

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-122419

Employee: Andrew Sutton
Employer: Tom Boyce Excavating, Inc.
Insurer: Missouri Employers Mutual Insurance
Date of Accident: September 22, 2004
Place and County of Accident: Christian County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 1, 2007. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued August 1, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 21st day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Andrew Sutton

Injury No. 04-122419

Before the

DIVISION OF
WORKERS'

COMPENSATION

Department of Labor and
Industrial Relations of
Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Tom Boyce Excavating,
Inc.

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance

Hearing Date: June 7, 2007

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: SEPTEMBER 22, 2004
5. State location where accident occurred or occupational disease was contracted: CHRISTIAN COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
RAKING GRAVEL
12. Did accident or occupational disease cause death? NO

13. Part(s) of body injured by accident or occupational disease: LEFT RING FINGER
14. Nature and extent of any permanent disability: 10 PERCENT
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? \$25,754.29
18. Employee's average weekly wages:
19. Weekly compensation rate: \$250.00
20. Method wages computation: STIPULATION

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$25,754.29

4 weeks of temporary total disability (or temporary partial disability)

17.5 weeks of permanent partial disability from Employer

6 weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

Total: \$32,629.29

23. Future requirements awarded: NONE

Said payments to begin IMMEDIATELY and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

ROB BULLOCK

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Andrew Sutton

Injury No. 04-122419

Before the

DIVISION OF
WORKERS'

COMPENSATION

Department of Labor and
Industrial Relations of
Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Tom Boyce Excavating,
Inc.

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance

Hearing Date: June 7, 2007

AWARD ON HEARING

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on June 7, 2007. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the case being submitted to the undersigned for issuance of an award on or about July 9, 2007.

The employee, Andrew Sutton, appeared personally and through his attorney, Rob Bullock, Esq. The employer, Tom Boyce Excavating, Inc., and its insurer, Missouri Employers Mutual Insurance Co., appeared through their attorney, Kevin Rapp, Esq.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about September 22, 2004 Tom Boyce Excavating, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Employers Mutual Insurance Co.
- (2) On the alleged injury date of September 22, 2004 Andrew Sutton was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Taney County, Missouri. The parties agree to venue lying in Christian County, Missouri. Venue is proper.
- (4) The employee notified the employer of his alleged injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the claimed accident the employee's average weekly wage was sufficient to allow a compensation rate of \$250.00 for both temporary total disability compensation, and permanent disability compensation.

(7) The employer and insurer have not provided temporary total disability compensation to the employee. However, the parties stipulate that, if the employee is found to have sustained a compensable injury on September 22, 2004, and if it is further found that this incident caused Mr. Sutton to sustain an injury in the nature of an infected finger, the employee suffered four weeks of temporary total disability. (The employee thus seeks four weeks of temporary total disability compensation.)

(8) The employer and insurer have not provided medical treatment to the employee.

The sole issues to be resolved by hearing include:

(1) Whether the employee sustained an accident or incident of occupational disease on or about September 22, 2004; and, if so, whether the accident or incident of occupational disease arose out of and in the course of employment?

(2) Whether the alleged September 22, 2004 accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed?

(3) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$25,754.29?

(4) Whether the employee is entitled to 4 weeks of temporary total disability compensation?

(5) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what the nature and extent of the disability?

(6) Whether the employee sustained any permanent disfigurement as a consequence of the alleged accident; and, if so, what is the nature and extent of the disfigurement?

EVIDENCE PRESENTED

The claimant testified at the hearing in support of his claim. Also, the claimant offered for admission the following exhibits:

Exhibit A..... Calendar for September 2004

Exhibit B..... Medical Bills & Expenses

Exhibit C..... Deposition of Shane Bennoch, M.D.

Exhibit D..... Deposition of Alastair D. Haddow, M.D.

Exhibit E..... Medical Records from Skaggs Community Hospital

The exhibits were received and admitted into evidence .

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

Exhibit 1..... Deposition of Curtis King

Exhibit 2..... Deposition of Tracey Boyce

Exhibit 3..... Deposition of David McKinsey, M.D.

