

In the Matter of the Compensation of
TONY L. FAIRBANKS, Claimant

WCB Case No. 07-01731

ORDER ON REVIEW

Malagon Moore et al, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman. Member Lowell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that upheld the self-insured employer's denial of claimant's injury or occupational disease claim for a left leg methicillin-resistant staphylococcus aureus (MRSA) infection. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary and supplementation.

Claimant works for the employer as a mechanic/millwright. The employer provides a "boot allowance" for the purchase of work boots. For years, claimant has purchased the same style of work boots each year. The boots are made of stiff leather and take time to break in.

Claimant bought new work boots in October 2006. He began wearing them to and at work.

On December 12, 2006, claimant noticed nothing unusual when he put on his work boots before work. During his regular shift that day, he worked on a vertical-style pump. Because the pump was very heavy, claimant left it on the floor, rather than lifting it onto a workbench. When he bent, crouched and knelt to work on the pump, his work boot irritated his left shin. He began experiencing pain and tenderness where the boot rubbed against his shin by midday and thereafter. (Tr. 6, 13-14). At the end of the day, claimant took off his boot, examined his shin, and discovered – for the first time -- a red area about two inches below the top of the boot. (*Id.* at 6).

After the sudden appearance of the red spot on December 12, 2006, and the onset of symptoms that day, claimant continued to experience discomfort where the boot rubbed against his skin. On December 19, 2006, he sought emergency room treatment. Claimant's condition was diagnosed as an MRSA infection. Intravenous antibiotics were administered on several occasions.

Claimant filed a claim for an “MRSA infection, left shin.” (Ex. 36). The employer denied the claim and claimant requested a hearing.

The rubbing of claimant’s work boot on December 12, 2006, while he was bending, crouching, and kneeling to perform his work, was a material cause of his need for treatment/disability for his left leg MRSA infection.

CONCLUSIONS OF LAW AND OPINION

Reasoning that the infection had likely been present for a long time before causing any symptoms, the ALJ found that the claim was properly analyzed as an occupational disease. Based on the opinion of Dr. Leggett, an examining physician, the ALJ concluded that claimant’s work activities were not the major contributing cause of his infection. Consequently, the ALJ upheld the employer’s denial. We disagree and reverse, reasoning as follows.

First, we determine whether claimant’s MRSA infection is properly analyzed as occupational disease or an accidental injury. *See Kenneth C. Molz*, 52 Van Natta 1306, 1308 (2000) (our first task is identifying the appropriate legal standard for determining compensability); *Daniel S. Field*, 47 Van Natta 1457 (1995). To do that, we must examine whether *the condition* was sudden or gradual in onset. *See Smirnoff v. SAIF*, 188 Or App 438, 449 (2003) (the determining factor in deciding if a claim is for an injury or a disease “is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly.”) The onset of symptoms may or may not coincide with the onset of a condition, depending on the medical evidence. *Id.* at 443.

An injury need not be instantaneous. However, “an *injury* based on repetitive trauma must develop within a discrete, identifiable period of time due to specific activity.” *LP Company v. Howard*, 118 Or App 36, 40 (1993) (emphasis in original); *see Mathel v. Josephine County*, 319 Or 235, 240 (1994) (compensable injuries under ORS 656.005(7) are “events,” whereas occupational diseases under ORS 656.802 are “ongoing states of the body or mind”). The distinction between occupational diseases and accidental injuries is usually based on the proposition that occupational diseases are gradual rather than sudden in onset. *Fuls v. SAIF*, 321 Or 151 (1995); *Mathel v. Josephine County*, 319 Or at 240; *James v. SAIF*, 290 Or 343, 348 (1981); *Weyerhaeuser v. Woda*, 166 Or App 73, 79-80 (2000).

Claimant argues that his infection should be analyzed as an injury, because the condition arose suddenly, on December 12, 2006. The employer responds that claimant's MRSA "infestation" should be analyzed as a longstanding and gradual disease condition, citing *Martha K. Seeley*, 54 Van Natta 2279 (2002) (on remand). We find *Seeley* distinguishable on its facts.

In *Seeley*, the claimant, an operating room technician, sustained innumerable "needle stick" injuries at work. After suffering a penetrating wound from a contaminated suture needle in 1999, the claimant tested positive for the hepatitis C virus (HCV) for the first time. *Seeley*, 54 Van Natta at 2280. The medical evidence established that the source of the claimant's HCV was unknown; it could not be determined; and it was impossible to ascertain how long the claimant had been HCV positive. *Id.* at 2281.

