

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706592/F710717

JONATHAN SULLIVAN

CLAIMANT

MEDI HOMES

RESPONDENT

GUARANTEE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED **MAY 14, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JOHN DAVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 12, 2008, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on December 12, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates in May and June of 2007, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$227.00 for total disability and \$170.00 for permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant contracted an occupational disease or infection in May or June of 2007.
2. The claimant's entitlement to medical services and temporary total disability from June 4, 2007 through June 11, 2007 and July 9, 2007 through August 7, 2007.
3. Attorney's fee.

In regard to these issues, the claimant contends:

"a. The claimant contends that he developed an occupational infection as a result of being exposed to infected patients while he was performing employment services.

b. The claimant contends that he is entitled to temporary total disability benefits for the periods of June 4, 2007 until June 11, 2007 and July 9, 2007 until August 7, 2007. The claimant contends that he is entitled to reasonably necessary medical treatment.

c. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"a. Claimant did not contract an MRSA infection in the course and scope of his employment with respondent Medi-Home, Inc.

b. It is the position of the respondents that this is the second claim filed by the claimant relating to the same alleged injury. The first claim is F706592. Respondents contend that the two claims should be consolidated."

_____The Commission currently has two claim files involving this case. The first, is F706592 and the second, F710717. However, both of these claim files involve the same alleged occupational disease and arise out of the same alleged period of employment related exposure. Thus, these two claims should be consolidated under one claim file. The Clerk of the Commission is hereby

requested to consolidate these two claims under one of the currently assigned claim numbers.

DISCUSSION

The central issue in this case is whether the claimant's cutaneous infection and resulting abscess in the right suprapubic area, which was caused by Methicillin resistant Staphylococcus aureus bacteria (MRSA) represents an occupational disease, under Ark. Code Ann. §11-9-601. The burden rests upon the claimant to prove that his condition satisfies all of the statutory requirements for a compensable occupational disease.

At this point, it becomes necessary to address a corollary issue. Subsequent to the hearing, the claimant tendered a one-page notation from Dr. Danny Silver, one of the claimant's treating physicians. The respondents objected to the late tender of this medical report or record.

The pre-hearing order (Commission's Exhibit No. 1) provided that all documentary evidence must be identified seven days prior to the scheduled hearing and tendered at the hearing. This order further provided that any evidence, including medical or documentary evidence, that was not offered in compliance with the foregoing requirements, would only be admitted for good cause shown. These requirements conform to the provisions of Ark. Code Ann. §11-9-705(c).

In order to present evidence, subsequent to the hearing, the party tendering such evidence must establish that the evidence offered meets the criteria for "newly discovered" evidence. This the claimant failed to do.

The documents attached to the letter tendering the report in question show that the tendered document was initially sent to Dr. Silver on November 20, 2007, by the claimant's attorney. A follow up letter by the claimant's

attorney with another blank copy of the tendered report was mailed and faxed to Dr. Silver on February 1, 2008. It was this blank faxed copy that Dr. Silver ultimately completed and dated February 7, 2008.

I am confident that this report from Dr. Silver was not actually received by the claimant's attorney until February 26, 2008, as the claimant's attorney states. None the less, this report was apparently in existence prior to the hearing. It should have been apparent that this requested report had not been received from Dr. Silver by the time of the hearing on February 12, 2008. However, no request was made by the claimant to either continue the hearing or to leave the record open for the introduction of additional medical evidence. The lack of diligence on the part of Dr. Silver or his staff in providing the claimant with the February 7, 2008 report, does not relieve the claimant of his obligation to take all reasonably possible steps to obtain and tender, in a timely manner, all of the documentary evidence that the claimant wishes to present.

It is my opinion that the claimant has failed to show that this report of Dr. Silver could not have been obtained and tendered in a timely manner by experiencing due diligence. I further find that the introduction of this report would not change the outcome of this case. Therefore, this untimely tendered report does not constitute "newly discovered evidence". As it was not timely tendered into evidence (in accordance with the pre-hearing order and the provisions of Ark. Code Ann. §11-9-705(c)), it will not be considered as evidence in this case. For the purposes of Appellate review only, the letter of transmittal from the claimant's attorney, dated February 26, 2008, with all attachments thereto will be placed into the record as Commission's Exhibit No. 2.

