

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RAPHAEL CARTER

)

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VS.

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W.C.C. 01-00621

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THE HOUSING AUTHORITY OF THE CITY)
OF CRANSTON

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employer's appeal from the decision and decree of the trial judge granting the employee's original petition for workers' compensation benefits in which he alleged that he developed Hepatitis C as a result of a needlestick at work. The employer contends that the medical evidence was not sufficient to prove that the needlestick caused the infection. After careful review of the record and consideration of the arguments of the parties, we deny the employer's appeal, and affirm the decision and decree of the trial judge.

The employee testified that he had been employed as a maintenance mechanic for the Cranston Housing Authority for fifteen (15) years. His job was to service more than a hundred facilities including single family homes, high-rises, low-rises and dormitory type housing. His general maintenance duties included emptying garbage containers, fixing boilers and rehabilitating apartments when tenants moved out.

Sometime around May 1997, the employee and a co-worker were changing a trash container. When the container was pulled back, a bag fell out and a needle protruding through the bag stuck the employee in the index finger. He was unable to extract the whole needle from the bag, but identified it as a push type needle used to administer medicine. The employee noticed his finger was bleeding. Bill Ferry, a co-worker, helped him clean it and Ms. Ruth Snyder, a resident at the housing complex where this incident occurred, gave him a Band-Aid.

Later that week, the employee saw Dr. Richard J. Perry, his primary care physician, for an annual physical. He told the doctor he felt weak, but could not pinpoint the problem. The employee continued to work for six (6) months before seeking further medical attention. During this time he never notified his employer of this incident.

The employee continued to see Dr. Perry for treatment of some ongoing health issues, including anxiety, hypertension and eczema. In November 1999, routine blood work revealed some abnormalities. Repeat blood work was done. When the results were unchanged, Dr. Perry referred Mr. Carter to Dr. William Sikov. A bone marrow test was done, as well as additional blood work. In April 2000, the employee learned that he had Hepatitis C. This diagnosis was confirmed by the results of a liver biopsy which was done in June 2000.

In May 2000, the employee notified Elaine Woloohojian, the executive director of the Cranston Housing Authority, that he had Hepatitis C and he believed it was the result of a needlestick at work several years ago. He continued to work in his regular job until January 3, 2001, at which time his physical appearance had noticeably deteriorated. He noted the area under his eyes was darkened and he had lost a lot of weight. Though the employee had begun to feel better by the time of trial, he did not feel that he could return to work for the employer

because he was treated poorly after he notified them of his illness and they never took the situation seriously.

The employee testified that there were people with HIV and AIDS, as well as other illnesses, who resided in some of the complexes he serviced. He stated unequivocally that he was unaware of any other exposure that could have caused him to contract hepatitis.

On cross-examination, it was brought out that the employee has filed several claims that are either pending or settled against his employer with the Human Rights Commission, OSHA, and the Department of Labor. Further, he stated that he does not get along with Anthony Conti, his immediate supervisor.

Ruth Snyder testified that she lives in one of the complexes the employee serviced and met him the day she moved in. Although she could not recall the exact date it happened, she did remember that one (1) day Mr. Carter came out of the trash area holding up his hand because it was bleeding. She noted that he seemed upset and asked her if she had a Band-Aid. She also recalled that he said something about a needle causing the injury.

Denise Carter, the employee's wife, testified that she recalled her husband coming home from work one (1) day and complaining that he had been stuck by a needle. Since he was diagnosed with the disease, she noticed that he has lost weight, his face appears sunken, and he became an angry person. She stated that she has not engaged in any activity that would expose her to Hepatitis C and she was unaware of any other exposure that could have caused the employee's hepatitis.

Anthony Conti, the maintenance supervisor for the Cranston Housing Authority, testified that he was the employee's supervisor in 1997. He stated that the employee never notified him of the needlestick incident and the first he heard of it was in July 2000. Elaine Woloochian, the

director of the Cranston Housing Authority, similarly testified that she was informed about the needlestick incident and the employee's workers' compensation claim in May 2000. Mr. Conti further acknowledged that he had performed the job involving changing trash containers in the past and had seen syringes fall out of the containers.

