APPEAL NO. 022301
FILED OCTOBER 23, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 7, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of Methicillin Resistant *Staphylococcus Aureus* (MRSA) on _____ (all dates are 2001 unless otherwise specified); that the claimant had disability as a result of the compensable injury from _____ through November 30; and that the appellant (self-insured) is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer of the injury pursuant to Section 409.001. The self-insured appeals the determinations on evidentiary sufficiency grounds. The claimant timely responded to the appeal, urging affirmance. In the same document, the claimant urges that the disability period should be from _____, through the present. To the extent that the claimant is attempting to appeal the length of the disability, her response is not timely submitted as an appeal, and we are not permitted to consider it as an appeal.

DECISION

Affirmed as to timely reporting; reversed and rendered on injury and disability.

An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980).

The claimant worked as a nurse in a psychiatric hospital for over 14 years. She maintained that she contracted MRSA in the course and scope of her employment through exposure to a very ill patient for whom she provided primary nursing services for a month. The claimant's care of that patient (referred to as CD throughout the CCH and in this decision) included providing medication and bathing the patient. CD developed signs of infection, including loss of appetite, boils, fever, ash-gray lips, and the sweats. The claimant testified that she had to pop the boils without gloves because none were available at the hospital, nor was there any antibacterial soap available. CD was twice transferred from the psychiatric hospital to another hospital for care, but no information regarding CD's care or diagnosis was provided to the claimant or to her employer because of medical confidentiality concerns.

The claimant testified that she experienced similar symptoms in early July. When she developed boils which started small but became extremely large, she sought medical care and was hospitalized. The claimant had preexisting, underlying conditions of situational anxiety, high blood pressure, and diabetes which predisposed her to contracting MRSA. After two hospital stays during July, the claimant continued to be treated for MRSA until the third week of October. The claimant's medical records establish that she definitely had MRSA. Due to the confidentiality of CD's medical records, the claimant was unable to establish that CD in fact had MRSA. The claimant admitted that she does not know if CD ever had a diagnosis of MRSA, but believes that CD must have had MRSA because they both had the same symptoms.

Ms. P testified that she is a registered nurse whose training and work were in occupational health and infection control, and that about half of her time is spent in infection control. She reviewed CD's records from the psychiatric hospital and found no mention of MRSA in those records. She did not have any of the records from the hospital where CD's infections were treated. Ms. P testified that she visited the claimant while she was hospitalized in July, and that the claimant did not mention caring for CD as a possible cause of the MRSA. Ms. P said that she only learned of the alleged connection to CD at the benefit review conference in June 2002. She disputed the claimant's statement that there were no gloves available for nurses to use while caring for patients. She also stated that MRSA is a disease to which the public is commonly exposed and agreed that staph infections are not limited to hospitals. Ms P agreed that CD had the symptoms of MRSA, as did the claimant, but added that these are common symptoms of many infections and different diseases. Ms P mentioned that DNA typing of the MRSA would be the only definitive way to ascertain that CD and the claimant were both infected from the same MRSA, and such testing had not been done.

The evidence included information about MRSA from internet articles, specifically, that working in a hospital poses a greater risk of infection and colonization of MRSA; that MRSA is a nosocomial disease, that is, more prevalent in health care facilities than in the community; and that the claimant was diagnosed with MRSA in July and had been in recent, prolonged, close contact with a patient exhibiting identical symptoms to those which the claimant had. Dr. W, the claimant's treating doctor, submitted a letter dated April 8, 2002, in which he stated he was treating the claimant for MRSA, and that MRSA "is a nosocomial infection and is not found in a home setting. This infection is generally found in a hospital setting." Dr. S, identified as a Clinical Professor of Medicine (Infectious Diseases) at the (University), (City), whose report was not considered persuasive by the hearing officer in establishing that MRSA is an ordinary disease of life, stated that "[o]ver the last decade there has been over a 40% increase in [MRSA]. This increase has occurred both in nosocomial infections as well as community acquired infections." He went on to opine that "[b]ased on the review of her medical records, there is no evidence that [claimant's MRSA] was acquired through her employment at [hospital]." From the evidence presented at the CCH, and the inferences which she drew from it, the hearing officer determined that the claimant was actually infected in the workplace, as opposed to in the community.

We previously discussed the legal principles involved in this case in our opinion in Texas Workers' Compensation Commission Appeal No. 981637, decided September 2, 1998, a case which involved a serious illness contracted by a claimant who worked as a nurse in the neurosurgical unit of a hospital. She contracted listeriosis, a disease caused by listeria, which manifested as a severe and rare form of meningitis. We said:

> We believe that in this case, expert medical evidence was required to establish the cause of claimant's disease. *See generally* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) This is a case analogous to the situation in [Schaefer, *supra*], where it was asserted that a rare disease contracted by the claimant, caused by bacteria indigenous in soil, came from his occupation of working underneath houses. The disease in this case was also rare. The court noted, however, that this did not preclude it from being considered an ordinary disease of life. In rejecting the probative value of a doctor's testimony that was in favor of compensability in that case, the court stated:
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> > We have held that in, workers' compensation cases expert medical testimony can enable a plaintiff to go to the jury if the evidence establishes "reasonable medical probability" of a causal connection between employment and the present injury . . . . In the absence of reasonable probability, the inference of causation amounts to no more than conjecture or speculation [citations omitted].
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> The court further noted that the fact that proving the causal connection was difficult did not circumvent the claimant's burden of proof, and that absent proof that the organism was indigenous to claimant's work, or prevalent to a great degree in that work, the condition, although rare, could be considered an ordinary disease of life to which the public was exposed outside of employment. Schaefer, [*supra*]. The court found that without proof that the organism involved in that disease had actually been in the soil where the claimant worked, the doctor's opinion standing alone did not prove causation. The Appeals Panel has before considered the argument, advanced in this case by Dr. W, that the location of work around a higher concentration of ill persons itself accounted for a likelihood of exposure, and found same insufficient, standing alone, to prove causation. *See* Texas Workers' Compensation Commission Appeal No. 951587, decided October 26, 1995; Texas Workers' Compensation Commission Appeal No. 94103, decided March 7, 1994; and Texas Workers' Compensation Commission Appeal No. 92093, decided April 2, [sic 24] 1992.
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> Very little in this record goes beyond speculation about a *possibility* that the claimant could have contracted the disease at work. There was no

> evidence that listeria in particular, as opposed to sick people in general, was present to a greater degree at the hospital than in the general population. There was no actual case of listeriosis, or meningitis caused by listeria (as opposed to other forms of meningitis), established in the hospital at the time and location proximate to the claimant in the likely time for exposure. We affirm the hearing officer's decision that the claimant did not contract listeria meningitis from her work as a nurse, as sufficiently supported by the record.

The evidence in the instant case fails to meet the standard for proving causation by a reasonable medical probability as required by the Schaefer case and Appeal No. 981637, *supra*. There was no expert medical evidence presented to establish that the claimant was infected with MRSA at the workplace, the evidence does no more than suggest a possibility as to how or when the claimant was exposed to or contracted MRSA, and the hearing officer's statement that "the claimant was able to identify the carrier [of the MRSA]" is not based on reasonable medical probability, but relies on possibility, speculation, and surmise. As a matter of law, the claimant has failed to present sufficient expert medical testimony to establish the cause of the claimant's disease.

Since no expert medical evidence based on reasonable medical probability establishes that the claimant contracted MRSA in her employment, we reverse the decision of the hearing officer and render a decision that the claimant did not sustain a compensable injury in the form of MRSA on _____.

Since we have reversed the hearing officer's injury determination, we likewise reverse the hearing officer's determination that the claimant had disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's determination that the claimant timely reported her injury to the employer is a factual determination within the province of the hearing officer. That determination is supported by sufficient evidence, and is affirmed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision is affirmed in part and reversed and rendered in part, as set out above.

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge