BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306621

MARY J. FANT, EMPLOYEE	**CLAIMANT**
ARKANSAS DEPT. OF HEALTH, EMPLOYER	**RESPONDENT**
PUBLIC EMPLOYEE CLAIMS DIV., TPA	**RESPONDENT**

OPINION FILED AUGUST 4, 2004

Hearing before Administrative Law Judge J. Mark White on July 8, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Richard S. Smith, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 8, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on March 29, 2004, and a Prehearing Order was entered that same day. A copy of the March 29, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including May, 2003; that the claimant earned an average weekly wage of $579.15, entitling her to a compensation rate of $386 for total disability benefits and $299 for permanent partial disability benefits; and that the respondents have controverted this claim in its entirety.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable occupational disease in May, 2003; whether the claimant is entitled to associated medical and indemnity benefits; and controversion and attorney's fees.

The claimant contends that she sustained a compensable occupational disease in May, 2003; that she contracted clostridium difficile bacteria during the course and scope of her employment; that she is entitled to temporary total disability benefits from on or about May 20, 2003, through September 2, 2003; that she is entitled to temporary partial disability benefits from September 2, 2003, through on or about September 16, 2003; that the medical treatment she has received to date has been reasonably necessary in connection with her injury; and that she is entitled to have her attorney's fee paid as permitted by law.

Respondents contend that this claim is not compensable pursuant to Ark. Code Ann. § 11-9-601(e)(2) & (3); that the claimant cannot prove by a preponderance of the evidence a causal connection between her infection and her work; and that the

claimant failed to give notice of her injury until June 12, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that her occupational disease resulted in disability.
4. The claimant has proven by a preponderance of the evidence that her occupational disease arose out of and in the course of her employment and was actually incurred in her employment.
5. The claimant has proven by a preponderance of the evidence a causal connection between her occupational disease and her employment.

6. The claimant has proven by a preponderance of the evidence that her occupational disease was due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the employment.

7. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable occupational disease in the form of a Clostridium Difficile infection.

8. The claimant has proven by a preponderance of the evidence that she contracted her occupational disease in immediate connection with a hospital in which persons suffering from that disease are cared for or treated.

9. The claimant has proven by a preponderance of the evidence that she was within her healing period from May 21, 2003, until January 12, 2004; and that she was totally incapacitated from earning wages from May 21, 2003, until August 25, 2003.

10. The claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from May 21, 2003, until August 25, 2003.

11. The claimant has proven by a preponderance of the evidence that her average weekly wage decreased as a result of her compensable occupational

disease from September 2, 2003, until September 17, 2003.

12. The claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from September 2, 2003, until September 17, 2003.

13. The claimant has proven by a preponderance of the evidence that the medical treatment she received for her occupational disease, including her hospitalization, surgery and related treatment, was reasonably necessary in connection with her compensable occupational disease.

14. The respondents have failed to overcome by a preponderance of the evidence the prima facie presumption that sufficient notice was given.

15. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a home health nurse. In the course of her employment duties in April and May, 2003, she provided nursing care to two patients, Mildred Martin and Lawrence Bell, who suffered from a bacterial infection known as Clostridium Difficile. On Friday, May 16, 2003, the claimant developed a fever of 103 degrees. She completed her work that day but

went home early. The next day she began to have diarrhea. By Monday her diarrhea had subsided and her temperature had dropped to 100.4, so she returned to work.

On Tuesday, May 20, her temperature was at 102 but she worked a full day. That afternoon, the diarrhea returned, but it was yellow and full of mucus. She testified that she had never experienced this type of diarrhea, but that her patient, Ms. Martin, was exhibiting the same type of diarrhea. That afternoon the claimant attempted to set up an appointment with her personal physician, but he was unavailable. By this time, the claimant suspected that she had been infected with Clostridium Difficile, and she shared this information with the doctor's office. The doctor sent her to the hospital for lab work on Wednesday, May 21. The next day, May 22, he sent her to be admitted into DeQueen Regional Medical Center because her white blood cell count was abnormally high. The claimant was eventually diagnosed with Clostridium Difficile and treated with antibiotics.