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries
- Request for Hearing-Final Award
- Notice of Hearing
- Answer of Employer & Insurer to Claim for Compensation
- Claim for Compensation

DISCUSSION

The claimant, Andrew Sutton, is 29 years of age, having been born on September 24, 1977. He resides in Joplin, Missouri with his wife and children.[\[1\]](#)

Mr. Sutton enjoys limited education, as he attended but did not complete the 9th grade. And, he has not obtained a GED. In light of this limited education, Mr. Sutton's employment history is varied, and relates primarily to laborer oriented work. He is presently employed as a dishwasher for Ryan's Steakhouse.

Also, Mr. Sutton's personal history is marked by a criminal record that involves convictions for stealing and writing bad checks. He is presently on probation for this concern, and notes that he has been successful in his probation, and expects to complete the probation in September 2007.

The employer, Tom Boyce Excavating, is a construction business that is engaged in the earth moving phase of construction projects, which includes clearing, general grading, and installation of underground utilities. As an employer, Tom Boyce Excavating employs approximately 65 to 70 employees, who involve primarily operators and general laborers, and secondarily foremen and office staff. The operators are responsible for operating the heavy equipment, including the backhoes and bulldozers. The laborers, which number about 30, are responsible for shoveling, raking and laying and assembling pipe for underground utilities. Additionally, laborers assist the operators in spotting, and perform other laborer oriented work needed at the construction site.

In or around June 2004 Mr. Sutton obtained employment with Tom Boyce Excavating, working as a laborer. Mr. Sutton continued in this employment until being terminated in or around October 2004. As an employee of Tom Boyce Excavating, Mr. Sutton performed labor work that included raking, shoveling, using the pick and such other labor activities as might be presented on a construction project. Notably, he did not wear gloves when engaged in these activities, nor were gloves provided by Tom Boyce Excavating.

Nature of Claim

The parties appear to agree readily that, in September 2004, Mr. Sutton suffered a medical injury or condition in the nature of Methicillin-resistant Staphylococcus aureus ("MRSA"), which necessitated receipt of medical care, including hospitalization and surgical interventions. Notably, this medical condition involves a bacterial infection, and is now considered an epidemic concern in the United States. In describing the nature of this medical condition, David McKinsey, M.D. (infectious disease expert for the employer and

insurer) propounded the following comments:

Q. Okay. Can you explain to the Administrative Law Judge what MRSA is or what is the history of MRSA?

A. MRSA is Methicillin-resistant Staphylococcus aureus. Staphylococcus aureus has been an important bacterial cause of infection in humans for many years. In recent years the organism has become more resistant to antibiotics, and those isolates that are resistant to methicillin are referred to as MRSA.

* * *

Q. Where does this bacteria come from? This particular strain that was determined to exist in Mr. Sutton?

A. This particular strain has caused an epidemic in the United States since the year 2000. It's thought that this is a brand-new strain of Staphylococcus aureus. It is found primarily on the skin surface of humans or in the nose. Rarely it can be found on pet dogs or pigs and it can exist in the environment for brief periods of time.

In addition, in identifying this medical concern to involve a bacterial infection resistant to certain drugs involving a form of penicillin, Alastair D. Haddow, M.D. (infectious disease expert for the employee), testified that the infection requires special treatment. Additionally, while this bacterial infection was once considered a hospital born staph infection, it is now considered a community acquired infection. In discussing the nature and cause of MRSA, Dr. Haddow propounded the following testimony:

Q. Now, is it true, or isn't it true, that MRSA is a type of staph infection that is most often the result of someone spending some time in a hospital or doesn't it come from a hospital stay?

A. Ten years ago that would have been true. That's not true today. In fact, I'm going to present a lecture tomorrow to the family practitioner group in Branson and I reviewed all the most recent information on this organism. There is a new form of MRSA called CA-MRSA, which is a community acquired staph aureus.

Q. Right.

A. In our experience this now accounts for probably well over half of the methicillin resistant staph or MRSA that we see admitted to this facility.

