

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO.: 026340-96**

Cheril Young  
Cape Cod Hospital  
Cape Cod Hospital

Employee  
Employer  
Self-Insurer

**REVIEWING BOARD DECISION**

(Judges Levine, Maze-Rothstein and McCarthy)

**APPEARANCES**

Brenda J. McNally, Esq., for the employee  
Linda C. Scarano, Esq., for the self-insurer at hearing  
Paul M. Moretti, Esq., for the self-insurer on appeal

**LEVINE, J.** The employee appeals from an administrative judge's second denial of her claim for compensation benefits for an alleged work-related condition, Hepatitis C. In Young v. Cape Cod Hosp., 13 Mass. Workers' Comp. Rep. 298 (1999), we reversed the judge's prior decision. The judge had concluded that the exclusive medical evidence in the case – that of the § 11A impartial physician – did not support a finding of causal relationship between the employee's job as an emergency room technician and her Hepatitis C, because the doctor assumed a needle stick, which the employee did not remember. Id. at 301. We concluded that the medical opinion established causal relationship as a matter of law, because the occurrence of a needle stick was a rational inference that the doctor could draw as a result of his deductive reasoning. We recommitted the case for findings on, inter alia, the duration of total incapacity. Id. at 303. The judge then denied the claim again. As reason for this second denial, the judge considered that the recent Appeals Court opinion in Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586 (2000), compelled him to disregard our interpretation of the medical opinion. (Dec. 9.) We disagree, because we consider that Patterson is

distinguishable. Therefore, we reverse the decision. We award the benefits under §§ 30 and 34 that the judge specifically found the employee to be entitled to should we disagree with him. (Dec. 10-11.)

The facts of the case are fully set out in Young, supra. Pertinent to the present opinion are the following findings from the decision the judge issued after recommitment:

[A]fter reviewing Patterson and the well-reasoned briefs submitted by both counsel in this case, I am convinced that [the impartial physician] Dr. Aserkoff's opinion on causal relationship must fail for lack of proper foundation. . . . Dr. Aserkoff apparently believed he could make assumptions based on environmental factors in this case specifically, even after admitting that he based his opinion on hospitals generally and that he had no knowledge of the employee's specific work activities, but as the Appeals Court in Patterson points out, such an opinion would patently lack foundation.

. . .

[T]here is nothing to suggest that [the employee was stuck by a needle], other than Dr. Aserkoff's assumption based on hospital workers generally. Ultimately, Dr. Aserkoff stated "as I listened to the question and try to refine my answer better, I would say that if you exclude the possibility of a needle stick, that there is no way to render an opinion as to her source of her infection and no way to say that it is more likely to be in her source (sic) of employment or someplace else." (depo. 63). His refined answer in this regard conclusively establishes what he used as a basis for his ultimate opinion on causation, and having analyzed the opinion in light of Patterson, I am compelled to find his opinion lacking in foundation and therefore conclude that it cannot establish the necessary element of causal relationship. As with the impartial physician in Patterson, Dr. Aserkoff had no personal knowledge of the conditions or procedures at the Cape Cod Hospital, nor did he have evidence of the risk factors associated with the particular work environment or her specific duties. After reviewing Patterson, it appears that the Reviewing Board's "inference" of causal relationship is inconsistent with the Appeals Court's holding on a similar matter, and I therefore do not find that Dr. Aserkoff's opinion establishes an industrially related illness in this case.

(Dec. 6, 8-9.)<sup>1</sup>

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<sup>1</sup> See Young, 13 Mass. Workers' Comp. Rep. at 301, wherein we explain why Dr. Aserkoff's opinion is not speculative.

In Patterson, supra, the Appeals Court addressed an impartial physician's causal relationship opinion in a case of an alleged work-related asthma. The court reversed the award of compensation benefits, reasoning:

[T]here was no competent evidentiary basis for [the § 11A physician's] causation opinion. Most fatally, his conclusions regarding Patterson's exposure to latex impermissibly rested on assumptions and information not established (as was required) by his own direct personal knowledge or by admissible evidence in the record. Patterson, on whom the burden lay, proffered no testimony, expert or lay, and no admissible exhibits regarding air quality or the presence of any potentially asthma-inducing agents in any part of the hospital. Instead, she relied entirely on a few nonmedical engineering reports – not made a part of the administrative record – which apparently described certain environmental conditions at the hospital. . . .

Id. at 595. The court therefore concluded that “[t]he ultimate causality conclusion of the judge – who had no power to admit evidence at the hearing in a manner contrary to the DIA regulations or the rules of evidence (at least when such evidence is properly objected to) – consequently was itself not grounded, as it must be, on a competent evidentiary record.” Id. at 598.

The judge's reliance on Patterson, supra, was misplaced. The “presence of any potentially asthma-inducing agents” in the workplace, upon which the Patterson impartial physician based his opinion, was an “assumption” specifically because it was not grounded in the record evidence. For example, the hypothesized presence of latex in operating rooms was based on environmental reports that were not admitted into evidence and the impartial physician's own claimed knowledge of typical conditions in hospital operating rooms and other medical areas. Id. at 595-597. The Patterson court reasoned that the non-evidentiary documents were not a proper foundation for the doctor's opinion, because they were not *medical* documents, and because the employee had not shown that such evidence was independently admissible and of a type reasonably relied upon by physicians as a permissible basis for formulating an opinion. Id. at 595-596 & n. 16. The impartial physician also did not have any direct personal knowledge of the air quality in any part of the hospital. Id. at 594. Moreover, the doctor allowed that the employee's asthma may have had other environmental agents as causal factors. Id. at 590. The

causal relationship opinion of the impartial physician therefore was the unsubstantiated product of conjecture. Id. at 597.

The present case is distinguishable. The Patterson doctor's assumption of something in the workplace air is not analogous to this doctor's assumption of an inapparent needle stick in the emergency room.<sup>2</sup> Patterson's asthma could have been the result of any number of causes; the doctor did not rule out any potential exposures in reaching his assumption of a workplace exposure. Here, the impartial physician reasoned by deduction that the employee's Hepatitis C more likely than not stemmed from her emergency room exposure. That was the only risk factor for contracting Hepatitis C to which the employee was exposed. In that setting, the employee was at risk of contracting Hepatitis C, by way of a needle stick, which can occur without knowledge or realization of its occurrence. The doctor specifically ruled out the other potential causes, based on the employee's history which the judge credited. For example, he discounted the risks involved in dental treatments and association with HIV-infected and incarcerated individuals.<sup>3</sup> It was on the basis of this process of "differential diagnosis" that the doctor deduced the workplace to be the most likely known causal environment, and drew the reasonable inference that an inapparent needle stick was more likely than not the direct cause.<sup>4</sup> The impartial physician in Patterson could not draw such an inference of asthma-

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<sup>2</sup> The doctor's use of the word, "assumption," need not be legally significant. See Cymerman v. Hiller Co., 11 Mass. Workers' Comp. Rep. 609 (1997)("aggravation," as used by a doctor, compels no legal conclusion); Turcotte v. Westinghouse Elec. Corp., 9 Mass. Workers' Comp. Rep. 300 (1995)(same). Cf. L. Locke, Workmen's Compensation § 522 (2d. ed. 1981)("Use by the doctor of the words 'possible,' 'conceivable,' or 'reasonable' do not fatally flaw his opinion. Awards have been upheld where the expert witness used a variety of phrases which were construed as indicating his opinion that causal relationship was more likely than not").

<sup>3</sup> As we pointed out in our first decision in this case, the judge found that the employee was not subject to specified risk factors for contracting Hepatitis C. Young, 13 Mass. Workers' Comp. Rep. at 299 & n.1.

<sup>4</sup> "Differential diagnosis" has been described as "a ranking process used to determine things which may cause a specific clinical problem. The doctor considers all information specific to the case to rule out possible causes and determine the most probable cause(s) of the injury." Glaser v. Thompson Medical Co., 32 F.3d 969, 977 n. 15 (6<sup>th</sup> Cir. 1994). "Differential diagnosis [is] a

inducing agents, having employed no such reasoning process. Importantly, the present case presents no variance between the evidence before the judge and that relied upon by the impartial physician, unlike the environmental reports in Patterson, which the court ruled inadmissible. Finally, the doctor accounted in his deposition testimony for whatever omissions in or misunderstandings of the employee's history he might have had, without changing his opinion. Young, supra at 301.<sup>5</sup> The unknown needle stick here is a rational inference drawn as a result of the impartial physician's differential diagnosis, specifically excluding other potential causes. It is quite different from the fatal speculation regarding causal relationship that characterized the impartial physician's opinion in Patterson.<sup>6</sup> Compare Rodrigues's Case, 296 Mass. 192 (1936)(there was a basis to draw a rational inference that the employee came in contact with a chemical irritant).

Moreover, our review of the record indicates no objection by the self-insurer to the admissibility of the impartial physician's opinion. Freyermuth v. Lutfy, 376 Mass. 612, 616 (1978)("The consequences of the failure to object is to waive the objection to the testimony"). Its arguments at hearing were on the basis of the sufficiency of the causal relationship opinion evidence. (Self-Insurer's Closing Argument.)<sup>7</sup> Therefore, we do not address the self-insurer's argument on appeal that the impartial physician's opinion was

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standard diagnostic tool used by medical professionals to diagnose the most likely cause or causes of illness, injury or disease." Id. at 978. The Supreme Judicial Court has approved of the process as a sound basis for expert medical opinion evidence. Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 12-13 (1998). See also Hicks v. Boston Medical Center, 15 Mass. Workers' Comp. Rep. 1, 6-8 (2001).

<sup>5</sup> It is noteworthy that the judge and the doctor both credited the history recounted by the employee. (January 30, 1998 Dec. 5-8; Dep. 60.) Cf. Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999)(additional medical evidence required where judge rejected parts of employee's history, impartial's opinion was based on that history, and employee sought the introduction of additional medical evidence).

<sup>6</sup> In the self-insurer's and judge's view of the applicability of Patterson, even if the employee had in fact suffered a needle stick, the employee would still lose unless the needle were preserved and shown to carry the Hepatitis C virus.

<sup>7</sup> We take judicial notice of the closing argument, as it is not a part of the record on appeal.

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based on an unreliable basis, and not the legitimate product of a proper differential diagnosis. See P. J. Liacos, *Massachusetts Evidence*, § 3.8.3 (7<sup>th</sup> ed. 1999) (“Specificity [in objections] serves to call the attention of the judge and the opposing party to the particular problem asserted at a time when it can still be corrected . . .”). Such argument goes to the admissibility of the opinion. See Hicks, 15 Mass. Workers’ Comp. Rep. at 6-8, and cases cited therein. In the circumstances, the impartial physician’s opinion that the employee – more likely than not, to a reasonable degree of medical certainty – suffered an inapparent needle stick arising out of and in the course of her employment as an emergency room technician, which infected her with Hepatitis C, was based on a reasonable medical inference, drawn as a result of a differential diagnosis – and not a speculative assumption. Therefore, we reverse the decision and award the § 34 benefits as found, in the alternative, by the administrative judge.<sup>8</sup>

So ordered.

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Frederick E. Levine  
Administrative Law Judge

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Susan Maze-Rothstein  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Filed: **September 25, 2001**

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<sup>8</sup> Neither party disputes the judge’s findings that the employee is temporarily totally incapacitated beginning June 20, 1996. She is also entitled to § 30 benefits and to an attorney’s fee of \$4,243.36 pursuant to § 13A(5). (Dec. 6.) Mikel v. MBTA, 14 Mass. Workers’ Comp. Rep. 84, 91-92 (2000).