On May 23, the claimant was transferred to Christus St. Michael Hospital in Texarkana. On May 25, Dr. Randall Schmidt performed a subtotal colectomy and ileostomy, removing most of the claimant's colon. She was discharged from the hospital on June 2 and directed to followup with Dr. Schmidt for postoperative wound care.

The claimant returned to work for the respondent-employer on September

2, 2003. She stopped working on March 26, 2004, as the result of an unrelated lung condition. She has not returned to work since.

II. Adjudication

A. Compensability

An occupational disease is statutorily defined as "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) (Repl. 2002). To prove her claim compensable, a claimant must prove by a preponderance of the evidence a causal connection between her disease and her occupation or employment. *Id.* Medical testimony is not required to prove such a causal connection. *Sanyo Mfg. Corp. v. Leisure,* 12 Ark. App. 274, 675 S.W.2d 841 (1984). To be compensable, the disease must also be "actually incurred" in the employment and must be "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." ARK. CODE ANN. § 11-9-601(g)(1)(A) (Repl. 2002). The hazards are "characteristic" where there is a "recognizable link" between the nature of the employment and an increased risk of contracting the disease. *Crossett School Dist. v. Gourley,* 50 Ark. App. 1, 899 S.W.2d

482 (1995).

This claimant contends she was infected with Clostridium Difficile as a result of her employment. *Dorland's Illustrated Medical Dictionary*, 29th Edition, defines Clostridium Difficile as a species of bacteria "that produces a toxin that causes pseudomembranous enterocolitis in patients receiving antibiotic therapy." *Dorland's* defines pseudomembranous enterocolitis as "an acute inflammation of the bowel mucosa." Clostridium Difficile "is associated with the administration of antibiotics and often affects in-patients in health care facilities." *Attorney's Textbook of Medicine*, § 229.137 (1995).

The first element of compensability is that the disease must result "in disability or death." ARK. CODE ANN. § 11-9-601(e)(1)(A). The claimant's testimony and the medical records submitted into evidence establish that the claimant was hospitalized for her infection and as a result missed work. I find that the claimant has proven by a preponderance of the evidence that her disease resulted in disability.

The remaining elements regard the causal connection between the claimant's disease and her employment. Prior to her diagnosis, the claimant provided nursing services in the course of her employment to Mildred Martin and Lawrence Bell, whose medical records were submitted into evidence. Those records show that both

Martin and Bell were infected with Clostridium Difficile at the time they were being treated by the claimant. In particular, the claimant testified that she treated Martin "almost every day" from the day Martin was released from her hospitalization for a Clostridium Difficile infection on April 18. Bell was diagnosed with the infection on May 9 and treated on an out-patient basis.

Dr. Randall Schmidt, the claimant's surgeon, opined in a May 28, 2004, letter:

> It is very rare for a patient to develop Clostridium difficile without antibiotic use, but it is a communicable disease that is transferred by the fecal/oral route. That means that stool that Ms. Fant would have had on her hands or gloves or clothing from taking care of these patient's [sic] with Clostridium difficile somehow entered her GI tract and caused her to have this deadly infection.

The claimant testified that when Martin returned home from the hospital, she was responsible for obtaining a stool sample, changing a Foley catheter, performing pericare, and bathing Ms. Martin – all activities that would have necessarily involved contact with fecal matter. The claimant testified that there were occasions in which she touched Martin and Martin's clothes and bed linens without gloves. In short, the claimant's testimony corroborates the etiology of the infection as described by Dr. Schmidt. Moreover, as noted above, Clostridium Difficile ordinarily develops in patients undergoing antibiotic therapy; the claimant testified she had taken no antibiotics for months prior to her infection.