The employer in *Seeley* argued that, because the claimant's condition was not the product of multiple incremental injuries or exposures, but instead resulted from a single accidental exposure, it must be analyzed as an injury rather than an occupational disease. *Id.* at 2282. We disagreed. Based on the doctor's references to the claimant's length of employment (25 years) in a health care profession with a statistically higher incidence of HCV, and her history of numerous "needle stick" episodes, we concluded that the claimant's hepatitis C condition was gradual in its onset and properly analyzed as an occupational disease. *Id.* at 2283.

This case differs significantly from *Seeley*. Here, it is not impossible to discern which of many exposures caused claimant's infection. Indeed, the unrebutted medical evidence persuasively establishes that claimant's injurious exposure and the onset of his infection occurred suddenly, during a discrete period of time -- on December 12, 2006¹ (as explained below). Thus, *Seeley* is inapposite.

Here, it is unlikely that claimant had an MRSA infection before the discrete onset of symptoms on December 12, 2006.² (Exs. 43-12, -14-16, -21, -29, -33).

¹ The ALJ found that it was likely that claimant had an MRSA infection for a lengthy period of time before it caused symptoms. (Opinion and Order, p. 2). Although the evidence the ALJ cited in support of this finding indicates that was *possible*, it does not indicate that it was *likely* that claimant's infection (as opposed to his "infestation") preceded his symptoms. (See Exs. 42, 43-11, -14).

² The dissent infers that claimant's infection arose gradually over the two and one-half months he wore new boots at work. We infer otherwise, reasoning as follows. First, the record clearly establishes that the onset of claimant's condition -- an infection characterized by a red spot, or abrasion -- arose suddenly over the first part of one day at work. Second, the record does *not* establish that claimant's work boot rubbed against his left shin before December 12, 2006, but the record establishes that his boot rubbed against his shin that day. In other words, there is no reason to infer or assume that work activities

(See n 1, *supra*). Indeed, according to Dr. Abraham, his most recent treating physician, claimant probably did *not* have an MRSA infection before December 12, 2006. Dr. Abraham's opinion in this regard is unrebutted. (See Ex. 43-19-20, -32). The contemporaneous medical records describing the mechanism of claimant's injury (*i.e.*, the rubbing of his left work boot while working on December 12, 2006) support Dr. Abraham's opinion, as do claimant's objective findings of infection, which appeared that day, not before. (See Exs. 15-1, 17).

Under these circumstances, based on claimant's credible reporting and Dr. Abraham's unrebutted, persuasive opinion, we conclude that the onset of claimant's MRSA infection was sudden, *not* gradual. Consequently, claimant's condition is properly analyzed as an accidental injury under ORS 656.005(7)(a). See *Donald Drake Co. v. Lundmark*, 63 Or App 261, 266 (1983), *rev den*, 296 Or 350 (1984) (the claimant's back trouble coincided with jolting of the faulty loader, the fact that it grew worse over his subsequent employment did not make it "gradual in onset").³

To establish a compensable injury, claimant must show that his work injury was a material contributing cause of his disability or need for treatment for his MRSA infection. ORS 656.005(7)(a); ORS 656.266(1); *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Under ORS 656.005(7)(a)(B), if a "compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment," the combined condition is compensable if the compensable injury is the major contributing cause of the disability or need for treatment of the combined condition. However, a "combined condition" necessarily requires a "preexisting" condition.

before December 12, 2006 contributed to the infection. Moreover, Dr. Abraham considered the fact that claimant had worn his new boots for over 2 months before the infection occurred. Yet, this information did not change the doctor's opinion that the rubbing boot contributed to the infection. (Ex. 43-21). Thus, the record does not support the dissent's inference that the infection existed before it was discovered, or that work activities other than those on December 12, 2006 contributed to it.

³ The employer also relies on *John W. Walters*, 45 Van Natta 55, 56, *aff'd without opinion*, 125 Or App 338 (1993), where a claim for a disseminated sporotrichosis infection was analyzed as a disease and found due in major part to work exposure to plants. *Walters* differs from this case, because there we specifically found that the claimant's symptoms arose gradually over a period of time. *Id.* at 56. Here, we find that claimant's symptoms, and his MRSA infection arose suddenly, during a discrete period of time on December 12, 2006.

To be a legally cognizable “preexisting condition,” a condition must either: (1) have been diagnosed or treated before the 2006 injury; or (2) have been arthritis or an arthritic condition. ORS 656.005(24)(a); *Jeri L. Shaw*, 60 Van Natta 1658, 1660 n 1 (2008).

Here, the record establishes that claimant likely had colonized bacteria on the surface of his skin before he had pain, redness, and swelling on his left shin. (*See Ex. 42*). However, claimant was not diagnosed with a bacteria colonization and he did not obtain treatment for a colonization before December 12, 2006. Therefore, the “preexisting” bacteria is not a legally cognizable preexisting condition.

