

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-311

QUALSERV CORPORATION and
TWIN CITY FIRE INSURANCE
COMPANY

APPELLANTS

V.

CLIFFORD RICH

APPELLEE

Opinion Delivered SEPTEMBER 21, 2011APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F903764]

AFFIRMED

ROBIN F. WYNNE, Judge

Qualserv Corporation and Twin City Fire Insurance Company appeal from a decision of the Arkansas Workers' Compensation Commission in which the Commission found that Clifford Rich's exposure to cobalt dust while at work aggravated his preexisting chronic obstructive pulmonary disease (COPD). Appellants argue that appellee failed to prove that exposure to dust while working aggravated his COPD. They also argue that appellant failed to prove the proportion of his disability attributable to the exposure. We affirm the Commission's decision.

Mr. Rich went to work for the Circle R Machine Shop, which is a division of Qualserv Corporation, on January 2, 2008. His job duties included precision grinding of wood-working and metal-working tools. Appellant described his job as sharpening and repairing bits that were dull or broken. According to Mr. Rich, all of the grinding he did was carbide or tungsten carbide. He stated that his work created an "extreme amount" of dust.

Mr. Rich testified that from January 2008 until the end of 2008 or beginning of 2009, Circle R's overhead-exhaust system did not function. John Sherell, a manager at Circle R, testified that the dust control system did work but admitted that there had been some trouble with it. Mr. Rich further stated that he was not instructed about protective measures, nor was he required to wear a mask.

The Occupational Safety and Health Administration (OSHA) conducted an inspection of Circle R that was completed on June 2, 2009. Air monitoring was performed in the shop on March 25, 2009. The OSHA inspection found that the ventilation system was inadequate to protect the employees from airborne dust. The OSHA inspection also revealed that the airborne concentration of cobalt dust exceeded the permissible exposure limit. The employer hired Environmental Enterprise Group (EEG) to perform a second inspection, which was done in June 2009. Based upon the results, EEG had no recommendation other than a routine monitoring program. Mr. Rich testified before the Commission that the amount of dust in the air when both air samples were taken was less than the amount normally present. Dennis Huckabee, another employee at Circle R, testified that the amount of grinding done at the shop on the date of the OSHA inspection was not the average amount. Mr. Huckabee also testified that the man who performed Mr. Rich's job prior to him was on disability due to breathing problems.

Mr. Rich testified that his breathing gradually worsened and that on June 16, 2008, he attempted to work but could not breathe. That day, he was seen at the St. Edward Mercy Medical Center emergency room for his respiratory problems. Tests performed on Mr. Rich

revealed evidence of moderate to severe COPD. In addition to COPD, Mr. Rich was diagnosed with bilateral pneumonia. The history given by Mr. Rich included tobacco use of four cigars per day at the time he was admitted. He also indicated that he began smoking at age fifteen and previously smoked one to two packs per day. A history that Mr. Rich gave in 2006 states that he used to smoke as much as four packs a day.

Following a consultation on June 23, 2008, Dr. Sarikun Tjandra stated that Mr. Rich's test results revealed findings that were most likely emphysematous changes and possible fibrosis due to Mr. Rich's smoking history. Dr. Tjandra also stated that he was not able to rule out possible dust exposure as the cause of the lung problems. On July 18, 2008, Carmen Oxford, an advanced practical nurse, stated in a report that Mr. Rich was reporting that he was having a lot of complications with difficult or labored respiration, especially when he was around the fine, powdery materials that his work would produce. On August 5, 2008, Mr. Rich reported to Nurse Oxford that, after being referred to Dr. Tjandra for a follow-up, Dr. Tjandra kept him on the same medication and recommended a job change.

Nurse Oxford reported on December 9, 2008, that Mr. Rich "continues to work in an environment that is most likely the main contributor to this shortness of breath and he has not changed his working environment at all." Nurse Oxford reported again on December 17, 2008, that if Mr. Rich "continues to work in the field that he is in, he will continue to have increasing problems with his lung dysfunction." In a clinic note dated February 20, 2009, Dr. Tjandra states, "whether [illegible] work place or not hard to tell. Ask him to [check with] occupational physician or get other job. He said currently have to find any job. Will

consider disability claim or job release [illegible].” Nurse Oxford stated in a note dated June 3, 2009, that Mr. Rich “has developed a history of chronic obstructive pulmonary disease that has become extremely prominent with him continuing to work in his current employment.”