I find that the claimant was infected with Clostridium Difficile as a result of her contact with either Lawrence Bell or Mildred Martin. Her contact with these patients occurred during the time-and-space boundaries of her employment and was for the purpose of executing her job duties – providing nursing care to her patients. I find that the claimant has proven by a preponderance of the evidence that her disease arose out of and in the course of her employment and was actually incurred in her employment. It follows *a priori* that I must also find that the claimant has proven by a preponderance of the evidence a causal connection between her disease and her employment.

As Dr. Schmidt's letter notes, this infection is spread by contact with fecal matter. The claimant's job duties as described in her testimony necessarily require contact with fecal matter. Though conceivably anyone could contract this disease, the nature of the claimant's employment was such that she frequently encountered the conditions necessary for transmission of the bacteria. I find that there is a recognizable link between the nature of her employment and an increased risk of contracting the disease, and that this infection is a hazard of her employment and its nature. Moreover, only a limited number of occupations require regular and frequent contact with fecal matter of diseased individuals, and the claimant's occupation is one of them. I find that the hazards of this disease are peculiar to the

claimant's employment. Given these findings of fact, I find that the claimant has proven by a preponderance of the evidence that her disease was due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the employment.

The claimant has proven every element of a compensable occupational disease. I therefore conclude that the claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease in the form of a Clostridium Difficile infection. The respondents are liable for treatment of the infection and every consequence naturally flowing therefrom. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999).

The respondents contend that this claim is barred by Ark. Code Ann. § 11-9-601(e)(2), which provides:

> No compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in or immediate connection with a hospital or sanitorium in which persons suffering from that disease are cared for or treated.

The claimant was not employed by a hospital or sanitorium; therefore, the question is whether she contracted her disease in "immediate connection" with a hospital where persons suffering from Clostridium Difficile are treated. This phrase is not defined by statute; I note that "connection" may be defined as "an association

or relationship." *American Heritage Dictionary*, p. 311 (1991).

As noted above, the evidence establishes that the claimant contracted her Clostridium Difficile infection from either Mildred Martin or Lawrence Bell. Martin developed Clostridium Difficile while being treated for a urinary tract infection in a nursing home; she was admitted to DeQueen Regional as an inpatient for treatment of the Clostridium Difficile infection and released on April 18, 2003. The claimant testified that she treated Martin "almost every day" beginning April 18. Bell had been hospitalized at DeQueen Regional Medical Center for a ruptured appendix and subsequently developed Clostridium Difficile. Bell was never admitted for treatment of Clostridium Difficile, but he was tested and diagnosed with the infection – in other words, treated – at DeQueen Regional on May 9, 2003. The claimant's symptoms began on May 16, 2003.

There is clearly a relationship between the claimant's contraction of this bacteria and DeQueen Regional Medical Center, in that the patients who gave her the infection were both treated at DeQueen Regional for their infections. This relationship is immediate, in that the claimant was exposed to the bacteria within days of her patients' treatment at DeQueen Regional – in the case of Martin, the very day she was released from the hospital. DeQueen Regional is a hospital that treats individuals with this infection, as both patients were treated there for their infection.

Given these facts, I must find that the claimant has proven by a preponderance of the evidence that she contracted her infection in immediate connection with a hospital in which persons suffering from that disease are cared for or treated.

In making this finding, I am aware that the Court of Appeals has previously said in *dicta* that this particular section of the statute was intended "to protect hospital and sanatorium workers." *Osmose Wood Preserving v. Jones,* 40 Ark. App. 190, 843 S.W.2d 875 (1992). Nonetheless, it is well settled that a statute "must be construed so that no word is left void or superfluous and in such a way that meaning and effect is given to every word therein." *Clemmons v. Office of Child Support Enforcement,* 345 Ark. 330, 47 S.W.3d 227 (2001). To interpret this statute to exclude compensation for all but employees of hospitals or sanitoriums would render superfluous and void the phrase "or immediate connection with."

The respondents also contend that this claim is barred by Ark. Code Ann. § 11-9-601(e)(3), which provides:

> No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

The fact that the general public may contract a disease is not controlling; the test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments. *Heptinstall v. Asplundh Tree Expert Co.,* 127 S.W.3d

486 (Ark. App. 2003).

