COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026340-96**

Cheril Young	Employee
Cape Cod Hospital	Employer
Cape Cod Hospital	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Maze-Rothstein)

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 brief

LEVINE, J. Cheril Young appeals from the decision of an administrative judge denying and dismissing her claim for workers' compensation benefits based on her infection with the Hepatitis C virus. In his decision, the administrative judge found that Ms. Young was totally temporarily incapacitated as a result of the illness but ruled that, as a matter of law, she had failed to satisfy her burden of proving causal relationship. Because the judge erred, we reverse the finding on causal relationship and recommit the case for determination of the duration of incapacity.

The employee was fifty years old when the hearing on this matter was held. Over the course of her adult life, she had worked in a variety of positions in the health care profession. (Dec. 3, 4.) She began her employment with Cape Cod Hospital in 1988, working as a health care technician on a medical floor; in 1990 she began working as an emergency room technician. This job involved obtaining patient vital signs, assisting doctors in suturing and applying orthopedic splints, transporting patients and generally

assisting in major traumas. (Dec. 4.) The employee did not perform invasive procedures but would assist and clean up afterwards. She disposed of "sharps boxes" and approximately three times per month she would clean "suture sharps." (Dec. 4, 5.) She does not recall ever having been stuck or cut. (Dec. 5.) She had no risk factors for contracting Hepatitis C, (Dec. 5-6),[1] other than her employment.

In June 1996, the employee began to experience severe abdominal pain, diarrhea, jaundice, itching, loss of appetite and weight loss. (Dec. 6, 7.) She was subsequently diagnosed with Hepatitis C. (Dec. 7.) She has been placed on a number of medications and has experienced a gradual improvement in her symptoms although she continues to experience abdominal pain, fatigue and nausea. Id.

The employee filed a claim for benefits which the self-insurer opposed. Her claim was initially denied after a § 10A conference. The employee appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A she was examined by Dr. Bernard Aserkoff, a board certified gastroenterologist, whose practice includes the treatment of Hepatitis C patients. (Dec. 8.) In his July 23, 1997 report, Dr. Aserkoff opined that the employee suffered from chronic Hepatitis C infection causally related to her employment resulting in medical disability that is "likely to be total and permanent." (DIA Exhibit 1.)

In his decision the judge adopted the opinion of the § 11A examiner relative to diagnosis and resulting disability. (Dec. 8.) However, the judge rejected Dr. Aserkoff's causal relationship opinion, finding it "factually unsupported and . . . grounded in an admitted 'assumption' or 'speculation.' " Id. While finding her totally incapacitated for work, the judge denied the employee's claim because she did not meet her burden of proving that her incapacity for work is causally related to her employment. (Dec. 11, 12.) The employee appeals that decision; she argues that the administrative judge's reason for rejecting Dr. Aserkoff's causal relationship opinion is flawed. We agree.

[1] The judge found, inter alia, that the employee never used any intravenous drugs; that she only used sterile, packaged needles for insulin injections for her diabetes; that she never had a blood transfusion. (Dec. 5, 6.)

Underpinning Dr. Aserkoff's opinion of causal relationship is his conclusion that the employee suffered an inadvertent needle stick in the course of her employment. (See, e.g., Dep. 64, 65.) The administrative judge rejected Dr. Aserkoff's causation opinion. Fundamentally, the judge's rationale is that "the only realistic way the Employee could have contracted the disease [at work] is if she were stuck with a contaminated needle" and "there is no direct or convincing circumstantial evidence that anything factually happened on the job." (Dec. 7-8, 7.) The judge summarized Dr. Aserkoff's reasoning and then rejected it:

> The reason Dr. Aserkoff concluded that the Employee had a needle stick in the past but was unaware of it was based upon his knowledge that people in hospital settings often get needle sticks without recalling them and, to him, "a lack of recollection is not sufficient to exclude the possibility." (depo. 55.) It is clear that his opinion is based merely upon this factual possibility, and as a legal matter, it does not establish an industrial injury within the meaning of the Act.

(Dec. 10-11, emphasis added; see also Dec. 8-9.)

When the judge concluded that Dr. Aserkoff's opinion was based on a mere factual possibility and "as a legal matter" it did not establish an industrial injury, we understand the judge to mean that, as a matter of law, the record would not support a finding of causal relationship. Compare Perkins v. Eastern Transfer, Inc., 12 Mass. Workers' Comp. Rep. 370, 373 (1998).[2] We disagree.

Where the issue of causal relationship is beyond the common knowledge and experience of an ordinary layman, as in this case, proof of causation must rest on expert testimony. Josi's Case, 324 Mass. 415 (1949). Dr. Aserkoff provided the only expert medical opinion in the case. His opinion was admitted pursuant to § 11A of the Act and as such constitutes prima facie evidence. G. L. c. 152, § 11A. Since Dr. Aserkoff's medical testimony is uncontradicted, the judge must accept Dr. Aserkoff's testimony

[2] As pointed out earlier, the judge did state that he could not find that the employee's condition is causally related to her work because "there is no direct or convincing circumstantial evidence" otherwise. (Dec. 7.) However, this statement appears tied to the judge's rejection of Dr. Aserkoff's opinion as being speculative.

unless he gives adequate reasons for rejecting it. Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep.518, 521-522 (1998).

The fact that the employee testified that she did not recall suffering a needle stick during the course of her work, (Tr. 47),[3] does not mean that Dr. Aserkoff's opinion that the employee acquired the Hepatitis C virus by an inadvertent needle stick is speculative and as a matter of law must be rejected. The judge found that Dr. Aserkoff has treated patients with Hepatitis C and as a board certified gastroenterologist is well acquainted with the disease. (Dec. 8.) The doctor testified repeatedly that it was his opinion, to a reasonable degree of medical certainty, that the employee acquired the virus during the course of her employment and by an inadvertent needle stick. (Dep. 17, 19, 24, 28, 32, 51-52, 64, 65.)[4] He held to this opinion despite knowing that the employee was a technician and not a nurse, (Dep. 14); that she had limited exposure to "sharps," (Dep. 57); that she "denie[d]" any needle stick, Id.;[5] that the employee's gums had bled while undergoing dental work, (Dep. 29, 39-40);[6] that some people have chronic hepatitis which is latent for many years before symptoms appear, (Dep. 37, 46-47);[7] and that there is a significant percentage - - thirty or forty percent - - of people with the virus for whom there is not a specific attributed vehicle for infection. (Dep. 24).[8] It was the doctor's

[3] On one occasion in the course of his decision, the judge erroneously reported that the employee "denied ever having such a needle stick." (Dec. 8; emphasis added). As pointed out in the text, the employee only testified that she did not "recall" a needle stick. (Tr. 47.)

[4] References to the evidence herein are to illustrate that Dr. Aserkoff's opinion is not speculative.

[5] At Dep. 57, Dr. Aserkoff was in effect asked to assume that the employee denied having any needle stick. But see footnote 3.

[6] Dr. Aserkoff testified it is "distinctly uncommon" for dental work to be the source of infection. (Dep. 39-40.)

[7] Dr. Aserkoff testified that, based on liver function tests, the employee suffered acute hepatitis and not exacerbation of a chronic hepatitis of years' duration. (Dep. 34, 35, 37.)

[8] Dr. Aserkoff testified that, because the employee worked in a hospital, it is more probable that she is in the larger group of people with the virus for whom there is a known cause than in the group of people for whom there is no known cause. (Dep. 31-32.)

opinion that the employee stuck herself based on no other known exposures and the fact that she worked in a hospital environment in which the virus is present, and is a commonly transmitted infection, (Dec. 9-10; Dep. 28, 51-52), where an individual in an emergency room can come into contact with sharps in many ways. (Dep. 16.) He testified that unknown needle sticks occur with some frequency, (Dep. 56); it is a common event for people working in a medical environment, (Dep. 19), despite the employee having taken precautions. (Dep. 28, 65). He disagreed with the contention of self-insurer's counsel that "without a confirmed needle stick [he could not] say with a reasonable degree of medical certainty that [the employee] did acquire [the virus] through her employment." (Dep. 16.) Instead, it was Dr. Aserkoff's opinion, to a reasonable degree of medical certainty, "beyond 50 percent," that the employee acquired the infection from a needle stick. (Dep. 57; Dec. 10-11.)

The employee has the burden to prove by a fair preponderance of the evidence the existence of a causal relationship between a disability and an industrial injury. The medical condition at issue in the present case must be shown by the employee to have been caused by an injury in the workplace; that is, that the Hepatitis C virus from which she suffers "was due to [her] work and arose out of it." Perangelo's Case, 277 Mass. 59, 62 (1931). But the employee need not exclude all other possibilities as the source of an injury. Rodrigues's Case, 296 Mass. 192, 195 (1936); Blanchard's Case, 277 Mass. 413, 415 (1931); Tassinari's Case, 9 Mass. App. Ct. 683, 686 (1980).[9] "It is sufficient if the evidence afforded the basis for the reasonable inference that [her] injury resulted from [her] work . . . . " Rodrigues's Case, supra.

The evidence is sufficient to support a finding that the employee's Hepatitis C infection resulted from her work. The judge accepted that Dr. Aserkoff was well acquainted with the disease. This includes its epidemiology. (See Dep. 19; Dec. 9.) So informed, Dr. Aserkoff concluded that, given all the employee's particular circumstances

[9] Thus the judge's observation -- "that other possible explanations for the Employee's contraction of the disease have not been ruled out" (Dec. 6) -- need not be of legal consequence.

and how the virus is spread, she acquired the virus as a result of her work in the hospital's emergency room. Rodrigues's Case, supra, is supportive that the evidence here is sufficient. In Rodrigues's Case, the employee had had dermatitis causally related to his first employment; the employee lump summed his case with the first insurer. This dermatitis had cleared up. The question in Rodrigues was whether evidence warranted a finding that there was causal relationship between the employee's work during a second period of employment at the same plant and the dermatitis condition he had at the termination of that employment, when a different insurer was on the risk. Id. at 193. One doctor testified that the employee's condition was due to a chemical irritant, and since the employee worked at the plant, he deduced that the condition had come from work. Another physician testified that he was familiar with the chemicals used at the plant, and opined that the employee had industrial dermatitis as a result of coming in contact with those chemicals. He testified it was necessary to come in contact with those chemicals in order to cause dermatitis. Id. at 195. Despite the fact that the employee did not testify that any chemical irritant came in contact with his skin and there was testimony which, if believed, would negate such a conclusion, the court nevertheless held that there was a basis to draw a rational inference that some chemical irritant did come in contact with the employee during the relevant employment. It affirmed the award of workers' compensation. Id. at 196.

An inference of causal relationship is compelled here. To summarize, work was the only risk factor to which the employee was exposed. The Hepatitis C virus is present in the emergency room of a hospital. Unknown needle sticks are common among hospital workers even when precautions are taken. Dr. Aserkoff deduced and opined to a reasonable degree of medical certainty that the condition came from work. In the circumstances of this case, Dr. Aserkoff's opinion that the employee acquired the infection by an inadvertent needle stick is not speculative. It is legally sufficient evidence to support the employee's claim. The judge erred in ruling that as a matter of law the record would not support a finding of causal relationship. Unless he gives an adequate reason, the judge is obliged to accept the § 11A doctor's uncontradicted, prima

facie opinion. Coelho, supra. In the present case, the medical opinion is not legally insufficient and cannot be rejected for that reason. Nor does the record reveal any other reason to reject the uncontradicted medical opinion. Therefore, once the judge in his findings eliminated any other risk factors, (Dec. 5,6), Dr. Askeroff's prima facie opinion on causal relationship must be accepted.

That being the case, we reverse the judge's finding on causal relationship, see Medeiros v. San Toro Mfg., 7 Mass. Workers' Comp. Rep. 66, 68 (1995), and order that the self-insurer is liable for the employee's Hepatitis C infection.

There has been no appeal of the judge's finding that the employee is temporarily and totally incapacitated as a result of the Hepatitis C infection. (Dec. 8, 11.) However, the judge did not make findings as to the duration of that incapacity, for example, whether it began on June 20, 1996, as claimed by the employee. (Dec. 2.) Therefore, it is appropriate to recommit the case on that issue as well as for the award of attorney's fees and §§ 13 and 30 benefits.

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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Martine Carroll
Administrative Law Judge

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