

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706592

JONATHAN SULLIVAN,
EMPLOYEE

CLAIMANT

MEDI HOMES,
EMPLOYER

RESPONDENT

GUARANTEE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 19, 2009

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

Claimant represented by the HONORABLE EDDIE WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JOHN DAVIS, Attorney
at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed May 14, 2008. The administrative law judge
found that the claimant contracted an occupational disease
during his employment. Based on our *de novo* review of the
entire record, the Full Commission reverses the
administrative law judge's opinion. The Full Commission

finds that the claimant did not prove he sustained a compensable occupational disease.

I. HISTORY

Debbie Arrington testified that she began working for Medi-Home, Inc. as a certified nursing assistant in March 2006. The claimant, Jonathan Sullivan, testified that he began working for the respondent-employer in about September 2006. Debbie Arrington testified that the respondent-employer notified her in April and May 2007 that she was being exposed to patients with MRSA, that is, "Methicillin resistant Staphylococcus aureus." Ms. Arrington testified that she observed the claimant working with patients who had MRSA. The claimant testified on direct examination:

Q. During the period of April and May of 2007, did you work with any patients at Medi Homes who had been diagnosed with MRSA?

A. Yes, sir.

Q. How do you know that they had been diagnosed with MRSA?

A. Some of them, I was told by the nursing staff that they had them, and other people, I was told by the DON; I was told by some residents that they had MRSA.

Q. Can you give me some idea about the proximity, the closeness, with which you worked with these patients?

A. You mean contact?

Q. Yeah. Did you touch them; would you just look at them, or what?

A. Very close contact....Sometimes I would change their beds when they would use the bathroom; I would transfer them from beds to wheelchairs; I would feed them, give them showers, baths, bed baths. Basically, everything that normal people do during the day that they can't do for themselves.

Q. Did you always wear personal protection equipment when you handled these patients?

A. I wore what was given to me, which was just a pair of gloves; that was all I had.

Q. What about a mask?

A. I was not supplied with a mask.

Q. Were you ever coughed on by these people?

A. When I took care of the people, a bunch of them have Alzheimer's and I've been spit at, I've been hit, numerous numbers of times....

The parties stipulated that the employment relationship existed on all relevant dates in May and June 2007. The claimant testified on direct examination:

Q. Now, there was some conversation at the beginning of this hearing about there being two claims. Was there an incident at the nursing home where you were trying to keep a patient from falling and you grabbed that patient and thought that you had sustained a hernia?

A. Yes, sir.

Q. And that was on or about May 31st of '07; is that correct?

A. It was the day before I woke up and found the abscess on my stomach.

Q. Okay. Tell me what happened the day after you had the incident with catching the patient.

A. It was really nothing to it. I woke up at about 11:30, between 11:30 and noon, and I rolled over, and as soon as I rolled over, it hurt -

Q. What hurt -

A. - really, really bad. About five inches below my belly button, I would say, to the right a little bit, and it hurt really, really bad, and I rolled over and I couldn't figure out what it was and I looked down and there was a huge knot, and I couldn't figure out what it was, and I called the nursing home and I explained to them what was going on, and I told her that thought that that was a hernia because when, you know, when something like this happens, in that area, that's the only thing I thought it could have been, was a hernia or something like that. So she told me to go fill out an incident report - the DON of the nursing home told me to fill out an incident report and go to the emergency room.

Q. So at the time that you first recognized this lump or swollen area or whatever you might call it, you associated it with the incident with the patient that you had caught and kept from falling?

A. Yes, sir.

The claimant testified on cross-examination:

Q. You didn't have any contact with this patient who you caught with his or her body fluid, did you?

A. No, sir.

Q. And the site of the infection in your groin, you said, is five inches below the belly button? Is that correct?

A. I would believe so, yes....It's just a little bit toward the right.

Q. And this was an area then, where you've described, it was fully covered at all times while you were at the nursing home; is that correct?

A. Yes, sir.

Q. And it was covered with scrubs that you wore?

A. My underwear and scrubs.

Q. All right. And this patient that you caught, there was no contact between that patient's skin and the skin around the site of the infection that you got later, was there?

A. There was no contact....

The claimant received emergency treatment at St. Edward Mercy Medical Center on June 2, 2007:

This is a 25-year-old male, who comes to the emergency department complaining of lower abdominal pain and a bulge, which has been getting more painful and swelling, and warm to touch over the last 12 hours. The patient tells me he is a CNA and had lifted a very heavy patient on the 1st of June. He felt some mild abdominal discomfort, but did not think anything of it. He went to bed. He woke up at noontime on the 2nd of June experiencing significant pain in the lower abdomen just inferior to his umbilicus. This pain got worse throughout the day. He noticed the swelling got worse throughout the day as well. By the time he came here to the emergency department, the pain

is focal to the right suprapubic area radiating through the right groin to the right testicle....

There is tenderness to palpation and a palpable mass in the right suprapubic area. This area is very swollen, tender to palpation and warm to touch. Positive overlying erythema as well....We are going to check a complete blood count, basic metabolic panel, coags, and a CT of the abdomen and pelvis; and, sign this patient out to Dr. Anderson at this time, and final disposition will be per Dr. Anderson.