The primary issue during the trial and on appeal is whether there is competent medical evidence in the record to support the conclusion that the Hepatitis C diagnosed in 2000 was caused by the needlestick incident which occurred in 1997. The pertinent medical evidence consists of the depositions and records of Drs. Richard J. Perry, David Schreiber, Michael R. Martin, and Dennis J. Mikolich.

Dr. Perry, an internist, conducted a comprehensive physical examination during his initial evaluation of Mr. Carter on September 13, 1996. At that time, the employee had complaints of insomnia, depression, anxiety, hypertension and eczema. Mr. Carter attributed some of these conditions to his work environment. Routine blood work done in September 1996 was normal.

The first indication of a problem was in November 1999 when routine blood work revealed a low white cell count. When repeat blood work continued to show abnormal results, Dr. Perry referred the employee to Dr. Sikov for further evaluation. After some additional testing and a bone marrow test, the employee was diagnosed with Hepatitis C. When Mr. Carter saw Dr. Perry on April 5, 2000 to discuss the diagnosis, the employee informed the doctor about the needlestick incident in 1997.

Dr. Perry testified that "[t]here is no reason to dispute the possibility that through a needlestick with a contaminated needle that Mr. Carter acquired Hepatitis C in that fashion." (Resp. Ex. #2, p. 7) He opined, to a reasonable degree of medical certainty, that it was possible to become infected with Hepatitis C through a contaminated needlestick. He noted that, based

upon his conversations with the employee, Mr. Carter had no other risk factors or exposures for transmission of Hepatitis C.

Dr. David Schreiber, a specialist in gastroenterology, began his treatment of the employee on May 18, 2000. After performing a physical examination and reviewing prior medical reports and test results, he diagnosed the employee with chronic Hepatitis C. Based upon the history of the needlestick reported by the employee, the doctor causally related the condition to the needlestick. The employee began a course of treatment with injections of Interferon and taking Ribavirin. The doctor testified that as of December 31, 2000, the employee was unable to continue working due to the side effects of the treatment and the disease. Unfortunately, the treatment did not work. The doctor advised Mr. Carter to return in about a year.

Dr. Schreiber personally saw the employee on November 13, 2001 and he has since been followed by a nurse practitioner in the doctor's office. The employee was undergoing another course of Interferon therapy at the time of the doctor's testimony. The doctor maintained that Mr. Carter continued to be partially disabled as a result of the Hepatitis C and the treatment for the disease.

The doctor stated that the early signs of cirrhosis of the liver detected by the liver biopsy were more likely due to Hepatitis C than to alcohol abuse, although he acknowledged that the alcohol abuse may have contributed to it. Mr. Carter had reported to the doctor that he used to drink about a bottle of wine a day since he was a teenager, but he had stopped drinking alcohol entirely after being diagnosed with Hepatitis C in March 2000.

Dr. Perry left the state shortly after the employee's Hepatitis C diagnosis. Dr. Michael R. Martin took over as the employee's primary care physician in August 2000. The employee

informed him that he had experienced depressed feelings for years but in the last six (6) to nine (9) months since he started the Rebetron therapy for treatment of his Hepatitis C, they had been worse. Dr. Martin prescribed Paxil to treat the increased depression, which he stated was a side effect of the medication therapy. On January 15, 2001, the doctor found Mr. Carter unable to work due to fatigue and depression secondary to the Hepatitis C and the Rebetron therapy. As of June 29, 2001, Dr. Martin concluded that the employee could return to work so long as he avoided the use of machinery or doing jobs in which he was more likely to cut himself. He explained that Mr. Carter needed to take precautions such as wearing gloves to prevent anyone else coming in contact with his blood. He noted that these precautions should have been imposed as soon as the diagnosis of Hepatitis C was made.

Dr. Dennis J. Mikolich, a specialist in internal medicine and infectious diseases, reviewed the records and depositions of Drs. Schreiber, Perry and Martin at the request of the employer. He also reviewed transcripts of the employee's testimony in court, as well as various test results. The doctor explained that Hepatitis C can cause chronic problems, most often to the liver. He stated that transmission of Hepatitis C requires contact with the body fluid or blood of a person who has hepatitis. He acknowledged that a needlestick from an infected person is a potential means of transmission of the virus. However, he estimated that between fifteen percent (15%) and twenty percent (20%) of hepatitis patients have no known risk factors for exposure that they can recall.

Dr. Mikolich testified that in his opinion, to a reasonable degree of medical certainty, the degree of damage revealed on the liver biopsy in 2000 was not consistent with Hepatitis C exposure only three (3) years prior. He estimated that the exposure to Hepatitis C would have had to occur twenty (20) to thirty (30) years ago to cause the degree of damage to the liver

shown on the biopsy. He also noted that there was no documented exposure in Dr. Perry's records until 2000. The doctor acknowledged that alcohol abuse can cause significant liver damage and that long term alcohol abuse combined with subsequent contraction of Hepatitis C could cause the type of damage shown on the biopsy. Dr. Mikolich also stated that it was possible that the employee contracted Hepatitis C due to a needlestick.

The trial judge, citing Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), found the opinions of Drs. Perry and Schreiber to be more persuasive than the opinion of Dr. Mikolich regarding causation. She noted that all of the doctors agreed that Hepatitis C can be transmitted by a needlestick and that the employee had no other known risk factors for exposure to the virus. She further indicated that the employee's abuse of alcohol for over thirty (30) years likely contributed significantly to the degree of liver damage revealed in the liver biopsy in 2000. The trial judge further accepted the opinion of Dr. Schreiber that the employee became partially disabled as of December 31, 2000 due to the effects of the disease and the treatment for it. She also concluded that the employee had failed to establish that he suffered from stress as a result of the work-related condition.

The appellate panel's review of the findings and orders of a trial judge are strictly circumscribed by statute and case law. Section 28-35-28(b) of the Rhode Island General Laws provides that the findings of fact made by a trial judge shall be deemed final unless an appellate panel finds them to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is prohibited from simply substituting its own evaluation of the evidence absent a specific determination that the trial judge was clearly wrong. See Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). In the present matter, based upon our

deferential review of the complete record of the proceeding, we cannot say that the trial judge's conclusions are clearly erroneous.

The employer has filed five (5) reasons of appeal alleging error on the part of the trial judge. The first four (4) reasons argue that the trial judge was wrong to rely upon the opinions of Drs. Perry and Schreiber regarding causation because those opinions were not expressed in terms of probabilities, but were mere speculation or conjecture and were inherently improbable. We disagree.

The intended purpose of expert medical testimony is to assist the court in the search for the truth. It is well-settled that a trial judge is free to accept or reject the testimony of a medical expert in whole or in part and to determine the probative value of that testimony. The expert is not required to utilize certain "magic words" or "precisely constructed talismanic incantations" in rendering his opinions. Gallucci v. Humbyrd, 709 A.2d 1059, 1066 (R.I. 1998). Absolute certainty or conclusiveness is not necessary, however, the expert must testify with "some degree of positiveness." Sweet v. Hemingway Transport, Inc., 114 R.I. 348, 355, 333 A.2d 411, 415 (1975). During the course of his testimony, the expert may, implicitly or explicitly, definitively eliminate other possible conclusions thereby lending the necessary "degree of positiveness" to his own conclusion.

There is no dispute that the employee is infected with the Hepatitis C virus which was diagnosed in 2000. His first abnormal blood test was in November 1999. His last blood work prior to that date, which was done in 1996, was normal. The fact that he was stuck with a needle while handling trash at work is clearly established by the testimony of the employee, the employee's wife and Ms. Snyder. All of the doctors, including Dr. Mikolich, agree that a contact with a contaminated needle is a method of transmission of the virus. Furthermore, both Drs.

Perry and Schreiber reviewed other possible means of exposure to the virus and no other risk factors were identified.

Dr. Schreiber testified that, based upon the history provided by the employee regarding the needlestick and the absence of any other risk factors, it was his opinion that Mr. Carter became infected with the Hepatitis C virus from the needlestick at work. The employer contends that the doctor then contradicted himself by testifying that he could not state with any certainty that the needle was contaminated without testing the needle. As noted above, the court does not require absolute certainty. The employee is not required to produce the specific needle for testing in order to prove his case. Such a requirement would be akin to disallowing a doctor's opinion on causation regarding a back injury because he did not actually see the employee lift an object at work. This would be an impossible burden.

The testimony of the doctors must be viewed in its entirety, not by isolating the answers to a few questions. After reviewing the deposition of Dr. Schreiber, we find that the doctor's statements and opinions, taken as a whole, convey the requisite degree of "positiveness" to be competent and admissible as expert medical testimony.

Admittedly, Dr. Perry was not as definitive in the phrasing of his opinions on causation as Dr. Schreiber. The use of the word "possible" obviously raises a red flag. However, the doctor went on to testify that reports of subsequent case studies substantiated the transmission of Hepatitis C via a needlestick and that his discussions with Mr. Carter, as well as Dr. Schreiber's evaluation, did not reveal any other possible risk factors for exposure. Dr. Perry's testimony did not equivocate between the needlestick and some other possible cause. Rather, he proceeded to exclude all other possible causes and bolster the conclusion that the employee did acquire the disease from the needlestick.

Based upon our review of the doctors' testimony, we conclude that their opinions were both competent and probative. As noted by the trial judge, this case came down to a determination as to which expert medical opinion was the most persuasive. She exercised her prerogative in accepting the opinions of Drs. Perry and Schreiber over that of Dr. Mikolich. See Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). We cannot say that she was clearly wrong in making that selection.

In its final reason of appeal, the employer argues that the trial judge was clearly wrong to conclude that the liver damage revealed by the biopsy in 2000 was caused by alcohol abuse, rather than long-standing Hepatitis C. Dr. Mikolich cited the significant degree of liver damage as consistent with the contraction of Hepatitis C twenty (20) to thirty (30) years ago. He did acknowledge that long term alcohol abuse can cause significant liver damage, but he was never asked about the effect of the employee's alleged alcohol consumption over the last thirty (30) years. The pathologist who authored the report of the liver biopsy noted that some of the findings were consistent with chronic alcohol use, but no one questioned the pathologist about this statement. Dr. Schreiber conceded that some of the liver damage could be attributable to long term excessive alcohol consumption, but he could not specify a certain percentage.

In her decision, the trial judge, in explaining her rejection of the opinions of Dr. Mikolich, stated the following as one (1) of the factors:

“With respect to Mr. Carter’s liver disease, the medical records document alcohol abuse well before Mr. Carter’s diagnosis of Hepatitis C. Dr. Mikolich confirmed that Mr. Carter’s liver damage was of long-standing duration and that such liver damage can occur as a result of alcohol abuse. The Court believes that Mr. Carter’s liver damage is indeed caused in part by his alcohol abuse.” (Tr. Dec. p. 10) (Emphasis added.)

The trial judge's statement is supported by the evidence in the record. There is medical testimony to the effect that alcohol abuse can cause significant liver damage. The employee reported to two (2) of his physicians that he has been consuming some amount of alcohol almost every day since he was a teenager (he was forty-nine (49) years old at the time of the Hepatitis C diagnosis in 2000). The pathologist reported that some of the findings of the biopsy were consistent with chronic alcohol abuse. It was not clear error for the trial judge to state that she believed that some of the liver damage shown on the biopsy report was due to alcohol abuse.

Based upon the foregoing discussion, we deny and dismiss the employer's appeal and affirm the decision and decree of the trial judge.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

ENTER:

Healy, C. J.

Olsson, J.

Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RAPHAEL CARTER

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W.C.C. 01-00621

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THE HOUSING AUTHORITY OF THE CITY)
OF CRANSTON

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the employer's appeal is denied and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on February 10, 2003 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of One Thousand Two Hundred and 00/100 (\$1,200.00) Dollars to Stephen Rappoport, Esq., counsel for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

John A. Sabatini, Administrator

ENTER:

Healy, C.J.

Olsson, J.

Connor, J.

I hereby certify that copies were mailed to Stephen Rappoport, Esq., and Bruce Balon,
Esq., on