As noted above, I find that there is a recognizable link between the nature of the claimant's employment and an increased risk of contracting the disease. Therefore, this provision of the statute will not bar compensation.

B. Benefits

The claimant contends she is entitled to payment of her medical expenses, and to temporary total disability benefits from May 21, 2003 through September 2, 2003. At the beginning of the hearing the claimant's counsel amended the initial date to May 20, but the claimant's testimony later established that she did work a full day on May 20.

Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant was hospitalized as a result of her infection and surgery from May 22, 2003, until June 2, 2003. It was not until August 25, 2003, that Dr. Schmidt recommended that the claimant return to work. The claimant actually returned to work the following Tuesday, September 2. Dr. Schmidt released the claimant from his care as of January 12, 2004.

Given this evidence, I find that the claimant has proven by a preponderance of the evidence that she was within her healing period from May 21, 2003, until January 12, 2004; and that she was totally incapacitated from earning wages from May 21, 2003, until August 25, 2003. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from May 21, 2003, until August 25, 2003.

An employee is also entitled to temporary partial disability benefits where the employee's average weekly wage has decreased as a result of his compensable injury. ARK. CODE ANN. § 11-9-520. The claimant testified that she worked only part time as of September 2 so as to "build up" her strength. She resumed her full-time schedule on September 17, 2003. I find that the claimant has proven by a preponderance of the evidence that her average weekly wage decreased as a result of her compensable occupational disease from September 2, 2003, until September 17, 2003. I therefore conclude that the claimant has proven by a preponderance of

the evidence that she is entitled to temporary partial disability benefits from September 2, 2003, until September 17, 2003.

Medical Treatment

An employer must 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). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Dr. Schmidt opined in his May 28, 2004, letter that the claimant's hospitalization and colectomy surgery were necessary to treat her Clostridium Difficile infection; in fact, he opined that the claimant would have died without the surgery. There is no medical evidence in the record suggesting or establishing that the medical care received by the claimant was not reasonably necessary. Therefore, given the records of Dr. Schmidt and the claimant's other physicians, I find that the claimant has proven by a preponderance of the evidence that the medical treatment she received for her Clostridium Difficile infection, including her hospitalization, surgery and related treatment, was reasonably necessary in connection with her compensable occupational disease.

C. Notice

Employees are required to promptly notify their employers of any injury, and employers are ordinarily not responsible for payment of indemnity or medical benefits accrued prior to the employee's report of injury. ARK. CODE ANN. § 11-9-701 (a)(1). There is a prima facie presumption that sufficient notice was given. ARK. CODE ANN. § 11-9-707(2). It is thus the respondents' burden to overcome the prima facie presumption by a preponderance of the evidence. *See, e.g., Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981) (application of different prima facie presumption in workers' compensation context).

The claimant testified that she notified the respondent-employer of her infection on May 21, 2003, by telephone call to the office manager, Teresa Robinson. The Form 1 submitted by the respondent-employer itself identifies the "date employer notified" as May 21, 2003. The claimant did testify that she completed this paperwork herself, but there is no evidence whatsoever that the respondent-employer ever attempted to correct, change or explain this date before submitting the Form 1. Finally, the claimant testified that the respondent-employer's administrator, Shirley Hadley, came and spoke to her about the infection and its relationship to her work the second day she was hospitalized, May 23, 2003. The respondents did not call Hadley and Robinson to testify, and they presented no

evidence whatsoever to contradict the claimant's testimony.

As noted above, the respondents have the burden of proving that sufficient notice was not given. Given the claimant's testimony and the Form 1 submitted by the respondent-employer, I find that the respondents have failed to overcome by a preponderance of the evidence the prima facie presumption that sufficient notice was given.

AWARD

The claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease; that the medical care she has received has been reasonably necessary in connection with her disease; and that she is entitled to temporary total and temporary partial disability benefits. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Gregory R. Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

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HON. J. MARK WHITE
Administrative Law Judge