The assessment was "This is a 25-year-old male with abdominal pain, question of a cellulitis versus abscess abdominal wall."

A CT of the claimant's abdomen and pelvis was taken on June 3, 2007:

CT ABDOMEN: At the right lung base, there is a small nodular density which could possibly relate to a nodular area of infiltrate. This is seen on the highest cut. This measures approximately 6-7 millimeter. The liver is unremarkable as is the spleen. The pancreas and adrenal glands are unremarkable. Kidneys have a normal appearance. No masses or fluid collections noted. No inflammatory process detected. The appendix is unremarkable.

CT PELVIS: There is some edema/inflammation noted in the region of the subcutaneous area overlying the right inguinal region of unclear etiology. Whether this relates to a contusion or cellulitis is unclear. No definite hernia is detected.

The impression was "1. Soft tissue edema/inflammation overlying right inguinal region. Cellulitis? Contusion?"

2. Small nodule right lower lobe. Baseline chest CT is recommended. This could represent an incidental noncalcified granuloma."

The claimant testified, "After they did a CAT scan, they told me that it was MRSA."

Dr. Patric Anderson signed the following addendum dated June 3, 2007:

The patient is a 25-year-old, who was initially seen by Dr. Barnett. He had a CT pending. He asked me to follow up on that. It shows evidence of a subcu inflammation, which is consistent with the exam. The patient has abdominal pain and tenderness in his right lower quadrant. It is in the location of an area where he shaves. He has evidence of a folliculitis with a tender fullness area as well as a spot that is probably an abscess in the early stages. He does not have any fluctuance. It is very indurated and tender, but I do not think it is ready for an incision and drainage at this time. His CT, as reported above, shows no evidence of a hernia or other abnormality. There is a prominent subcu inflammatory fat stranding with lymph nodes present, but no focal fluid collection.

Dr. Anderson's diagnosis was "Lower abdominal wall abscess....I encouraged him to return in 2-3 days for recheck, otherwise, warm soaks, Bactrim, doxycycline, and Lorcet. Return if worse."

The claimant sought emergency treatment on June 4, 2007, complaining of a tender/swollen area in his right

groin. An "Identified cause?" section on the Emergency Physician Record was circled, "no." The claimant underwent an incision and drainage of abscess. The clinical impression was cutaneous abscess, review in two days. The claimant was taken off work. A Patient Registration Form dated June 6, 2007 indicated there was a Staff Alert for "2 MRSA." The claimant's condition was noted as being improved on June 8, 2007. The claimant's testimony indicated that he returned to work on or about June 11, 2007.

The claimant returned to the Medical Center for treatment on July 9, 2007. Dr. David W. Hunton noted on July 12, 2007, "This is a gentleman who had incision and drainage of abscess in the emergency room, returns with a larger abscess now. He has been treated previously and has been on antibiotics but has stopped. He has a near baseball sized swelling in the right groin which we will open up today, obtain new cultures, and treat him at least initially with parenteral antibiotics." Dr. Hunton performed an "Incision and drainage, right groin area." The pre- and post-operative diagnoses were "Probable bursa abscess, right groin area."

Dr. Hunton reported on July 12, 2007:

This is a twenty-five-year-old white male with past history of previous I D of a groin abscess which was methicillin resistant Staphylococcus aureus positive. He was treated by Dr. Silver, underwent I D in the emergency room, improved and has been well for several months. He had recrudescence of this several days ago with increasing pain and then finally some generalized aches and pains and fever. On physical examination, he has a large abscess in the right inguinal area. He is admitted for I D of this at this time.

Dr. Hunton's impression was "Methicillin resistant Staphylococcus aureus abscess right groin." Dr. Hunton recommended "I D of the same, which we will do today and probably home on the p.o. antibiotics, Septra, that he was started on."

A handwritten note dated July 26, 2007 and attributed to Dr. Silver indicated, "Joe Sullivan was evaluated here & Dxed with a cutaneous abscess caused by MRSA. It is possible that he contracted it from his job at the nursing home."

Dr. Hunton wrote to the claimant's attorney on August 7, 2007:

I am writing on behalf of Mr. Sullivan who I have recently been treating for a groin abscess with MRSA infection. Jonathan tells me that he was employed as a CNA at the nursing home. During his period of employment at the nursing home he was in close contact with two patients with MRSA. There is a good possibility that these

two are related in terms of causation and temporality. Feel free to contact me here at the office if additional information is needed or if I can be of help.

The claimant's attorney corresponded with Dr. Hunton on August 14, 2007 and stated in part, "In Workers' Compensation cases in Arkansas, specific terminology is required when one is attempting to prove a causal relationship between an employee's condition and that employee's employment. Attached you will find a Medical Questionnaire regarding Mr. Sullivan. If it is your opinion that there is likely a causal relationship between Mr. Sullivan's groin abscess with MRSA infection and his exposure to the two (2) patients at the nursing home, I would appreciate it if you would complete the attached Medical Questionnaire, sign it and return it to me....Simply opining that there is a possibility of a causal relationship between Mr. Sullivan's condition and his employment is not considered to be a statement within a reasonable degree of medical certainty under Arkansas Workers' Compensation law."

Dr. Hunton replied to the claimant's attorney on August 30, 2007:

I am in receipt of your letter of August 14th with regards to Mr. Sullivan's suit against Medi-Homes of Fort Smith. I am aware that there were several

patients in that nursing home with staph infection and that Mr. Sullivan indeed had contact with these people. In my opinion, it is certainly possible that the infection he subsequently developed could be related to this. However, I am not sure that I can answer that with a simple yes or no. Given the location of his infection in the right groin area, I think there is certainly an element of uncertainty that what he had was directly related to the situation of the patients. I would be happy to discuss this with you. Let me know if I can be of help here. Again, it is difficult for me to say definitively that the one definitely caused the other.

A pre-hearing order was filed on December 12, 2007.

The claimant contended that he developed an occupational infection as a result of being exposed to infected patients while he was performing employment services. The claimant contended that he was entitled to reasonably necessary medical treatment and temporary total disability benefits. The respondents contended that the claimant did not contract an MRSA infection in the course and scope of his employment with respondent Medi-Home, Inc.

The parties agreed to litigate the following issues:

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.

Dr. Hunton signed the following Medical Opinion on February 6, 2008:

Although there is uncertainty regarding whether Jonathan Sullivan's infection was directly caused by the situation of the patients at Medi-Homes of Fort Smith, it is my opinion, within a reasonable degree of medical certainty, that working in a nursing home with patients with staph infection placed Mr. Sullivan at a higher risk of contracting MRSA than members of the general population.

A hearing was held on February 12, 2008. The claimant testified regarding his condition, "It is okay. I have a scar, but the only problem I have right now is he said that he might have cut a nerve or something and my right leg is numb, on my thigh, and he said that that's just something that takes time to heal. So other than that, I don't have any problems."

An administrative law judge found, among other things, that the claimant contracted an occupational disease during his employment with the respondents. The administrative law judge awarded medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

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....

Ark. Code Ann. §11-9-603(a) (2) (A) (Repl. 2002) requires that written notice of an occupational disease be given within ninety (90) days after the first distinct manifestation of the disease; such notice must be given by the employee or someone on his behalf. *Pharmerica v. Seratt*, CA 08-83 (Ark. App. 6-18-2008). 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) (Repl. 2002).

In the present matter, an administrative law judge found that the claimant contracted an occupational disease during his employment with the respondent. The Full Commission finds that the claimant did not prove by a preponderance of the evidence that his disease arose out of or in the course of his employment with the respondents. The claimant did not prove that he contracted MRSA as a result of the described incident occurring on or about May 31, 2007. Nor was there any other probative evidence before the Commission demonstrating that the claimant contracted an occupational disease as a result of contact with unspecified patients at Medi Homes.

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B) (Repl. 2002). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. *Huffy Service First v. Ledbetter*, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing *Howell v. Scroll Tech.*, 343 Ark. 297, 35 S.W.3d 800 (2001). However, expert opinions based on "could," "may," or "possibly" lack the definiteness required to prove the causal connection. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 380 (2000).

In the present matter, Dr. Silver stated on July 26, 2007 that it was "possible" the claimant contacted MRSA from the claimant's job at the nursing home. Dr. Hunton wrote on August 7, 2007 that there was "a good possibility" the claimant's MRSA diagnosis was causally related to contact with patients. Dr. Hunton opined on August 30, 2007 that it was "certainly possible" the claimant's infection was related to contact with patients. Dr. Hunton also wrote, however, that "there is certainly an element of uncertainty

that what he had was directly related to the situation of the patients." Dr. Hunton opined on February 6, 2008 that, although the claimant was "at a higher risk of contracting MRSA than members of the general population," there was still "uncertainty regarding whether Jonathan Sullivan's infection was directly caused by the situation of the patients at Medi-Homes of Fort Smith[.]"

None of the medical opinions recited in the previous paragraph were stated within a reasonable degree of medical certainty, and the Full Commission cannot rely on these opinions to find that the claimant sustained a compensable occupational disease. The only other causation evidence was the claimant's uncorroborated testimony that his condition was linked to his employment. The Full Commission finds that neither the claimant's testimony nor the uncorroborated testimony of Debbie Arrington were sufficient to prove by a preponderance of the evidence that the claimant's diagnosed disease arose out of and in the course of the claimant's employment with the respondents. The claimant testified that he never experienced any skin-to-skin contact with any of the nursing home patients, and the claimant testified that he never came into contact with a patient's bodily

fluid. Nor was there any probative evidence before the Commission demonstrating that the claimant was exposed to the MRSA infection through coughing, spitting, or other similar contact arising out of his employment.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained a compensable occupational disease. Because the claimant did not prove he sustained a compensable occupational disease pursuant to Ark. Code Ann. §11-9-601(e) (1) (Repl. 2002), any respondents' defenses pursuant to Ark. Code Ann. §11-9-601(e) (2) *et seq* and any defenses related to notice are rendered moot. The Full Commission reverses the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.