

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

DAVID EBERSOLE,  
Employee,

v.

EVANS BUILDERS,  
Employer.

Hearing No. 1322310

*Occupat Disease  
case -  
microbactera  
avium  
intercellulare  
→ Board  
finds NOT  
C/R to  
poultry  
exposure*

**DECISION ON PETITION TO DETERMINE COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties came before the Industrial Accident Board on March 6, 2009, in a Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

HAROLD BARBER

ELAINE BOWEN

**APPEARANCES:**

Brian E. Lutness, Attorney for the Employee

John J. Klusman, Jr., Attorney for Employer

## NATURE AND STAGE OF THE PROCEEDINGS

On June 27, 2008, David Ebersole (“Claimant”) filed a Petition to Determine Compensation Due seeking acknowledgement of the compensability of a work-related illness allegedly sustained while working for Evans Builders (“Employer”) with an onset date of February 1, 2007. Specifically, Claimant seeks recognition that he developed microbacteria avium intercellulare (MAI) disease as the result of an occupational exposure. Employer disputes that Claimant contracted his illness as a result of his work.<sup>1</sup>

A hearing was held on Claimant’s petition on March 6, 2009. This is the decision on the merits.

## SUMMARY OF THE EVIDENCE

Claimant testified that he is fifty-three years old and began working for Employer in March or April of 2004. He started doing trim carpentry but then went on to do a little bit of everything, such as concrete and steel work. It is a very physical job involving tearing down walls and rebuilding things.

Claimant acknowledged that, in the 1970s, he had a spontaneous pneumothorax (*i.e.*, lung collapse caused by a cyst) but he recovered from that. He has had pneumonia on several occasions. In the early 1980s, it was found that he had a fungus spore in his right lung and that was removed. Claimant had smoked for twenty-five to thirty years, but he does not currently smoke. For most of that time, he smoked about a pack a day. By October of 2008, he was down to half a pack per day.

---

<sup>1</sup> Initially, Claimant was also raising a claim concerning a back injury, but that claim has been withdrawn at this juncture. Employer’s counsel raised an issue concerning being reimbursed for the cost of a doctor’s deposition it took with respect to the back claim in the event that Claimant re-files a claim for a back injury and in the event that Employer would need to do another deposition of the doctor. The Board will not address Employer’s counsel’s request at this time. It is currently just a hypothetical. It will only become an actual issue *if* Claimant files a new claim for a back injury and *if* Employer needs to re-depose its doctor. If it ever becomes an actual issue, Employer’s counsel may raise it at that time.

Claimant stated that Employer did its work primarily in various chicken processing plants. Claimant estimates that sixty to eighty percent of his work for Employer was done in a poultry environment. For example, he replaced beams and rebuilt loading docks for chicken. He also tore up old concrete floors and put down new concrete floors in the poultry plants. He built grain silos. He has worked in every area of the chicken plants. He also once worked on a chicken farm or hatchery. He last worked for Employer in November of 2007. He had no problems breathing or doing his job prior to November of 2007.

Claimant stated that, in December of 2007, he developed a heavy cough. He went to the hospital and was diagnosed as having pneumonia. He was given antibiotics and sent home. Claimant went to his primary care physician, Dr. Chan, who sent him for a chest x-ray. The x-ray found a spot on his left lung. Claimant went to a pulmonary specialist, Dr. Amir Quefatieh who performed more tests. A bronchoscopy found bacteria. Claimant was put into quarantine because there was a concern that he might have tuberculosis. After taking medicines for tuberculosis for about a month, Dr. Quefatieh then stated that it was actually "avium." Claimant continued to take strong antibiotics and still takes them.

Claimant stated that, in November of 2008, he went for a breathing function test and began to cough up blood. A microorganism ate through the blood vessel and he started bleeding into his lung. It happened again a couple days later. He underwent surgery in December to remove a part of his lung. It was at this point that he stopped smoking. He had severe pain such that he had to take morphine. He is still recovering from this surgery. He still has problems breathing, especially while walking. He has pain in his rib cage and some numbness. He currently is taking strong antibiotics, Percocet, Xanax, an anti-depressant, and allergy medications. He has developed more nodes in his lower lung and if the medications do not clear

them up he will have to have more of his lung removed.