In order to constitute a compensable "occupational disease", the disease must result in disability or death and must either arise out of and be in the course of the employment or follow as a natural or unavoidable result of a compensable injury, Ark. Code Ann. §11-9-601(e)(1)(A). Under current law, the causal relationship between the disease and the employment, which is necessary to prove that the disease arose out of and occurred in the course of the employment, need only be proven by the preponderance of the evidence Ark. Code Ann. §11-9-601(e)(1)(B). As with a compensable injury, there is no requirement that the causal relationship between the employment and the disease be proven to an absolute or mathematical certainty. It is only necessary for the claimant to prove that the employment was the likely or probable cause of the contracting of the disease. Further, there is no absolute requirement that this causal relationship must be proven by expert medical opinion. The existence of this causal relationship may be reasonably inferred from the facts established by the record as a whole.

The medical evidence unquestionably shows that on June 3, 2007, the claimant was suffering from a localized subcutaneous infection or abscess of the abdominal wall in the right suprapubic area. This localized infection was subsequently determined to be due to a Methicillin resistant Staphylococcus Aureus (MRSA). This localized infection or abscess required extensive use of antibiotics and repeated surgical draining debridement of the abscess.

The evidence presented unquestionably shows that, for several months prior to his development of the infectious abscess, the claimant had worked for the respondent as a CNA. His employment duties for the respondent, during April and May of 2007, required him to work in prolonged close proximity to the patients in the respondent's nursing facility, some of whom were suffering from

MRSA infections. His assigned duties included the picking up and moving of these patients, feeding these patients, changing the patients beds, giving the patients bed baths, and assisting the patients with showers. While working around and with the patients with known MRSA infections, the claimant was provided only with latex gloves, but no other protective clothing or mask. There is no evidence presented to show that the claimant was also in close proximity to anyone suffering from a MRSA infection outside of his work environment.

Unquestionably, it is possible that the claimant could have contracted the MRSA bacillus outside of his employment environment. However, based upon the evidence presented, common reason and logic would dictate that the most likely or probable cause of the claimant's MRSA infection was his prolonged and repeated exposure to the MRSA bacillus while performing his regular employment duties for the respondent. Clearly, his employment activities for the respondent would have placed him at far greater risk of contracting this disease, than the risk to which the general public would be exposed.

In reaching my decision, I recognize that the expert medical opinion which has been admitted into evidence, would not be sufficient, in and of itself, to establish the required causal relationship. The various opinions that were given in regard to causation, are not stated within a reasonable degree of medical certainty, as required by the Act. However, I would also note that none of the expert medical opinions in any way indicate that such a causal relationship was impossible or even unlikely.

I further recognize that the claimant testified that he knew of no direct contact between his skin, in the area of the abscess site, and the skin or body fluid of any of the MRSA infected patients at the nursing home. However,

there is also no evidence of skin to skin or skin to fluid contact in this area with any MRSA infected individual outside of his employment. There is also no expert medical evidence to show that such a direct contact must occur in order for the claimant to have experienced the subcutaneous infection and abscess in his right suprapubic area. However, due to the claimant's prolonged and repeated employment related exposure to the MRSA bacillus, this infectious organism could easily have been transferred by the claimant's day to day activities from his clothing or other areas of his body to the particular infection site.

I also recognize that Ark. Code Ann. §11-9-601(e) (3) provides that no compensation is payable for any ordinary disease of life to which the general public is exposed. However, although MRSA infections are becoming more and more prevalent, I do not find that such an infection would be considered an "ordinary disease of life". Even if this were the case, it is clear that the claimant's employment significantly increased his exposure and risk far in excess of that to which the general public would be exposed.

Finally, I would note that the claimant's MRSA infection would represent a contagious or infectious disease. However, the evidence shows that the claimant contracted this disease in the course of his employment in a facility in which persons suffering from this disease were obviously cared for or treated. Thus, he would not be prevented from receiving compensation by the provisions of Ark. Code Ann. §11-9-601(e)(2).

In summary, I find that the claimant has presented sufficient evidence to prove that his MRSA infection satisfies all of the statutory requirements for an "occupational disease" under Ark. Code Ann. §11-9-601. Specifically, he has proven that the hazards of this disease actually existed and were characteristic

of his employment with the respondent, that contracting of this disease arose out of and occurred in the course of his employment with the respondent, and that this disease resulted in his being disabled on a temporary basis.

Next, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled, as a result of his occupational disease. In the present case, the claimant is seeking medical services and temporary total disability benefits.

The evidence presented establishes that the medical services provided the claimant for his MRSA infection by and the direction of the personnel at the emergency room of St. Edwards Mercy Medical Center, by and at the direction of Dr. David Hunton, and by and at the direction of Dr. Danny Silver, all represent reasonably and necessary medical services for the claimant's compensable MRSA infection. Pursuant to the provisions of the Act, the respondents are liable for the expense of these medical services, subject to the medical fee schedule established by this Commission.

The greater weight of the credible evidence presented further establishes that the claimant remained within his healing period from the effects of his compensable MRSA infection from June 3, 2007 through August 7, 2007. The medical evidence presented clearly shows that the claimant continued under active medical treatment through some date after July 18, 2007. The claimant's testimony, which I find to be credible, shows that he remained under active medial treatment until August 7, 2007.

The claimant's testimony further reflects that he was off work, due to his compensable MRSA infection, from June 4, 2007 through June 11, 2007 and from July 9, 2007 through August 7, 2007. According to his testimony, he returned to work for the respondent on June 12, 2007 and worked through July

8, 2007 and again returned to work for the respondent on August 8, 2007. I find his testimony, in this regard, to be credible and sufficient to prove actual disability during these periods.

It is my opinion that the claimant has proven that he continued within his healing period from the effects of his occupational disease and was rendered totally disabled from performing regular gainful employment as a result of the effects of this occupational disease for the periods of June 4, 2007 through June 11, 2007 and July 9, 2007 through August 7, 2007. Thus, he would be entitled to temporary total disability benefits during these periods.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$227.00 for total disability and \$170.00 for permanent partial disability.

4. During his employment with this respondent, the claimant contracted an occupational disease, which was in the form of a localized MRSA infection in the abdominal wall in the suprapubic area.

5. The medical services provided to the claimant for his localized infection by and at the direction of the personnel at St. Edwards Mercy Medical Center emergency room, by and at the direction of Dr. David Hunton, and by and at the direction of Dr. Danny Silver, represent reasonably necessary medical services for the claimant's occupational disease. The respondents are

liable for the expense of these services, subject to the Commission's medical fee schedule.

6. The claimant was rendered temporarily totally disabled by his occupational disease for the periods of June 4, 2007 through June 11, 2007 and July 9, 2007 through August 7, 2007. He is entitled to appropriate temporary total disability benefits during these periods.

7. The respondents have denied that the claimant's localized MRSA infection represents an occupational disease, under Ark. Code Ann. §11-9-601, and have controverted the claimant's entitlement to any and all benefits attributable to this infection.

8. The appropriate controverted attorney's fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded.

ORDER

The respondents shall be liable for the expense incurred by the claimant for medical services provided to him for his occupational disease, in the form of a localized MRSA infection in the right suprapubic area, by and at the direction of the personnel at the emergency room of St. Edwards Mercy Medical Center, by and at the direction of Dr. David Hunton, and by and at the direction of Dr. Danny Silver. The respondents' liability for these expenses is controlled by the Commission's medical fee schedule.

The respondents shall pay to the claimant temporary total disability benefits for the periods beginning June 4, 2007, and continuing through June 11, 2007, and beginning again on July 9, 2007, and continuing through August 7, 2007.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from these benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE