

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F807372

EDWARD JORDON,  
EMPLOYEE

CLAIMANT

UNIVERSITY OF ARKANSAS-FAYETTEVILLE,  
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2009

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE EVELYN BROOKS,  
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE RICHARD SMITH,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed January 2, 2009. The administrative law judge found that the claimant failed to prove he sustained a compensable occupational disease. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained a compensable occupational disease pursuant to Ark. Code Ann. §11-9-601.

I. HISTORY

Edward Gene Jordon, age 51, testified that he began working as a custodian for the University of Arkansas in about May 2004. Mr. Jordon testified, "I take care of the football players' locker rooms, their showers, the whole first floor of the Broyles Complex....All the meeting rooms for the coaches; the teaming room where they all meet; the showers. I take out all the trash, pick up all - keep the floors cleaned, mopped, everything." The claimant estimated that he worked an hour and a half daily in the locker room: "I pile their towels up, their clothes up, and I vacuum around them, and wipe down the mirrors, I clean them; I clean the tops of the lockers off and the bottoms of the lockers off where their stuff stays; take out the trash." The claimant testified that the towels and clothing which he handled were dirty.

The claimant testified on direct examination:

Q. And do you clean the shower areas in the locker rooms?

A. Yes.

Q. Do you use chemicals to clean those?

A. Yes.

Q. What kind of chemicals do you use?

A. We use Bac-Shield one day and we use bleach the next day. And we have to fill all the soap basins for each one of the players. They have hand soap dishes to shower with.

Q. And when you're cleaning the showers, how do you do that physically?

A. Just walk right in there. I mean I use my gloves; I hook up a hose from a water hydrant and I have a bottle with foam in it. We use Bac-Shield of foam on the walls and everything, floors. When we use bleach, it does the same thing but don't foam....

Q. Do you ever scrub anything?

A. Yeah. Sometimes you have got to scrub the drains out. You have to take the drain covers, which are brass, and do them in bleach. Scrub the walls, the bathrooms, the stools, all that.

Q. And do you wear any type of protective clothing?

A. Just blue gloves....

Q. And how far do those come up?

A. About just barely to the bend in your hand there; I mean about the same as regular gloves.

Q. And what kind of clothes do you wear?

A. Regular Levi's and a shirt like this.

Q. And is that a short-sleeved shirt or long-sleeved shirt?

A. Short-sleeved mostly, until it gets cold and then we change.

The parties stipulated that the employment relationship existed on all relevant dates, including May 9, 2008. The claimant testified on direct:

Q. So what happened to you on or about May 9<sup>th</sup> of this year?

A. I was shampooing the carpets in the players' locker rooms. I noticed a hurting under my arm, so I just blew it off, you know, because that machine, you have to pull it, and I went ahead and I went home and I noticed I had two places under my arm....

The claimant sought emergency treatment at Washington Regional Medical Center on Sunday, May 11, 2008. The claimant complained of re-occurring lumps appearing under his right arm and that the lumps had been present for several days. There were no other symptoms or problems. The onset of symptoms was reported as gradual, onset two days earlier. Examination of the claimant's upper extremity showed "3 small tender nodules right axilla with some redness to skin, small areas of induration. No fluctuance." The claimant was diagnosed with "Folliculitis" and was discharged home.

The claimant was admitted to Washington Regional Medical Center on or about May 13, 2008: "The patient is a 50 year-old white male who came in with right axillary pain

that began 1 week ago. The patient states it started as one bump and went to 4 bumps and later merged into one large infection....The patient returns today with continued pain, no improvement with treatment of antibiotics. The patient works at the Athletic Department at the University of Arkansas. The patient does a lot of mopping in the department picking up behind the athletes....Skin shows a right axillary inflammation and erythema 4 to 5 cm in width with no induration and no drainage." The physician's assessment included "1. Right axillary cellulitis....The patient will be admitted for right axillary cellulitis."

The claimant was discharged from Washington Regional Medical Center on May 18, 2008:

This is a 50-year-old white male who presented to the emergency room with axillary pain for a week prior. It started as a little bump and then coalesced with four other minor bumps to form a larger wound. He was seen previously in the emergency room and placed on doxycycline and then he went back to work, so then it got worse and he presented to the emergency room...

The patient had an incision and drainage done and then cultures were taken. This grew out to be a heavy growth of Staphylococcus aureus, which was methicillin resistant. He was placed on intravenous vancomycin prior to sensitivities. Following the sensitivities, he was placed on clindamycin orally. He had good response to this. He resumed his home medications as needed while on admission. He is being discharged today on the

18<sup>th</sup> of May. He has remained afebrile, tolerating a diet okay, and his pain is reduced.

He will need to follow up with wound care for daily dressing as well. I will give him a work note since he does housecleaning and has to use his hands a lot. This will help him get some rest and go back to work when the pain is greatly reduced. He will follow up with his primary care physician at the University of Arkansas in a week's time....

The discharge diagnosis was "Right axillary cellulitis, improved, status post incision and drainage."

The claimant treated with Dr. Regina R. Hudec at Washington Regional on May 19, 2008:

The patient is a 50 year old white male who was admitted to Washington Regional Medical Center through the Emergency Room on 5/13/2008 with right axillary cellulitis and abscess formation. The patient was initially treated with intravenous vanomycin. On 5/16/2008 an incision and drainage was performed. Wound cultures returned for methicillin-resistant Staphylococcus aureus sensitive to clindamycin. The patient was discharged on 5/18/2008 on oral clindamycin. The patient is referred to the Wound Care Clinic for wound care and evaluation. The patient is without any complaints today. He is tolerating his antibiotics without problems....The patient reports that the localized redness and swelling has improved greatly....

The patient works at the Athletic Department at the University of Arkansas....The patient recently has moved to a home and has no current running water....

SKIN: Shows two open wounds in the axillary area. The more inferior wound has surrounding

induration....There is surrounding erythema, but does not exceed 2 cm. There is a smaller wound just cephalad that measures 5 x 1 x 5 mm. No surrounding induration....

Dr. Hudec's assessment included "1. Right axillary abscess with cellulitis status post surgical incision and drainage. Cultures have returned for methicillin-resistant Staphylococcus aureus sensitive to clindamycin....Daily wound care will include packing with Iodosorb impregnated gauze. Because of current water situation at home, we will perform the daily dressing changes here at our facilities. The patient is encouraged to continue his antibiotics as prescribed. The patient will return to clinic as needed daily."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on May 23, 2008. In the Accident Information section of the Form AR-N, the claimant reported that there had been an accident at 10:00 a.m. on May 9, 2008, in the men's locker room of the Broyles Complex. The claimant reported that he had informed the employer of the accident at 2:00 p.m. on May 12, 2008. The claimant reported that he had injured his right axillary, underarm, and that the cause of injury was "infected by MRSA bacteria." (The Form AR-N

was stamped Received by Public Employee Claims on June 23, 2008.)

The record indicates that Dr. Bernadette Alberty in the Regional Wound Care Clinic saw the claimant on May 27, 2008 and approved the following note: "Please excuse from work this week. He will be seen in the clinic on Friday 5/30 for re-evaluation."

The record indicates that Dr. Hudec saw the claimant on June 2, 2008 and indicated that the claimant could return to work on June 6, 2008. Dr. Hudec saw the claimant on June 5, 2008 and indicated that the claimant could return to work on June 10, 2008.

A pre-hearing order was filed on September 15, 2008. The claimant contended that he "got a staph infection while working" on May 9, 2008. The respondents contended that the claimant's staph infection was not compensable because it "does not meet the criteria for an occupational disease or illness, as set out in Ark. Code Ann. §11-9-601. For example: the general population is exposed to, and often contracts, staphylococcus aureus infections, including MRSA's; there is nothing in the medical records, or elsewhere in the file, to establish that claimant became infected as a

result of his job duties; there is no evidence that staph infections are a characteristic of claimant's job; claimant is unable to meet the burden of proof by clear and convincing evidence."

The parties agreed to litigate the following issues:

1. Whether the claimant's staph infection is compensable under the Act.
2. The claimant's entitlement to medical services, temporary total disability benefits from May 13, 2008 through June 9, 2008 and attorney's fees.

A hearing was held on November 3, 2008. Adrian Cornwell testified that he acquired a staph infection on the top of his left foot in about June 2008 while power-washing the stadium on the respondents' premises. The respondents stipulated that Adrian Cornwell had an employment-acquired staph infection, MRSA, while working at the University. Mr. Cornwell testified that he did not work with the claimant and did not work in the locker rooms of the Broyles Complex. Tyler Hutchinson testified that he had formerly been employed with the University, and that he had acquired a staph infection while power-washing the stadium bleachers.

Joe Swingle testified that he was director of athletic facilities for the University of Arkansas. Joe Swingle corroborated the claimant's testimony regarding the cleaning

and disinfecting steps that were taken to prevent the contraction and spread of MRSA. The claimant's attorney cross-examined Mr. Swingle:

Q. Assuming from what you have explained about the trouble you have had to watch out for staph infection, there is a problem with staph infection in athletics today; is that correct?

A. As far as? Can you be more specific as far as problems? I mean we are very proactive. We want to make sure there does not become an outbreak or anything.

Q. Okay. So all of this cleaning that you do, is this directed for staph infections?

A. Yes.

Q. The trainers that are telling you to only let one person use a towel, is that directed at the prevention of the spread of staph infection?

A. Yes....

Q. And Mr. Jordon has already testified that he goes around the room, picking up these towels and gathering them and putting them in one place. Would you have any reason to disagree with that?

A. No....

Q. Are they provided any kind of gloves or gowns that would cover their arms?

A. No, ma'am.

An administrative law judge filed an opinion on January 2, 2009. The administrative law judge found that the claimant did not prove he sustained a compensable

occupational disease. The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-601(Repl. 2002) provides:

(e) (1) (A) "Occupational disease", as used in this chapter, unless the context otherwise requires, means 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 as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

(2) 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.

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

(g) (1) An employer shall not be liable for any compensation for an occupational disease unless:

(A) The disease is 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 and is actually incurred in his or her employment....

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. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question. *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).

B. Notice

Ark. Code Ann. §11-9-603(a)(2)(A) (Repl. 2002) requires that written notice of an occupational disease be given within ninety days after the first distinct manifestation of the disease; such notice must be given by the employee or someone on his behalf. The ninety-day statutory period does not begin to run until the employee knows or should reasonably be expected to know that he is suffering from an occupational disease. See *Quality Service Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991). Failure to give notice shall not bar any claim if the employer had knowledge of the injury; if the employee had no knowledge

that the condition or disease arose out of and in the course of his employment; or if the Commission excuses the failure on the grounds that, for some satisfactory reason, the notice could not be given. Ark. Code Ann. §11-9-701(b)(1).

In the present matter, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable occupational disease. The claimant began working as a custodian for the University of Arkansas athletic department in about May 2004. The claimant, who the Commission finds was a credible witness, testified that his work duties included taking out the trash, cleaning, mopping, picking up wet and dirty towels and clothing, and vacuuming. The claimant usually worked with a short-sleeved shirt and his only protective clothing was gloves covering his hands. The claimant testified that he felt a pain under his arm while performing his work duties on or about May 9, 2008. The claimant began treating at Washington Regional Medical Center on May 11, 2008. It was noted during the course of the claimant's treatment that he performed custodial duties for the respondent-employer, which duties involved cleaning and picking up behind athletes. The claimant reported that his symptoms had been

gradual in onset. Occupational diseases are generally gradual rather than sudden in onset. *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994). There were several objective medical findings noted, including nodules and redness under the right axilla, inflammation, erythema, and open wounds. Dr. Hudec noted that the claimant worked at the University of Arkansas and Dr. Hudec eventually diagnosed "methicillin-resistant *Staphylococcus aureus*." The Full Commission finds that the objective medical findings of record were causally related to the claimant's workplace duties for the respondents. We also find that Dr. Hudec's diagnosis of MRSA was causally related to the claimant's workplace duties for the respondents.

Pursuant to Ark. Code Ann. §11-9-601(Repl. 2002), the Full Commission finds that the claimant proved by a preponderance of the evidence that he contracted an occupational disease which arose out of and in the course of the claimant's occupation and employment with the respondents. A causal connection is generally a matter of inference to be drawn from all the evidence. See *Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

The instant claimant proved by a preponderance of the evidence that there was a causal connection between his occupation-employment and the occupational disease. We find that the disease was due to the nature of the claimant's employment and actually incurred in the claimant's employment. Because of the claimant's custodial duties, he was at an increased risk in contracting methicillin-resistant *Staphylococcus aureus*. The evidence shows that the first distinct manifestation of the occupational disease occurred on or about May 9, 2008. The claimant signed a Form AR-N, Employee's Notice Of Injury, on May 23, 2008, and the respondents received the Form AR-N no later than their file mark of June 23, 2008. The record therefore demonstrates that the claimant provided written notice of the occupational disease within ninety days after the first distinct manifestation of the disease. The claimant therefore satisfied the written notice requirement of Ark. Code Ann. §11-9-603(a) (2) (A) (Repl. 2002).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable occupational disease pursuant to Ark. Code Ann.

§11-9-601. The administrative law judge's decision is reversed. The claimant proved that all of the medical treatment of record was reasonably necessary in connection with the compensable occupational disease. The claimant proved that he remained within a healing period for the compensable occupational disease and was totally incapacitated from earning wages beginning May 13, 2008 through June 9, 2008. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I respectfully dissent from the majority's finding that the claimant proved that he sustained a compensable

occupational disease. Based up on my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

In my opinion, there is no evidence establishing when and where the claimant became infected with MRSA. While I recognize that the claimant testified that he first experienced symptoms in the right axillary area on May 9, 2008, while shampooing the carpet in the player's locker room, this in and of itself is not indicative of when the actual infection occurred. The initial history taken at the Washington Regional Medical Center emergency room on May 11, 2008, indicated that the claimant had been having a "recurring lump" under his right arm and that the current lump had been present for several days. It is likely that the claimant's MRSA may have been present for a considerable amount of time prior to May 9, 2008. It is also possible that the claimant's initial symptoms may not have involved an MRSA infection but folliculitis of some other type. It is clear that MRSA is not going to produce symptoms within seconds, minutes or hours after exposure.

Further, there is no causal connection established between the claimant's job and the MRSA infection. The

claimant did not have any kind of wound or injury that broke the skin. The first abnormality was a lump under the claimant's right arm. Whether this bump was the result of an MRSA infection, an ingrown hair or other cause is not know and is not established by the evidence of record. Moreover, the claimant was living in less than sanitary living conditions. He was living in a house with no running water. To conclude that the claimant's MRSA is related to his job is conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, COMMISSIONER