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CLAIMANT'S EXPERT EVIDENCE ON MULTIPLE CHEMICAL SENSITIVITY (MCS) HELD INADMISSABLE - CLAIMANT'S PERMANENT TOTAL DISABILITY CLAIM DENIED

Defense attorneys have always contested cases involving the bizarre symptoms of MCS. Arlene Bernardoni, an employee of Huntsman Chemical Company, presented such a claim. In that case, the Commission found that the testimony of the treating physician about MCS was inadmissible because THE DIAGNOSIS OF MCS IS NOT SUFFICIENTLY ESTABLISHED TO HAVE OBTAINED ACCEPTANCE IN THE MEDICAL COMMUNITY.

In her fourteen years of employment by Huntsman (and its predecessor company), the claimant described constant exposure to chemicals. More significantly, she was a three-pack per day smoker from 1964 (when she was 21 years of age) until October, 1994. Her work as an extrusion operator began in 1978. That position involved mixing batches of chemicals, the resultant exposure to fumes. Overexposure to these fumes resulted in many symptoms, including irritation of the respiratory tract.

She began treating with Dr. Ramon Inciong, her primary care physician, for

acute bronchitis in 1992. Her medical history included a reference to February 22, 1994, when she was using a chemical to clean carpeting at work with symptoms of headache, nausea, weakness and a sore nose and throat. Thereafter, she was referred to a number of doctors who found underlying pulmonary obstructive disease that was probably secondary to her smoking. She was seen by a number of physicians, some of whom had opined that her exposure to chemicals had aggravated her respiratory symptoms. Several of the physicians had concluded that her attacks were not related to her employment.

The most significant treatment was supplied by Dr. Marsha Vetter, an M.D. with a Ph.D. in microbiology and immunology and specializing in environmental medicine. After acknowledging that chemical sensitivity is not supported by any significant literature, she concluded that the claimant's development of chemical sensitivity was a cumulative process with a triggering event being the exposure to the cleaning product in February, 1994. Dr. Vetter said the claimant needed to be in an environment where she could control her exposure to chemicals, which would be very difficult to find.

The employer's expert witness, Dr. Marcus Bond, who specialized in occupational medicine and toxicology, stated that the major medical associations "did not recognize MCS as a condition that can be verified through scientific procedures." On that basis, he opined that there was no scientific basis for recognizing MCS as an illness.

The arbitrator had found the claimant

permanently and totally disabled. The Commission disagreed and found only 12-3/7 weeks of TTD and \$1,010.57 in medical expenses. With the Commission's position accepted favorably by the appellate court.

The Commission found further that, even if claimant's current condition of ill-being was causally related to her work environment, there was no basis for awarding permanent total disability benefits. According to the Commission, no physician opined that claimant was permanently and totally disabled, and there was no basis to conclude that claimant was obviously permanently and totally disabled. Although there was evidence that claimant could not return to her job with employer, the evidence did not establish that she could not work anywhere else. There was no evidence of a job search or expert vocational testimony to establish that claimant fell in the 'odd-lot' category.

When the claimant argued that the Commission had improperly excluded Dr. Vetter's testimony about MCS, the appellate court noted:

In Illinois, the admission of expert testimony is governed by the standard first expressed in Frye v. United States. Commonly called the

'general acceptance' test, the Frye standard dictates that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'

Illinois law, when addressing a syndrome that has not yet been admitted in this state, has a trial court conduct a *Frye* hearing to determine the scientific validity of the syndrome. During a workers' compensation arbitration hearing, most expert testimony is received via evidence depositions, making it impossible to require a separate *Frye* hearing with live witnesses. In supporting the Commission procedure, the court stated:

The arbitrator and the Commission considered all of the evidence relevant to the Frye issue before ruling on the admissibility of Dr. Vetter's testimony and dealt with the issues they would have addressed had a separate Frye hearing been held. Therefore, we believe that the procedure employed here was appropriate.

The claimant then argued that, even if the Commission correctly refused to consider the evidence about MCS, the Commission's causation finding is against the manifest weight of the evidence because several treating physicians had concluded that the work environment exacerbated her

pulmonary condition which had been caused by her smoking. The court recognized the disputed medical but noted that several physicians noted that the exposure to the cleaning chemicals provided only a temporary exacerbation to the underlying pulmonary condition.

EDITOR'S NOTE: When faced with MCS claims, it is important to refer to this *Bernardoni* decision, which refers to a number of Illinois cases based on the *Frye* case. As the language in the instant case points out, a review of the many medical evidence depositions would constitute a *Frye* hearing with the Commission having the right to reject medical testimony supporting the validity of the diagnosis of MCS.

PSYCHOLOGICAL INJURIES SUFFERED BY SCHOOL TEACHER AS A RESULT OF POLICE MISTREATMENT AT HIS ARREST HELD COMPENSABLE

Irwin Rotberg, a Chicago elementary school teacher, was intervening in a fight involving two of his students, when he allegedly committed battery on one of the students. He was arrested by the Chicago Police, who allegedly mistreated the claimant by applying tight handcuffs, denied water and the use of the restroom and placed him in a cell. Claimant had a long history of psychiatric problems and alleged that he now was totally disabled as a result of this aggravation of his condition.

The medical testimony was quite extensive. The claimant had been treated for psychological and psychiatric problems for at least seven years prior to his arrest.

He described the physical injury to his hands when the cuffs were removed and immediately thereafter he started to sweat profusely, experienced heart palpitations and could not stop shaking and trembling. He was described as being disheveled, extremely disoriented and agitated, especially when he drove home after being released. The claimant was initially advised that he could not teach children until the charges against him were resolved and he was assigned to a clerical position in the school office. After the charges were dismissed, the claimant worked as a gym teacher for four days and as a substitute fifth grade teacher.

Claimant initially applied for a disability pension from the Teacher's Pension Fund. Dr. Abrams and Dr. Utley, both psychiatrists, found the claimant to be suffering from a permanent disability which prevented him from teaching. The Teacher's Fund found the claimant to be permanently disabled and awarded him a disability pension. The claimant then proceeded with his workers' compensation claim and the opinion makes no reference as to the effect of the disability pension awarded by the Fund.

Dr. Hovseplan and Dr. Cullinane, both described the claimant as suffering from major depression which was aggravated by the arrest and short jail confinement. Dr. Ronald Ganellen, Ph.D, interviewed the claimant and reviewed his medical records. He was of the opinion that "the arrest and incarceration, should be considered a continuation of his life-long, persistent anxiety and depression, rather than the onset of a new condition." Dr. Jonathan Kelly examined the claimant and reviewed his medical condition and

concluded that the claimant did not have a post-traumatic stress disorder and that the claimant was a pathological liar interested in financial gain. The claimant's attorney then obtained several other reports from Dr. Leavitt and Dr. Blechman. Both concluded that the claimant's condition was aggravated by the arrest and subsequent events.

The Commission denied the claim as a result of the findings of Drs. Kelly and Ganellen. The appellate court reversed and found for the claimant, even though the court described itself as "reluctant to find a factual determination of the Commission to be against the manifest weight of the evidence," but it overcame its reluctance describing the findings of both Drs. Kelly and Ganellen on the issue of causation as "seemingly inconsistent."

It would appear that the conflict of the medical testimony, the Commission could have justified finding for the claimant but when it did not, it would seem that the appellate court would accept the Commission's finding on a factual issue. Without reviewing the entire medical testimony, it is important to read Justice McCullough's dissent because it explains why the Commission's decision on a highly disputed medical issue should not be reversed. Justice McCullough stated:

The majority places importance on certain findings of the arbitrator to support its decision. The majority also stated that only Dr. Kelly found no causal connection with the events of May 1999. Dr. Kelly's findings are sufficient in themselves to support the

Commission decision. The following findings by the arbitrator and adopted by the Commission support the Commission's decision:

Dr. Kelly diagnosed mood disorder, dysthymic disorder, panic disorder with agoraphobia, obsessive compulsive disorder, history of eating disorder, and personality disorder. Dr. Kelly concludes that Rotberg does not have a mental disorder that is causally related to the incident on his job as a teacher in May 1999. He adds that there is no sign of post-traumatic stress disorder. Dr. Kelly stated that treatment records do not indicate persistent inability to function or a new diagnosis or new symptoms not present prior to May 20, 1999.

Ronald Ganellen, PhD, a clinical psychologist, conducted psychological testing on Rotberg. Dr. Ganellen states that the results of the psychological testing data and his review of the medical records are consistent with longstanding emotional difficulties beginning in childhood and persisting continuously until the present time. Dr. Ganellen adds that the symptoms of emotional distress presented by Rotberg should be considered a

continuation of his lifelong persistent anxiety and depression rather than the onset of a new condition.

The arbitrator finds that the proximate cause of Rotberg's claimant condition of increased anxiety, panic, and depression is the action of the police officers in arresting and incarcerating him, at the behest of Mrs. Sears. There is no testimony or medical evidence indicating that his condition is connected to the act of separating the two fighting students.

** * **

The respondent played no part in causing Rotberg's arrest, and indeed, could not have prevented the police officers from coming to the school to arrest Rotberg based on Sears' complaint of battery. And most certainly, the respondent played no part in – and could neither reasonably foresee nor prevent – the police's mistreatment of Rotberg, which, in the final analysis, is the cause of his present condition." A review of the record supports the Commission's decision. The order of the circuit court should be affirmed.

EDITOR'S NOTE: A reviewing court should not reverse the Commission solely because a

court might make a different finding on the evidence or draw inferences other than reasonably drawn by the Commission. The court should not substitute its judgment for that of the Commission on conflicting medical testimony.

When the reviewing court substitutes its own judgment in a highly contested case, it assumes the status of a “super Commission.” The Commission in a compensation case is a trier of the facts and its decision should not be disturbed unless there is a clear miscarriage of justice.

CLAIMANT’S EMPLOYER CHANGED INSURANCE CARRIERS BETWEEN CLAIMANT’S TWO ACCIDENTS - SECOND CARRIER HELD LIABLE WITH PENALTIES ASSESSED.

James Delricco, a carpet installer with Central Rug & Carpet, alleged a work-related accident on October 1, 2000. After he had climbed approximately 15 feet to the top of a rack used to store roles of carpeting, he slipped and fell for a few seconds before grabbing onto an iron railing with his left arm, after which he was able to find his footing and climb down. After reporting the accident to his immediate supervisor, he continued working until November 6, 2000, when he underwent a routine physical examination at the VA Hospital. X-rays of the elbow revealed mild degenerative changes and he was prescribed medication. Over the next few months, he made two additional VA Hospital visits, during which time an orthopedic surgeon diagnosed him with chronic medial elbow epicondylitis. No treatment was rendered.

On June 19, 2001, more than eight

months after the accident, the claimant began seeing Dr. Jeffrey Visotsky, who confirmed the original diagnosis. The doctor recommended conservative treatment, which included injections and a structured rehabilitation program. The condition improved but did not completely go away.

The claimant alleged another work-related accident on February 6, 2002. While attempting to move a grand piano, he “pulled something” in his left arm and reported the incident to his supervisor. The claimant returned to Dr. Visotsky for treatment and after an MRI showed a small tear, recommended surgery. Neither insurance carrier would authorize surgery and the claimant was limited to light duty, which was not available. Dr. Visotsky testified that the October accident could have caused the epicondylitis and the February accident could have aggravated it. It should be noted that the claimant did not give Dr. Visotsky a history of the February accident.

Dr. Robert Schenck conducted an independent medical examination of the claimant and stated that the MRI findings could have been present in the absence of an injury on February 6, 2002, found no change in his physical condition after that date and that the February incident did not alter the claimant’s condition in any way.

The arbitrator found that claimant had failed to prove his condition was causally related to the October accident because the February accident was an independent, intervening accident that broke the chain of causation. He denied the request for penalties and attorneys fees, stating that the employer presented a good

faith defense. The Commission modified only the portion of the Arbitrator's Decision dealing with penalties and attorney's fees and felt that they should have been awarded. The Commission added:

Based on the entire record the Commission finds [employer's] liability for [claimant's TTD] and medical benefits was clear, and that these benefits were primarily denied because [employer's] two insurance carriers could not determine which one was responsible therefor.

The appellate court agreed suggesting that finger pointing of the liability between two insurance carriers for the same employer would always lead to a finding of penalties against the carrier having coverage for the related accident.

EDITOR'S NOTE: One might dispute the decision on the basis that claimant had, in effect, not proven that either accident was responsible for his present condition. The arbitrator had found that the first accident was not the cause and with reference to the second accident, the employer had established that the claimant had not even reported the accident to his treating physician and the condition was essentially the same both before and after the second accident.

Frank J. Wiedner
Editor