Under these circumstances, claimant must establish that his work activities on December 12, 2006 were a material cause of the need for treatment for his MRSA infection. ORS 656.005(7)(a); *Vivian M. Kelly*, 59 Van Natta 1469, 1470 (2007). A “material contributing cause” is a substantial cause, but not necessarily the sole cause or even the most significant cause. *See Van Blokland v. Oregon Health Sciences University*, 87 Or App 694, 698 (1987); *Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976) (“material contributing cause” means something more than a minimal cause; it need not be the sole or primary cause, but only the precipitating factor); *John P. Monroe*, 60 Van Natta 317, 320 (2008) (same).

Here, Dr. Abraham explained that claimant’s work activities contributed to his infection. (*See Exs. 41, 43-32-33*). Dr. Abraham steadfastly maintained that, although the *bacteria* came from elsewhere, the inciting event that caused the need for treatment was the boot rubbing at work. (*Ex. 41-1, 43-13, -17-18, -26, -32; see Ex. 43-24*). Dr. Abraham acknowledged that causation of an MRSA infection would be difficult to determine, (*Ex. 43-15*), and many scenarios were possible, (*id.* at 43-22, -34). However, based on claimant’s history, which struck him “just a little more clinically suspicious that the work boot was involved,” Dr. Abraham concluded that the rubbing boot was a factor that contributed to the infection. (*Ex. 43-19-20*). Dr. Abraham’s conclusion was based on claimant’s history, the location of his wound, the lack of other etiologies “ascertained,” and the consistency between these factors and a work-related diagnosis. (*Exs. 15-2, 43-26*).

We find Dr. Abraham's opinion persuasive, because it is well reasoned, based on an accurate history, and consistent with that history.⁴ Dr. Abraham specifically opined that claimant's work exposure "to his work boot" was the major contributing cause of the need for treatment and disability. (Ex. 41; *see* Exs. 43-13, -17-18, -26, -32). We rely on Dr. Abraham's persuasive opinion and conclude that claimant's work exposure on December 12, 2006 (the work boot rubbing against his left shin, while he was bending, crouching, and kneeling to perform his work) was at least a material cause of his need for treatment/disability for his MRSA infection.⁵ *See* ORS 656.005(7)(a). Consequently, claimant has established legal and medical causation and carried his burden of proof.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). Claimant requests fees of \$6,000 for services provided at hearing and \$3,000 for services provided on Board review.

The employer contends that claimant's requests are excessive, because the hearing lasted only 35 minutes, the documentary record was of average length, and the disputed condition resolved without impairment. Under these circumstances, the employer argues that fees of \$5,000, for services at hearing, and \$2,000, for services on review, would be reasonable.

We review the attorney fees issue *de novo*, considering the specific contentions raised on review, in light of the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case. *See Schoch v. Leopold & Stevens*, 325 Or 112, 118-19 (1997) (in determining a reasonable assessed attorney fee, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances of each case). Those factors are:

⁴ Dr. Leggett opined that claimant would not have contracted an MRSA infection "from the boot abrasion" if he were not already colonized with *S. Aureus* bacteria, and he did not acquire the bacteria in his workplace. (Ex. 42-3). Therefore, Dr. Leggett concluded that claimant's *infection* was unrelated to his work or workplace. (*Id.*) The doctor's conclusion does not follow from his premises: He apparently attributed the infection in part to the boot abrasion (which occurred at work), but then said that the infection was unrelated to work. Moreover, it is undisputed that the bacteria preexisted the December 12, 2006 work activities and the sudden onset of symptoms. But that does not detract from Dr. Abraham's opinion that the rubbing of claimant's work boot against his left shin *contributed* to his MRSA infection. Because Dr. Leggett's reasoning focuses on the bacteria only and does not address the *infection*, we find no persuasive reason to discount Dr. Abraham's opinion relating the infection to the undisputed bacteria *and* the rubbing of claimant's work boot on December 12, 2006.

⁵ Although Dr. Abraham did not expressly say that the boot rubbing *that day* caused claimant's need for treatment, he essentially ruled out any earlier rubbing (consistent with the remainder of the record). *See* n 2, *supra*.

(1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

Here, the record contains 43 exhibits, including three medical opinion letters generated by claimant's counsel. The record also includes a "post-hearing" deposition, with a 42-page transcript. The hearing lasted about half an hour, with a 16-page transcript. Claimant was the only witness who testified. On review, claimant's counsel submitted an appellant's and reply briefs, consisting of about nine pages, in support of claimant's argument that his claim was compensable.