It accounts for skin infections, boils, abscesses, heart valve infections, meningitis, osteomyelitis, all of which I've seen community acquired in this facility, so it now represents probably a significant burden of all these infections that we see with staph in our hospital coming in from the outside, so 10 or 15 years ago your statement would have been totally correct, but beginning about 1999-2000 studies of Vanderbilt in Memphis started looking at this and found an ever-rising number of this staph in children.

It's become a common organism in children. It's become a common organism in adults in the community and it's a real serious problem.

* * *

Q. Generally that MRSA came from human to human contact, is that correct?

A. It's acquired as colonization of the patient with staph probably acquired from another person, in this case community acquired, and by definition they should not have had to have a community acquired infection. They should not have been within a hospital or facility within a set period of time –

Q. Okay, But in any event it comes from human to human contact?

A. Human to human contact is how you acquire the organism on your skin or how it lives in you nose. That's separate from how it develops an infection. So a lot of people are carrying the bacteria on them but they are not infected.

Q. Okay.

A. So if you cultured 30 percent of the population between -- anywhere between 15 and 30 percent of population, if you went out and cultured their noses, would be carrying this -- one of these bacteria, maybe a sensitive staph or an MRSA staph and not know it because they don't have a boil, they are not sick, it's just there.

Q. If a person is carrying it can it manifest itself in some portion of the person's body?

A. If it's becoming an infection then it's no longer a carrier. It's a disease at that point.

Q. For an infection to -- for a person to have -- carry it and then develop into an infection does there have to be something special about their body? Do they have to have a cut or scrape or can it just appear on a limb or portion of their body?

A. It can -- if we look at face boils and arm boils and boils on the skin around the body can actually develop without a primary entry site so we see people now presenting to the community.

I've seen three young women within the past month who had a boil on their face that was a community acquired staph, or a community acquired MRSA. They had no entry points there. It just showed up but we are seeing an increase number of patients who also come who had a wound, a cut.

There is a young man in the hospital now had in baseball practice got a cleat on the side of his knee and got an infection in his leg and it's one of these MRSA germs, so yes, it can definitely be an injury site but not always. Some people just seem to get a boil here and there and they are sick with it but didn't have a wound.

Alleged Work Incident & Medical Care

In the late summer 2004, Mr. Sutton worked on a project near CC Highway in Christian County, Missouri. In regards to this project, Mr. Sutton performed labor work associated with site preparation and the installation of culverts and drainage tunnels/ditches. The drainage tunnels included: installation of pipes, which, upon assembly, would be covered with dirt and rocks; setting of manhole covers; and the sealing of manhole covers with "tar". Primarily, Mr. Sutton raked gravel and rocks. He performed this raking with a new rake, which had a wooden handle. Also, he used a large metal crowbar and shovel to perform work in the ditch. He did not use any gloves.

A few days prior to September 22, 2004, according to Mr. Sutton, he experienced a blister forming on his left ring finger. At the time, he did not give much attention to it, believing it to be nothing more than a "soft spot" that would resolve without any attention. However, on or about September 22, 2004, while cutting PVC pipe with a hacksaw, the blister popped. According to Mr. Sutton, he informed his supervisor (Curtis King) of this occurrence, but no action was taken. (Mr. King does not recall any such conversation, and does not recall Mr. Sutton ever suffering a blister, much less a popped blister. Notably, Mr. King is not aware of any employee of Tom Boyce Excavating suffering a blister while engaged in employment for the company.)

Over the next few days, Mr. Sutton's finger began to worsen, causing him to suffer significant pain and swelling. Mr. Sutton recalls specifically Friday, September 24, 2004, insofar as this day is his birthday, but he could not celebrate his birthday because he was in too much pain. Over the weekend, according to

Mr. Sutton, his finger continued to worsen, resulting in him calling into work sick, and presenting to the emergency room of Skaggs Community Health Center on Monday, September 27, 2004. In presenting to the emergency room with complaints of pain in his left ring finger, Mr. Sutton provided a history that made note of him not knowing why his finger was hurting so badly. The history recorded at the time of this presentation is as follows:

Mr. Sutton is a 27-year-old who has a three to four day history of increasing swelling of the left ring finger with pain now. He has not had any fever sensation or chilling. He says the pain is unbearable at this time. He comes to the Emergency Department for evaluation. He is not certain whether or not he got stuck, stung or bitten.

The attending physician found Mr. Sutton's finger to be "edematous, swollen, red, very painful to palpation, and very taut." In light of the abscess formation and tenosynovitis, as well as concern over joint involvement, the orthopedic surgeon consulted on the case recommended that Mr. Sutton be taken to the operating room for evaluation and treatment. Thereafter, Mr. Sutton proceeded to surgery, resulting in Marcus Heim, D.O. (orthopedic surgeon) opening the finger extensively, and irrigating it. Additionally, a culture was taken for further diagnostic testing. Mr. Sutton was then released from the hospital.

Mr. Sutton returned to work on September 28, 2004. Later, on the 29th, Skaggs Community Health Center telephoned Mr. Sutton and informed him that the culture studies performed earlier revealed a severe and highly contagious staph infection, and he should return to the emergency room for immediate treatment. Upon presenting to Skaggs Community Health Center on September 29, 2004, Mr. Sutton became under the care of Alastair D. Haddow, M.D., who is physician specializing in the diagnosis and treatment of infectious disease. Notably, at the time of this examination, Dr. Haddow took a history, and upon evaluating the finger and reviewing the medical records and tests, propounded the following diagnosis:

Staph aureus tenosynovitis with abscess formation status post surgery. Work related injury.

Subsequently, Dr. Haddow admitted Mr. Sutton into the hospital, and initiated therapy with Vancomycin IV, and elevation of the left hand. Also, Dr. Haddow referred Mr. Sutton to Darin L. Talley, M.D., [2] who is an orthopedic surgeon, for orthopedic evaluation and consideration of additional surgery. Mr. Sutton remained in the hospital overnight.

On September 30, 2004, Dr. Talley evaluated Mr. Sutton, and diagnosed him with "[s]tatus post irrigation of the left ring finger tenosynovitis with residual bullae and skin desquamation." In light of his examination and evaluation of Mr. Sutton, Dr. Talley recommended that Mr. Sutton undergo a derroofing of the residual fluid collection and to take the dead skin off the volar aspect of the finger in order to allow any fluid collection to drain. Thereafter, at the bedside, Dr. Talley performed a superficial debridement of some of the desquamated skin, and elected to leave the wound open to air to let the skin breathe. Dr. Talley continued to have Mr. Sutton receive intravenous antibiotics, and to remain in the hospital.

On October 1, 2004 Dr. Talley followed-up with Mr. Sutton, and observed that Mr. Sutton's finger continued to be "very red and edematous with continued drainage from his finger." As a consequence, Dr. Talley took Mr. Sutton into the operating room for a formal debridement. According to Dr. Talley, Mr. Sutton tolerated this procedure well, and was transferred to the recovery room in stable condition. Mr. Sutton continued to receive pain medication and intravenous antibiotics. Eventually, on or about October 7, 2004 Mr. Sutton became clinically stable, and received a discharge from the hospital. At the time of this discharge, Dr. Haddow offered a discharge diagnosis and treatment plan,

DISCHARGE DIAGNOSIS: Extensive tenosynovitis of the left fourth digit, status post debridement, drainage, and irrigation secondary to methicillin-resistant *Staphylococcus aureus*.

PLAN: The prognosis is good at the present time, although it is possible that the patient may require amputation of the distal phalanx of his fourth finger in view of the serious nature of this infection. Osteomyelitis of the distal phalanx could not be totally ruled out, however, serial x-rays if indicated may be needed. The patient was released in a stable condition and understood the need for taking medication and follow-up with his physicians.

Dr. Haddow provided Mr. Sutton with follow-up care, resulting in Mr. Sutton presenting to Dr. Haddow on October 28, 2004. Notably, at the time of the October 28, 2004 examination, Dr. Haddow released Mr. Sutton to return to work. Mr. Sutton attempted to return to work for Tom Boyce Excavating, but was terminated for missing too much work subsequent to his release by Dr. Haddow.

Medical Testimony:

Alastair Haddow, M.D.

Dr. Haddow is a Board Certified infectious disease expert who has been involved in the specialty of infectious disease since 1980. Dr. Haddow saw the employee in the hospital on September 29, 2004, and was retained to pick the antibiotic, to make sure the dose was correct, and to monitor the condition. Dr. Haddow testified that this is a very serious infection to the finger and the hand. Dr. Haddow testified that he remembered the employee's infection in that it was macerated, discolored and had fluid under it, and there was tenderness. He told Mr. Sutton that he could lose his finger.

Dr. Haddow testified that he believed Mr. Sutton's story that he had a blister that it had apparently been infected and that it was certainly plausible that the infection could have started that way. He further testified that he had seen many infections over the years that had arisen in the same situation. Dr. Haddow thought it would be a rare situation that a spider bite could have occurred on the finger.

Dr. Haddow also identified a letter he had written to Attorney Bullock describing the history of Mr. Sutton's injury and stated that it was clear to him that the infection had arisen from the on-the-job injury that Mr. Sutton had described to him of a blister having become infected. Dr. Haddow also testified that he had treated a number of people with this serious staph infection who did not have a specific injury point but that there is also a number of patients that come in with a wound or a cut that are infected.

Dr. Haddow also testified that many times, at the actual time of the entry of the bacteria into the skin could take hours to a week or ten days, and sometimes the area may look okay. He stated that sometimes they don't see the blisters, or the insect bite, or the wire stick, or whatever until they are simply confronted with the infection. He stated that, at the time he saw Mr. Sutton's finger, it was so beat up, he would not have seen the blister anyway.

Shane Bennoch, M.D.

Dr. Bennoch, who is an examining physician secured by Mr. Sutton, testified that the incident that occurred on September 22, 2004, was the prevailing cause of Mr. Sutton's infection to his left ring finger and subsequent surgeries. Dr. Bennoch opined that, as a consequence of this work-related injury, Mr. Sutton sustained a permanent partial disability of 20 percent to the left hand. Notably, in rendering this opinion, Dr. Bennoch acknowledges that Mr. Sutton experienced a very good result from his treatment, but notes that Mr. Sutton remains at increased risk for degenerative changes or problems with range of motion to the left finger and has permanent loss of sensation. Dr. Bennoch further testified that, in rendering his opinion, he assumed as true Mr. Sutton's history of having gotten a blister at work; and, while doing his work, the blister broke. According to Dr. Bennoch, he has seen thousands of infections during his time in the emergency room and this type of presentation is very common.

David McKinsey, M.D.

David McKinsey, M.D., who is an infectious disease expert, testified in behalf of the employer and insurer. Notably, Dr. McKinsey reviewed the various medical records of Mr. Sutton, and the depositions taken in this case, but he did not personally examine Mr. Sutton and did not see Mr. Sutton's finger. Dr. McKinsey agreed that Mr. Sutton had been diagnosed with MRSA or methicillin resistant staphylococcus aureus. He believes that this strain is an epidemic and that people get it with contact with another person who is carrying the bacteria on their skin. He stated that he believed that the MRSA infection on his skin was not associated with Mr. Sutton's employment with Tom Boyce Excavating, and that he did not have blisters on his hands when he presented to the emergency room on September 27th. Similarly, Dr. McKinsey states that there is not any reason to think that an infected blister would predispose someone to develop tenosynovitis.

Dr. McKinsey stated that it was not possible to determine how the infection originated in this case unless it was a puncture wound that was not recognized, and that it was difficult to know how it began. He stated that dirt played no role in spreading the infection and that the infection can occur in anyone but it was most common in children and young adults.

On cross-examination, Dr. McKinsey admitted that he premised his opinion, in part, on his assumption that Mr. King inspected Mr. Sutton's finger one day prior to Mr. Sutton presenting to the emergency room; and that Mr. King observed no blisters upon Mr. Sutton's hand. Yet, upon reviewing a calendar, Dr. McKinsey acknowledged that Mr. King may have been mistaken in his testimony, and did not see Mr. Sutton's finger the day before he went to the emergency room. In this regard, Dr. McKinsey acknowledged that, on September 27 (the first day Mr. Sutton presented to the emergency room for his finger), the attending physician diagnosed Mr. Sutton with an abscess or puss pocket. Similarly, Dr. McKinsey acknowledged that, on September 29, when Mr. Sutton returned to the hospital, he presented with complaints of a blister before ever seeing Dr. Haddow. And, Dr. McKinsey admits, a blister can get infected and that MRSA can get in from the skin to the body through a portal such as a cut or an abrasion.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an alleged accident or incident of occupational disease date of September 22, 2004, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on September 22, 2004, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v.*

Mister Guy, Inc. 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the employee's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the employee need not establish the elements of the case based on absolute certainty. It is sufficient if the employee shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation the employee has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I.

Accident / Incident of Occupational Disease & Medical Causation

The parties present a difficult issue, involving consideration of whether the infectious disease (MRSA) suffered by Mr. Sutton is causally related to his employment with Tom Boyce Excavating. This issue is not easily or readily resolved, insofar as the parties offer competing and differing expert medical opinion, all of whom I find to be credible.

Further, the parties offer differing views on whether Mr. Sutton suffered from a blister on his left ring finger; and, if so, whether it occurred several days prior to September 22, 2004. Mr. Sutton indicates that he developed a blister on his left ring finger several days prior to September 22, 2004, while performing his duties for Tom Boyce Excavating, which included raking for a number of hours. Mr. Sutton further states that this blister popped on September 22, 2004, while he was cutting pipe and the finger became very painful and infected, which necessitated him seeking emergency room treatment on September 27, 2004. In contrast, Mr. Sutton's supervisor, Curtis King, testified that he never saw a blister on Mr. Sutton's hand, but simply observed a swollen finger several days prior to Mr. Sutton seeking medical treatment. Indeed, Mr. King states that, at no time during his five years of employment as a foreman with Tom Boyce Excavating, had he observed any employee complaining of having a blister while performing work as a general laborer.

After consideration and review of the evidence, I resolve the differences in testimony between Mr. Sutton and Mr. King in favor of the testimony of Mr. Sutton, who I find to be credible. Notably, I do not find Mr. King to be credible in stating that he has never observed any of the laborers working for Tom Boyce Excavating, who perform manual work involving use of rakes and shovels, not to have suffered a blister. I further find and conclude that, prior to September 22, 2004, while working with a rake and performing his duties as a laborer for Tom Boyce Excavating, Mr. Sutton developed a blister on his left ring finger. Later, on Wednesday, September 22, 2004, while cutting pipe and performing his duties as a laborer for Tom Boyce Excavating, Mr. Sutton's blister popped. Mr. Sutton continued to work, but over the next couple of days, the finger became swollen, red and painful. Eventually, on Monday, September 27, 2007, Mr. Sutton presented to the emergency room of Skaggs Community Health Center for medical treatment for a swollen and painful left ring finger, which involved a severe and highly contagious staph infection. Eventually, the attending physicians diagnosed this medical condition as MRSA or methicillin resistant staphylococcus aureus, which necessitated receipt of extensive medical care that included hospitalization and surgery.

Finally, after consideration and review of the evidence, and taking into consideration the understanding that the applicable law requires a liberal interpretation in favor of coverage and affords to the claimant the benefit of the doubt,^[3] I find and conclude that, on or about September 22, 2004, Mr. Sutton

sustained an injury in the nature of a blister, which ruptured. Further, the rupturing of this blister resulted in Mr. Sutton suffering a bacterial infection in the nature of Methicillin-resistant Staphylococcus aureus. In rendering this determination, I resolve the differences in medical opinion in favor of the opinion of Dr. Dr. Haddow, who served as Mr. Sutton's treating physician and demonstrated a better understanding of the facts.

Thusly, while I view all of the physicians as credible, I believe Dr. Haddow provides the best explanation of the nature and cause of Mr. Sutton's injury; and I find Dr. Haddow to be more credible. Therefore, I find and conclude that, on or about September 22, 2004, the employee sustained an injury by accident or occupational disease, which arose out of and in the course of his employment with the employer, Tom Boyce Excavating.

II.

