STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RITA S. MAHER-PERRINO, as Administratrix of the Estate of EDWARD L. OMEROD, JR.	)	
	)	
VS.	)	W.C.C. 2001-01198
	)	
FRY'S METALS, INC. d/b/a ARCONIUM SPECIALTY ALLOYS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the decision and decree of the trial judge in which he found that the employee, Edward L. Omerod, Jr., developed an occupational disease, specifically pulmonary alveolar proteinosis, as a result of inhaling indium during the course of his employment with the respondent. The employee was awarded weekly benefits for total incapacity from September 19, 2000 and continuing. After thoroughly reviewing the record in this matter and carefully considering the arguments presented by the parties, we deny the employer's appeal and affirm the decision and decree of the trial judge.

The employer, Arconium Specialty Alloys, is a manufacturer of metal alloys and metal salts, which are used in electronic components. Most of the alloys and salts are made with the metal indium. Mr. Omerod initially began working for the employer in March 1999 as a temporary employee. He was fifty (50) years old at the time and worked as a packer in the white

metal department. On July 26, 1999, he was hired to work full-time as a hydrogen reduction furnace operator after passing a physical examination. The employee worked twelve (12) hours a day, primarily in an enclosed room where the furnace was located. Mr. Omerod explained that he filled crucibles with powders and crushed tiles, weighed them, and then placed them on a conveyor belt which led into the furnace. When the crucible exited the furnace, the content was in liquid form and he poured it into a mold. The material would harden in about ten (10) seconds and he would empty it from the mold into a bucket. At the end of his shift, he weighed the bucket and recorded the information. About once in a shift, the employee worked in another room drying and crushing material by hand or machine for use in the crucibles that went into the furnace.

Mr. Omerod asserted that the furnace room was always very dusty and smoky because the ventilation system did not operate properly. He was never advised to wear a mask or other respiratory protection while working. He experienced burning in his nose, ears, and throat, particularly when he had to open the furnace doors to extract material if there was a breakdown.

Around June or July of 2000, the employee began to experience shortness of breath and excessive coughing. Initially, he thought he had a heart problem and saw a cardiologist. On September 19, 2000, he was admitted to Memorial Hospital complaining of shortness of breath, nausea, and coughing. After ruling out a cardiac condition, the employee was evaluated and eventually treated by Dr. David B. Ettensohn, a specialist in pulmonary and critical care medicine. The doctor prescribed Prednisone and oxygen. Mr. Omerod underwent two (2) "mini" lung lavages and two (2) whole lung lavages over the next year.

The employee had no prior history of any breathing problems. He acknowledged that in the past he had worked for a company blowing cellulose insulation material into homes;

however, he always wore a mask while doing this work.

Sadly, Mr. Omerod passed away on October 30, 2006 due to respiratory failure.

Eric Stager, the engineering services manager for the employer since March 15, 2000, testified that the employer manufactures metal alloys and metal salts, which are used primarily in electronic components. Approximately seventy five percent (75%) to eighty percent (80%) of their product is made with indium. Mr. Stager estimated that about six (6) other companies in the world manufacture indium-based products. He confirmed that the powders placed into the crucibles by Mr. Omerod consisted of indium tin oxide, crushed indium tin oxide, and grindings of indium tin oxide, and the liquid that emerged from the furnace he operated was indium tin alloy, which was composed of about ninety percent (90%) indium and ten percent (10%) tin.

Mr. Stager indicated that the employer hires a risk management company to conduct annual air quality testing in its buildings. The first testing done for indium since he was hired was in April 2001 in the refinery area where indium salts are manufactured. The testing found exposures ranging from one (1) to sixteen (16) milligrams per cubic meter of air, which is well above the limit of one tenth of a milligram recommended by the American Conference of Governmental Hygienists. Mr. Stager noted that employees working in this particular area are required to wear respiratory protection. Mr. Omerod did not work in the refinery area, but he did work with the same material, indium tin oxide. The room where the furnace was located was never tested.

The medical evidence presented was quite extensive and detailed. Dr. David B. Ettensohn, the employee's primary physician and an expert in pulmonary and critical care medicine, testified before the court on two (2) occasions. The employer presented Dr. Douglas Hutt of New Jersey, who is licensed in pulmonary and critical care medicine, to testify in court

on May 9, 2002, shortly after the doctor had the opportunity to examine Mr. Omerod. The trial judge appointed Dr. John A. Pella to conduct an impartial medical examination of the employee on May 22, 2001. Dr. Pella, who is board certified in internal medicine and pulmonary diseases, testified by deposition. The physicians were in agreement that Mr. Omerod suffered from pulmonary alveolar proteinosis (hereinafter "PAP"), a disease characterized by the accumulation of a proteinaceous material in the air sacs of the lungs that inhibits the transmission of oxygen from the lungs to the blood. There was disagreement among the doctors as to the cause of the disease.

Counsel for the employer objected to the admissibility of the opinion testimony of Dr. Ettensohn, contending that the reasoning and foundation did not satisfy the standard for admissibility set forth in DiPetrillo v. Dow Chemical Co., 729 A.2d 677 (R.I. 1999) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The trial judge overruled the objection and allowed the doctor to state his opinion that the PAP was caused by the employee's exposure to indium in the workplace and that the employee was totally disabled due to that condition. Dr. Pella concurred in that opinion. Dr. Hutt concluded that the PAP was not caused by indium exposure and the cause was likely idiopathic. The trial judge chose to rely upon the opinions expressed by Dr. Ettensohn and found that the condition was work-related. He awarded weekly benefits for total incapacity from September 19, 2000 and continuing. The employer filed a claim of appeal.

On appeal, the employer initially raises the argument that the opinions expressed by Dr. Ettensohn did not satisfy the standards for admissibility set forth in DiPetrillo and Daubert, and consequently the trial judge erred in overruling the objection to the admission of the doctor's opinion regarding the cause of the employee's PAP. On appeal, this panel will not disturb the

trial judge's ruling with regard to the admissibility of expert testimony unless we find that he abused his discretion. After reviewing the applicable law and the testimony in question, we conclude that the trial judge did not abuse his discretion in admitting the opinions of Dr. Ettensohn.

The employer focuses its argument on four (4) factors discussed by the United States Supreme Court in Daubert for consideration in evaluating expert scientific testimony:

> (1) whether the proffered knowledge can be or has been tested;
> (2) whether the theory or technique has been subjected to peer review and publication;
> (3) the known or potential rate of error; and
> (4) whether the theory or technique has gained general acceptance in the relevant scientific field.

DiPetrillo, 729 A.2d at 689 (citing Daubert at 593-94). The Court noted, however, that this was not an exclusive list and did not constitute a "definitive checklist or test" for the evaluation of all forms of expert testimony. Daubert at 593. It is clear from the Daubert decision that these four (4) factors do not constitute an exclusive test to be applied in all cases to any type of scientific, technical, or other specialized testimony.

In DiPetrillo, the Rhode Island Supreme Court discussed at great length the need to conduct a preliminary hearing to evaluate the admissibility of expert scientific testimony and the wide variety of factors that may be considered, in addition to those noted in Daubert. In DiPetrillo, the Rhode Island Supreme Court stressed that the key to the determination of admissibility of expert testimony is reliability and relevance. The Court noted that Daubert set forth a more "liberal, multi-faceted analysis" for the admissibility of evidence in federal courts than the previous standard of "general acceptance" in the community established in Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923). After reviewing the Rhode Island Supreme Court's lengthy discussion on the standards for admissibility in DiPetrillo, it is clear that the

employer's rigid analysis of the admissibility of Dr. Ettensohn's testimony utilizing solely the four (4) factors derived from the Daubert decision is erroneous.

We believe the opinion of the Rhode Island Supreme Court in Gallucci v. Humbyrd, 709 A.2d 1059 (R.I. 1998), issued after Daubert, is particularly instructive as to the matter before the panel. In Gallucci, the trial judge had excluded expert medical testimony offered by a licensed orthopedic surgeon in a medical malpractice case alleging negligent postoperative physical therapy. The physician, Dr. Barry Lang, had examined the plaintiff and reviewed extensive medical records regarding his treatment. The trial judge excluded the doctor's opinion regarding causation due to a discrepancy in the amount of weight the plaintiff likely used in performing a certain exercise and the amount of weight the doctor initially believed was used.

The Rhode Island Supreme Court reversed, noting that the concern expressed by the trial judge goes to the weight to be accorded the testimony rather than to its admissibility. Gallucci, at 1064.

> It is our opinion that by applying such a narrow and stringent interpretation of the rules of evidence, the trial justice in this case impermissibly conflated her own functions with those of the jury. Although the trial justice technically permitted Lang to testify as an expert witness, she effectively disqualified him by applying an overly rigid standard for the admissibility of individual components of his opinion. Lang is a board-certified orthopedic surgeon, not a charlatan or a purveyor of junk science. His opinion, legally competent as it was, would have been helpful to the jury and should have been admitted.

Id. (citing Daubert, 509 U.S. at 592).

Similarly, the Court in State v. Morel, 676 A.2d 1347 (R.I. 1996), concluded that the differences in methods utilized to arrive at the statistical probability of a match in DNA analysis go to the weight of the DNA evidence rather than its admissibility. The sense gleaned from these cases, as well as others cited by the employer, is that the trial judge, while not permitting

scientific evidence that is lacking in foundation and potentially misleading, should not apply an overly rigid and strict standard for admissibility.

> In addition, it is beyond dispute that courts routinely resolve discrepancies in expert testimony, and thus DNA evidence is not unlike other conflicting scientific evidence or medical evidence regularly presented to juries by experts. We conclude, therefore, that provided a defendant is afforded the opportunity to cross-examine the experts, to question the validity of their conclusions, and to disclose the potential weaknesses of the proffered DNA analyses, the results of such analyses may be presented to the jury.

Id. at 1356 (citations omitted).

In the present matter, the employer stipulated to the qualifications of Dr. Ettensohn as an expert in internal medicine, pulmonary medicine, and critical care medicine. The doctor is board-certified in those areas. He explained three (3) basic categories of PAP – genetic, idiopathic, and exposure-related or acquired. The employee had no history of family members with similar problems so a genetic cause was ruled out. In attempting to determine the cause of the employee's PAP, Dr. Ettensohn next considered his significant exposure to indium, which he noted to be grouped in the heavy metal category of the Periodic Table of Elements. A lung biopsy revealed such a significant amount of indium present that it scarred the glass knife used by the technician to section the lung tissue. Dr. Ettensohn stated that he had never seen so much metal in lung tissue before.

The doctor testified that the employee's exposure to indium in the workplace was causally related to the development of PAP in the employee. He based this opinion on the extraordinary amount of indium found in his lung tissue, the employee's significant exposure to indium, the presence of inflammation in the lungs, which has been reported with heavy metal exposure, and the employee's clinical course. (Tr. 50:10-17, 4/12/02.) Dr. Ettensohn described his method of determining the cause of PAP in the employee as a clinical approach as opposed to

a scientific approach. He noted that in his research he found several reports of association of heavy metals and the development of PAP and he has done research regarding the effect of heavy metal exposure on the lungs.

All of the physicians acknowledged that there is no reported case or study associating indium with the development of PAP. It must be noted, however, that PAP is an extremely rare disease. It is estimated that one (1) in two million (2,000,000) people develop PAP in the United States. In addition, indium is a very rare metal and very little data exists regarding it. Consequently, the ability to conduct any scientific study regarding the relationship of indium to the development of PAP is severely limited.

Dr. Hutt, the employer's expert witness, is licensed in New Jersey and specializes in pulmonary and critical care medicine. He testified that although he could not conclusively rule out the exposure to indium as the cause of the employee's PAP, it was his opinion that it was idiopathic and unrelated to that exposure. The doctor maintained that because there is no scientific proof or data establishing how indium causes PAP, he could not state that there was a causal relationship in the employee's case. He also pointed out that simply because indium is a heavy metal does not mean it has the same toxic effect as other heavy metals with a similar atomic weight as reflected in their respective positions on the Periodic Table of Elements.

This conflict in the opinion of expert medical witnesses is precisely the type of situation that judges of this court routinely resolve on a regular basis. Both of these physicians are experts in their fields and reviewed extensive information regarding the employee and his condition in forming their opinions. They are certainly not "purveyors of junk science" and we can find no basis for declaring their opinions incompetent. After evaluating the testimony of Dr. Ettensohn

in light of the relevant case law, we find that the trial judge did not abuse his discretion in admitting the opinions of the doctor into evidence over the objection of the employer.

In the third reason of appeal, the employer argues that the trial judge erred in relying upon the opinions of Drs. Ettensohn and Pella as the basis for his finding that the employee's condition was work-related, because the great weight and clear preponderance of the evidence established that there was no scientific basis to find a causal relationship. The standard employed by the appellate panel in reviewing a trial judge's decision is very deferential. The findings of fact made by a trial judge are final absent a determination that they are clearly erroneous. R.I.G.L. § 28-35-28(b). We are precluded from undertaking a *de novo* review of conflicting medical testimony without initially concluding that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

The trial judge in this matter thoroughly reviewed the extensive testimony of all of the doctors and found the testimony and opinions of Dr. Ettensohn to be the most probative and persuasive. Such a determination is within his discretion and we find no abuse of that discretion in this case. *See* Parenteau v. Zimmerman Eng'g, Inc., 111. R.I. 68, 299 A.2d 168 (1973). The employer does not cite any instance where the trial judge overlooked or misconceived material evidence, and consequently, there is no basis for this panel to independently review and weigh the evidence.

In the final two (2) reasons of appeal, the employer contends that the trial judge erred in finding the employee totally disabled and declining to reduce the employee's weekly benefits by twenty-five percent (25%) pursuant to R.I.G.L. § 28-34-7, due to his morbid obesity. Dr. Pella was the only physician who even mentioned the possibility of the employee performing some type of extremely restricted work and the effect of the employee's morbid obesity. Both Drs.

Ettensohn and Hutt stated that the employee was totally disabled due to the effects of the PAP. The trial judge, as is his prerogative, found the opinions of Drs. Ettensohn and Hutt to be more persuasive and probative regarding the degree and cause of the employee's disability. *See* id. We cannot say that the trial judge was clearly wrong in his assessment of the testimony of the medical experts.

Based upon the foregoing, the employer's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed. The record in this matter is quite extensive. Counsel for the employee filed a lengthy, in-depth memoranda in response to the employer's reasons of appeal and memoranda. In light of the complexity of this matter and the obvious expenditure of time and effort by the employee's attorney in defending the appeal, we find that a counsel fee of Three Thousand and 00/100 ($3,000.00) Dollars is fair and reasonable compensation for the services rendered. 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

Healy, C. J. and Connor, J. concur.

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RITA S. MAHER-PERRINO, as Administratrix of the Estate of EDWARD L. OMEROD, JR.	)	
	)	
VS.	)	W.C.C. 2001-01198
	)	
FRY'S METALS, INC. d/b/a ARCONIUM SPECIALTY ALLOYS	)	

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 appeal is denied and dismissed, 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 24, 2003 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of Three Thousand and 00/100 ($3,000.00) Dollars to Andrew S. Caslowitz, Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Andrew S. Caslowitz, Esq., on

_____