Based on disputes generally presented to this forum, the complexity of the compensability issue was more complicated from a medical perspective. The attorneys involved in this matter are skilled, with substantial experience in workers' compensation law. Claimant's MRSA infection has been found compensable and he is entitled to workers' compensation benefits. The interest involved and the benefits secured for claimant are comparable to those involved and secured in claims generally found compensable by this forum. Considering the employer's denial and the parties' respective positions, there was a substantial risk that claimant's counsel would go uncompensated for his services. In particular, we note that the employer mounted a vigorous defense, including the generation of a medical report by a respected expert regarding MRSA. (*See Exs. 42, 43-22-23*). Finally, no frivolous issues or defenses were asserted.

In addition, time devoted to the case is but one factor we consider in determining a reasonable attorney fee. Rather, in accordance with OAR 438-015-0010(4)(g), the amount of time expended in litigating a claim is but one of many factors considered in determining a reasonable attorney fee award. *See Karen M. Stone*, 51 Van Natta 1560 (1999); *June E. Bronson*, 51 Van Natta 928, 931 n 5 (1999).

Accordingly, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review is \$9,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, his counsel's attorney fee request, and the employer's objection to that request), the benefit secured, the nature of the proceedings, the complexity of the issue, and the risk that counsel might go uncompensated.

Finally, because our order issues after the effective date of *amended* ORS 656.386(2) and OAR 438-015-0019, and because claimant has finally prevailed over a denied claim, we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees. *See Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008).

Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated April 14, 2008 is reversed. The self-insured employer's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's counsel is awarded a \$9,000 attorney fee, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on January 13, 2009

Member Lowell, dissenting.

The ALJ explained that this claim is properly analyzed as an occupational disease, not an injury, because there was no discrete injurious event. *See Active Transportation Co. v. Wylie*, 195 Or App 12, 15 (1999); *Valtinson v. SAIF*, 56 Or App 184, 188 (1982). The ALJ also found it likely that claimant's MRSA infection was present for a lengthy period of time before it caused symptoms.

The undisputed record supports the ALJ's reasoning. Claimant's work "exposure" to new work boots lasted much longer than one day. Indeed, he wore the allegedly offending left boot for two and one-half months before he discovered a red spot on his left shin. I would say that a work exposure of over two months is far too long to constitute a discrete event. Consequently, the claim should be analyzed as an occupational disease.

The majority relies on Dr. Abrahams' opinion to conclude that claimant probably did not have an MRSA infection before December 12, 2006.

A close examination of Dr. Abrahams' reasoning reveals that this opinion is based on the fact that claimant first noticed symptoms that day. Based on this history, which struck Dr. Abrahams as "just a little more clinically suspicious that the work boot was involved," the doctor concluded that the rubbing boot was a factor that contributed to the infection. (Ex. 43-19-20). However, Dr. Abrahams did not say that he relied on a history of *one day* of boot rubbing.

The majority also relies on claimant's testimony that he crouched and knelt repetitively at work on December 12, 2006. However, there is no medical evidence supporting claimant's belief that this one day of work caused the red spot that he observed that day on his left shin. Under these circumstances, Dr. Abrahams' opinion implicating boot rubbing is reasonably interpreted to include two and one-half months of rubbing, rather than just one day.

The majority acknowledges that claimant's MRSA *colonization* (but not his *infection*) was present on his skin before December 12, 2006. I agree that the colonization existed or occurred before that day. Moreover, notwithstanding the majority's contrary inference, the medical evidence is inconclusive regarding whether the work exposure occurred over two and one-half months or on just one day. Again, under these circumstances, this claim is properly analyzed as an occupational disease. *See Bracke v. Baza'r*, 293 Or 239, 246 (1982) (quoting *White v. State Ind. Acc. Com.*, 227 Or 306 (1961)) ("An occupational disease is stealthy and steals upon its victim when he is unaware of its presence and approach. Accordingly, he cannot later tell the day, month or possibly even the year when the insidious disease made its intrusion into his body.").

For these reasons, I would find that claimant's MRSA infection arose gradually and his claim is therefore properly analyzed as an occupational disease under ORS 656.802. *See Smirnoff v. SAIF*, 188 Or App 438, 449 (2003) (the determining factor in deciding if a claim is for an injury or a disease "is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly."). Because the medical evidence does not establish that work conditions were the major contributing cause of the MRSA condition itself (*i.e.*, not just the need for treatment), I would uphold the insurer's denial. *See Tammy L. Foster*, 52 Van Natta 178 (2000) (work activities must be the major contributing cause of the disease itself, not just the disability or need for treatment).

Consequently, I respectfully dissent from the majority's contrary decision.