Dr. Peter B. Bandera, who practices in the area of pain medicine and rehabilitation, testified by deposition (Claimant's Exhibit 1). He examined Claimant on October 18, 2008, and reviewed pertinent medical records. In his opinion, Claimant's MAI is causally related to his work environment.

Reviewing Claimant's past medical history, Dr. Bandera observed that Claimant had a partial lung resection in 1989 as a result of a fungus ball. He also had chronic obstructive pulmonary disease ("COPD") from chronic tobacco use. This made him more vulnerable to environmental exposures.

Dr. Bandera was aware that Claimant was a construction supervisor in a chicken plant. He emerged with flu/pneumonia-like symptoms in December of 2007. He had ongoing production of phlegm, shortness of breath, night fever and sweats, depressed appetite and, more recently, he began to cough blood. In May of 2008, he was hospitalized for microbacterium avium, a bacterium that is extremely common in the bird population. He also had a sinus infection and lung disorder. His two upper lobe left lung cavities had pneumonia infection. Ultimately, Claimant underwent a lung resection.

Dr. Bandera opined that Claimant, in his capacity of supervising construction of chicken buildings, was exposed to avium microbacteria. This is not the avian flu.<sup>2</sup> MAI is environmentally related. The doctor did not know the exact transmission of the bacteria to Claimant or the dosage of the exposure needed to get MAI. Driving by a chicken plant will not cause it, and you may not get it from working two days in a chicken coop, but if there is constant

---

<sup>2</sup> Although earlier in his deposition Dr. Bandera agreed with Claimant's counsel's suggest that MAI was not avian flu, *see Deposition of Dr. Bandera*, at 6, on cross-examination he agrees with counsel's suggestion that avian flu is in the same general class of disease, *see id.* at 22.

exposure over years, a person has an extreme high risk of contracting it. A chicken coop would be the main place (100% environment) to get such an illness. Claimant, because of his fragile state from his COPD, was more likely to contract it than the average population. Dr. Bandera agreed that he has seen three or four cases of avium bacterial disease in the past five years and he does not recall that any of them specifically involving work in a chicken coop. The doctor was uncertain what the latency period would be after exposure before the onset of symptoms.

Dr. Bandera agreed that Claimant's treating doctor for this disease, Dr. Quefatieh, does not comment on any relationship between Claimant's pulmonary problems and his work for Employer. Similarly, Claimant's primary care doctor, Dr. Chan, did not relate the symptoms to Claimant's job duties.

Wayne Evans, the president of Employer, testified that Claimant's job duties with Employer were as a carpenter. Later, he operated more in a supervisory capacity. Mr. Evans agreed, however, that Claimant would pitch in and do anything you asked him to do. Claimant did work at chicken processing plants, but also did work for the Board of Education and, once, on a personal farm that had no chickens. Mr. Evans cannot recall Claimant having any breathing or pulmonary problems related to his work. At the chicken processing plants, the chickens were in coops. Mr. Evans has also served as an officer of the Delmarva Poultry Association and is familiar with the industry's efforts to prevent the spread of avian flu. However, he has never heard of "avium" prior to this case.

Dr. Albert Rizzo, who practices in the area of pulmonary medicine, testified by deposition (Employer's Exhibit 1). He examined Claimant on October 15, 2008, and he reviewed pertinent medical records. In his opinion, Claimant's MAI cannot, more likely than not, be causally related to his work for Employer.

Dr. Rizzo stated that Claimant, in his teenage years, had a lung collapse known as a spontaneous pneumothorax. That was treated with a chest tube. Then, in the early 1980s, Claimant had an abnormal chest x-ray, which turned out to be a fungus ball. He had a lung resection for that. He then did fairly well until he had episodes of pneumonia in 2007. Claimant had a history of smoking a pack per day. He was trying to quit when Dr. Rizzo saw him in 2008 and, at that time, was down to a half-pack per day.

Dr. Rizzo stated that, in the spring of 2008, a bronchoscopy was performed and Claimant was identified as having microbacterium avium culture. MAI is a family of bacteria that looks like tuberculosis under a microscope. However, it differs from human tuberculosis in that it is not transmitted from human to human or from animal to human. Most pulmonary physicians see MAI as a result of an individual having previous pulmonary problems, COPD, previous cavities in the lung and the like. The chronic illness affects the local immune system in the lung and allows the MAI to become present in the lung and, sometimes, to go on to become an infection. There is no connection between MAI and avian flu. Avian flu is a virus while MAI is in the bacterial population.