Medical Care

On or about September 22, 2004 Mr. Sutton sustained a work-related injury, which involved a bacterial infection in the nature of Methicillin-resistant Staphylococcus aureus. The seriousness of this condition necessitated extensive medical treatment, including hospitalization and surgery. Consequently, Mr. Sutton incurred medical expenses in the amounts and as follows:

Skaggs Community Health Center (09-29-04 to 10-07-04).....	\$16,991.19
Skaggs Community Health Center (09-27-04).....	\$ 5,542.10
Pinnacle Orthopedic Sports Specialists (09-27-04).....	\$ 1,385.00
Skaggs Health Clinics (09-30-04 to 10-28-04).....	\$ 649.00
Lake Region Imaging (09-30-04 and 10-07-04).....	\$ 56.00
White River Orthopedic (09-30-04 to 10-03-04).....	<u>\$ 1,131.00</u>
TOTAL:.....	\$25,754.29

The employer and insurer disputed the compensability of the injury and, thusly, did not provide or pay for the aforementioned medical care.

After consideration and review of the evidence, I find and conclude that the aforementioned medical care is reasonable, necessary and causally related to the work-related incident of September 22, 2004. I further find and conclude that the medical expenses are fair and reasonable.

Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee the sum of \$25,754.29 in unpaid medical expenses, causally related to the accident and/or occupational incident of September 22, 2004.

III.

Temporary Total Disability Compensation

The parties stipulate that, because of Mr. Sutton suffering from MRSA, he missed four weeks of work. The parties further stipulate that, if the claim was determined to be compensable, Mr. Sutton would be entitled to four weeks of temporary total disability compensation. Therefore, having found the injury to be

compensable, I find and conclude that the September 22, 2004 incident caused Mr. Sutton to miss four weeks of work, and he is entitled to temporary total disability compensation for this period. The employer and insurer are ordered to pay to the employee the sum of \$1,000.00, which represents 4 weeks of temporary total disability compensation, payable at the applicable compensation rate of \$250.00 per week.

IV.

Permanent Disability Compensation / Disfigurement

The evidence is supportive of a finding that the September 22, 2004 incident caused Mr. Sutton to sustain certain residual permanent disability. Notably, Mr. Sutton continues to have trouble with his left ring finger, which includes residual numbness and discomfort that causes difficulty in his ability to lift things with his left hand. Additionally, Mr. Sutton notes that his left hand is sensitive to cold weather.

Also, Dr. Bennoch notes that the two surgeries and treatment for the MRSA has resulted in Mr. Sutton suffering residual nerve damage in his left hand, and puts him at "increased risk for either degenerative changes or problems with range of motion to that left ring finger." Dr. Bennoch thus opines that this incident caused Mr. Sutton to sustain a permanent partial disability of 20 percent, referable to the left hand. Yet, Dr. Bennoch does not impose any work restrictions upon Mr. Sutton. Nor is Mr. Sutton governed by any permanent medical restrictions.

Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the accident and/or occupational disease incident of September 22, 2004, Mr. Sutton sustained a permanent partial disability of 10 percent, referable to the left hand (17.5 weeks). Further, the injury caused Mr. Sutton to suffer certain residual and permanent scarring and disfigurement, meriting 6 weeks of additional compensation. Therefore, for the foregoing reasons, the employer and insurer are ordered to pay to the employee the sum of \$5,875.00, which represents 23.5 weeks of permanent partial disability compensation, payable at the applicable rate of \$250.00 per week.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: _____08/01/07_____

Made by: _____/s/ L. Timothy Wilson____

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
Signed July 26, 2007

A true copy: Attest:

_____/s/ Jeffrey W. Buker
Jeffrey W. Buker
Acting Director
Division of Workers' Compensation

[1] In September 2004 Mr. Sutton lived in Forsyth, Missouri.

[2] At the time of this admission, Dr. Heim was not available, resulting in Dr. Talley being asked to provide

the orthopedic care.

[\[3\]](#) This case involves application of Chapter 287, RSMO, as it existed in September 2004. The present statute, as amended on August 28, 2005, would involve a different analysis with a different standard of proof, and potentially different result.