

For purposes of this preliminary hearing it does not appear that there is a dispute over the compensability of claimant's accidental injury of December 12, 2007. On that day he was traveling on a man-lift between two floors of respondent's grain warehouse when he tripped, falling approximately 20 feet, landing on his head. A co-worker came to his aid and although emergency medical personnel were available, claimant continued to work the balance of his workday. This was, however, his last day of work.

Claimant went home that day and when he awoke after 3 hours he found he could not get up. Claimant remained in a recliner for a period of days and by his own testimony, resumed his 20-plus year addiction to cocaine in order to deal with his pain. On December 18, 2007, claimant was taken to the hospital and was admitted. An examination revealed that claimant was in septic shock which ultimately caused renal and later respiratory failure. The physician also found an abscess on claimant's right buttock.¹ Following some tests, the hospital diagnosed a CA-MRSA infection in the right buttock. Over the course of his 43 day stay in the hospital, claimant became very ill from the CA-MRSA. Only with the help of a significant number of antibiotics as well as other life-saving methods did he recover. However, after removal of the ventilator, claimant discovered he had complete bilateral hearing loss. The only explanation offered is that the combination of the high doses of antibiotics caused claimant's hearing loss.

Claimant's care was, in part, overseen by Dr. Thomas Moore, an infectious disease physician. Given the complexity of his condition, it is not surprising that Dr. Moore's testimony is equally complex. Both lawyers for the parties spent time with Dr. Moore in the hopes of ascertaining his opinions with regard to the causal connection between the CA-MRSA and claimant's work-related accident. After a long interview, a follow up letter directly from Dr. Moore and a subsequent deposition, there are some points that are now clear.

Dr. Moore testified that to a reasonable degree of medical certainty, claimant already had CA-MRSA in the abscess on his buttock on December 12, 2007.² This particular abscess was subcutaneous in nature and not contained within muscle tissue. While in the hospital, the CA-MRSA "seeded" or spread via the blood stream to various areas in the body which contain muscle tissue. Muscle tissue is normally resistant to such infections. But according to Dr. Moore, when muscle tissue is damaged, it appears that such damage makes the muscle tissue more prone to infection. And he believes that is what occurred in this case when claimant fell at work.

Dr. Moore opines that claimant's fall gave rise to muscle tissue damage, leaving him vulnerable to the "seeding" that can happen with CA-MRSA. The infection "seeded" into

¹ Moore Depo. at 39-40.

² *Id.* at 44.

his cervical spine and in the iliopsoas muscle. In fact, Dr. Moore stated that he “can say to a reasonable degree of medical certainty that the patient’s muscle injuries which were sustained on the job, provided fertile ground for the CA-MRSA to take root and blossom, thus significantly complicating his hospitalization and medical care.”³

But Dr. Moore also testified that the assault to the muscle tissue which creates the vulnerability could be so slight as to not have been noticed. He noted that there are those patients who become septic from such infections and have no history of trauma.⁴ In other words, people who have CA-MRSA might suffer some sort of assault to their muscle tissue and not know it. And under the right conditions, the infection will “seed” into that injured muscle tissue, allowing the infection to spread.

Dr. Moore also testified that cocaine users, regardless of whether the favored method of use is intravenous or through the nasal cavity, are particularly vulnerable to CA-MRSA.⁵

In contrast to the opinions of Dr. Moore are those expressed by Dr. Chris Fevurly, a physician who was retained by respondent to speak to this same issue. According to Dr. Fevurly, there is absolutely no relationship between claimant’s CA-MRSA and his work-related accident. It is worth noting that Dr. Fevurly has no apparent expertise with infectious diseases.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁶ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

³ *Id.*, Ex. 2 at 2 (Aug. 1, 2008 report).

⁴ *Id.* at 47.

⁵ *Id.* at 49.

⁶ K.S.A. 2007 Supp. 44-501(a).

⁷ K.S.A. 2007 Supp. 44-508(g).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁸

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁹ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹⁰ This has even applied in instances where a work related accident caused an acceleration of a preexisting cancerous tumor.¹¹

The ALJ granted claimant's request for the testing to see if he would benefit from a cochlear implant. In doing so, he undoubtedly concluded that claimant's present bilateral hearing loss was causally connected to his work-related fall. This belief is supported by Dr. Moore's testimony. This member of the Board has reviewed the physician's reports and the testimony presented to the ALJ and finds the Order should be affirmed.

Although the evidence is not wholly developed as of yet, it does appear that Dr. Moore's theory of how the CA-MRSA spread or "seeded" throughout claimant's body is a viable theory. Dr. Moore's credentials and his testimony are, simply put, more persuasive and credible, given his background and experience. For this reason, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 21, 2008, is affirmed.

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

⁹ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁰ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹¹ *Claphan v. Great Bend Manor*, 5 Kan. App.2d 471, 611 P.2d 180 (1980).

¹² K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge