that even if the Claimant did prove an injury/accident occurring on this date that he still failed to prove that his medical condition for which he is seeking benefits would be compensable).

Therefore, Employer and Carrier assert that the Circuit Court should affirm the finding of the Administrative Judge as affirmed by the Full Workers Compensation Commission that Claimant's medical condition for which he seeks benefits is not related to a chemical exposure within the course and scope of his employment and that Claimant did not suffer a work-related injury and/or accident on August 6, 2002.

Respectfully submitted,

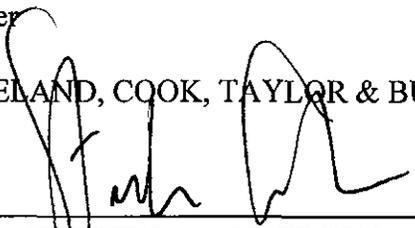
ALLIED WASTE NORTH AMERICA, INC. A/K/A
BFI, Employer

and

AMERICAN HOME ASSURANCE COMPANY,
Carrier

COPELAND, COOK, TAYLOR & BUSH, P.A.

By: _____


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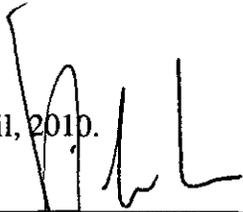
CERTIFICATE

I, STEPHEN A. ANDERSON and/or M. JASON SUMRALL, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Employer and Carrier to the following:

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Honorable Judge Dale Harkey
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Post Office Box 998
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SO CERTIFIED this the 12th day of April, 2010.



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