Dr. Rizzo opined that there is no relationship between the fact that Claimant worked in or around a chicken processing plant and the fact that he contracted MAI. When a pulmonologist looks at an individual who has been exposed in the poultry industry, it is usually for fungal infections such as Cryptococcus. MAI is not like that and is not particularly related to the poultry industry. MAI is not transmitted from animal to person or from person to person. MAI is an organism in the environment but it takes hold in the lung because the lung's immune processes are damaged. The bacteria can be in the lungs and not cause disease. Thus, the MAI could have been present in Claimant's lungs for years before it began to cause disease.

Dr. Rizzo stated that in his experience he is unable to pinpoint a source for MAI. There is no correlation between, for example, being in a closed building versus being in the open environment. He usually sees it in middle-age women with a history of chronic bronchitis or COPD. MAI is different from other avian-related infections. It is not more prevalent in the chicken population than other agricultural areas. It is prevalent in the general environment and Dr. Rizzo would not say that it is more prevalent in agricultural areas.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."<sup>3</sup> Because Claimant filed the current Petition, he has the burden of proof.<sup>4</sup> In this matter, Claimant has been called upon to prove the most fundamental element of any compensable workers' compensation claim: He must prove by a preponderance of the evidence that he was injured during the course and scope of his employment.<sup>5</sup> The Board finds that Claimant has not met his burden of proof.

There is no dispute that Claimant has MAI infection. It is also agreed that Claimant's prior pulmonary problems predisposed him to this infection. The issue is whether Claimant has established by a preponderance of the evidence that he got the bacteria while he was working for Employer. Dr. Rizzo, a pulmonologist, stated that in his experience there is no particular connection between chicken exposure and getting the MAI infection. He noted that the correlation with chicken processing tends to be more for fungal infections and MAI is not like

---

<sup>3</sup> 19 Del. C. § 2304.

<sup>4</sup> 29 Del. C. § 10125(c).

<sup>5</sup> Since the burden of proof is on the Claimant, Employer is under no burden to prove that an accident did not occur. Employer can raise no affirmative defenses, proffer no evidence as to how the alleged injury occurred and the Board can still rule in Employer's favor if Claimant does not meet his burden of proof. See *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985).

that. Dr. Rizzo indicated that MAI is in the general environment and not particularly connected to the chicken industry. By contrast, Dr. Bandera, a pain management doctor, thinks that Claimant was infected because he worked near chickens and Dr. Bandera believes that working in and around chicken coops increases the likelihood of infection. However, he also admitted that, in the four or five cases of MAI that he has personally seen prior to Claimant, he is unaware that any of them had any particular connection to chickens. Thus, neither doctor has any personal experience from which one could conclude that Claimant's work environment exposed him to any greater chance of infection than his normal non-work environment.

Dr. Rizzo also noted that the bacteria could have been in Claimant's lungs for years before it caused the infection. Dr. Bandera admitted that he did not know the latency period. Thus, the mere fact that Claimant became symptomatic in late 2007 does not necessarily mean that the exposure to the bacteria happened recently. He may have had it in his lungs for years—possibly even before he began to work for Employer.

The Board accepts the opinion of Dr. Rizzo over that of Dr. Bandera. The Board finds the opinion of a pulmonologist to be more persuasive as to causation of a pulmonological illness than the opinion of a pain management/rehabilitation doctor. The Board finds that Claimant has not established that, more likely than not, he contracted the MAI bacteria while working for Employer as opposed to anywhere else in the general environment. Claimant has provided no evidence of any similar infections from the chicken processing plants where he actually worked to even raise the suggestion that those plants posed a peculiar hazard to Claimant compared to the general environment.


This is Claimant's petition and he bears the burden of proof of establishing that, more likely than not, his work environment caused his illness. The Board finds that he has not met his burden.

**STATEMENT OF THE DETERMINATION**

FOR THESE REASONS, the Board DENIES Claimant's petition.

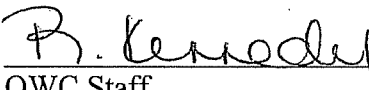
IT IS SO ORDERED THIS 30<sup>th</sup> day of July, 2009.

**INDUSTRIAL ACCIDENT BOARD**

 For  
HAROLD BARBER

  
ELAINE BOWEN

Mailed Date: 7-31-09

  
OWC Staff