In an opinion filed on August 11, 2010, the administrative law judge found that exposure to dust at his workplace did not cause Mr. Rich’s COPD, which was attributed to appellant’s use of tobacco, but that the exposure did temporarily aggravate his preexisting COPD. Appellants were ordered to pay the costs associated with the reasonable and necessary medical treatment related to the aggravation of Mr. Rich’s COPD. The Commission affirmed and adopted the ALJ’s opinion on January 26, 2011. Appellants have now appealed to this court.

In appeals involving claims for workers’ compensation, our court views the evidence in the light most favorable to the Commission’s decision and affirms the decision if it is supported by substantial evidence. *Hope Sch. Dist. v. Wilson*, 2011 Ark. App. 219, ___ S.W.3d ___. Substantial evidence exists if reasonable minds could reach the Commission’s conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm. *Id.*

Appellants are appealing from a determination by the Commission that appellant sustained a compensable aggravation of a preexisting condition. An employer takes an employee as he finds him, and employment circumstances that aggravate preexisting

conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting noncompensable condition by a compensable injury itself is compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). Arkansas Code Annotated section 11-9-102(4)(A)(i) (Supp. 2009) defines a compensable injury as

[a]n accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by objective medical findings. Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2009). “Objective findings” are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

Here, there are objective findings to support the diagnosis of COPD. The issue is whether there is sufficient evidence in the record to support the Commission’s finding that the aggravation of the preexisting COPD was compensable in that it arose out of and in the scope of appellee’s employment. Because Mr. Rich alleged that he sustained an occupational disease, 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) (Repl. 2002). Appellants argue that the causal connection was not proven

because no physician stated that exposure to cobalt dust caused Mr. Rich's breathing difficulties. They argue that Nurse Oxford's opinion regarding the cause of Mr. Rich's problems was impermissible speculation and that Dr. Tjandra could only state that the link between the dust exposure and the lung issues was "hard to tell," which they contend does not meet the reasonable degree of medical certainty for medical opinions addressing compensability and permanent impairment under Arkansas Code Annotated section 11-9-102(16)(B).

Dr. Tjandra did state that it was "hard to tell" whether appellant's breathing difficulties were linked to his employment. However, his was not the only medical opinion in the record. Nurse Oxford stated that appellant's employment was "most likely" the cause of his problems. Although appellants argue that Oxford's opinion is based on speculation, it is well settled that it is the province of the Commission to weigh conflicting medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Colebank v. T.J. Maxx*, 2009 Ark. App. 327. The language employed by Nurse Oxford is more definitive than terms such as "may," "could," or "possibly" that the supreme court has held do not meet the requirement of section 11-9-102(16)(B). See *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 533, 20 S.W.3d 280, 284 (2000).

In addition to the medical opinions regarding causation, there was other evidence to support the Commission's determination that appellant's employment aggravated his preexisting condition. The medical evidence does not indicate that Mr. Rich's COPD was symptomatic prior to his employment with Circle R. The OSHA study found that the

amount of dust in the workplace exceeded acceptable limits. Mr. Rich testified that the overhead-exhaust system was not functioning for a period of time while he was exposed to dust. There was also testimony that an employee who held Mr. Rich's job prior to him likewise experienced breathing problems. The evidence in the record regarding causation, taken as a whole, is sufficient to support the Commission's finding that appellant's employment aggravated his preexisting COPD.

Appellants also argue that Mr. Rich failed to prove the proportion of his disability attributable to the occupational disease as opposed to another noncompensable cause. Arkansas Code Annotated section 11-9-601(c)(1) (Repl. 2002) states

[w]here an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as the occupational disease, as a causative factor, bears to all the causes of the disability or death.

Appellants argue that appellee could not establish the proportion of his disability resulting from the dust exposure as opposed to his smoking habit. However, appellants failed to obtain a ruling from the Commission regarding whether section 11-9-601(c)(1) applies in this case. Because appellants failed to obtain a ruling from the Commission on this issue, their argument is not preserved and our review is precluded. *See Gray v. Johnson Employment Servs., LLC*, 2010 Ark. App. 812.

Affirmed.

GLADWIN and GRUBER, JJ., agree.