COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 040864-05

Louis Ciano	**Employee**
Peterson Party Center	**Employer**
Commerce & Industry Ins. Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Koziol, McCarthy and Horan)

The case was heard by Administrative Judge Dike.

APPEARANCES

Gia Marie Ferullo, Esq., for the employee
Diane Cole Laine, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision ordering it to pay a closed period of § 34 benefits for incapacity relating to the employee's reactive airway disease, which the judge found was caused by exposure to chemical fumes at work. (Dec. 8.) We reverse the decision.

The employee worked as a repairman in a warehouse, cleaning and refurbishing various types of rental equipment including tables and chairs. As a threshold matter, we note that the judge credited the employee's testimony "regarding his work area and the general conditions he described regarding the facility." (Dec. 7.) The employee described the warehouse as being approximately 120 feet long, divided down the middle by a wall that had two openings to the other side. (Tr. 18, 19.) The employee's regular work station was located in the back of the warehouse, about thirty feet away from spray painting booths and about ten feet away from a window. (Tr. 20.) A small exhaust fan was located to the right of his workbench, and there was no wall between his workbench and the spray painting booths. (Tr. 20, 50.)

During the week preceding the claimed date of injury, December 7, 2005, the employee was working in the front of the warehouse near two garage doors where

trucks entered and the rental equipment was loaded and unloaded. (Tr. 22-23.) This was also the area where chairs and stools were stored. (Tr. 22-23.) The wall divided this storage area from the spray booths. (Tr. 50.) On December 7, 2005, the employee was refurbishing wooden bar stools, repairing them and scuffing their polyurethane finish with a steel wool cloth to prepare them for lacquering. (Tr. 22-23.) Another employee brought the stools to the spray booths where they were sprayed with lacquer, and the finished stools were then returned to the area where the employee was working, which is where they were typically stored. (Dec. 3-4.)

The odor of the lacquer was strong, and after working for four hours, the employee developed soreness in his chest, which increased to the point where he had to leave work. The employee saw his primary care physician the next day, and was prescribed medications. (Dec. 4.) He did not return to work. Four days later, the employee developed a dry, heavy cough, and was admitted to the hospital for three days. (Dec. 4.) After a process of differential diagnosis, the employee was identified as suffering from a respiratory disorder. (Dec. 5.) The employee's treating physician concluded that the employee's exposure to various fumes, dusts, and chemicals at work caused his pulmonary problems. (Dec. 5-6.)

The employee filed a claim for workers' compensation benefits, which resulted in a conference order of a closed period of § 34 weekly incapacity benefits. That order was cross-appealed. (Dec. 2.) Pursuant to § 11A(2), the employee was examined by pulmonologist, Dr. Philip H. Thielhelm. The judge discussed his opinions as follows:

> [Dr. Thielhelm] opined that the employee suffered from a reactive airway disease as a result of his work place exposure. He reasoned that the employee's condition was caused because his work area was frequently contaminated by dust and chemicals and that his work area was not set up to isolate him from the process of spray painting. He readily admitted that he did not have knowledge of the specific contaminants that the employee was exposed to in terms of their specific chemical composition. He nonetheless concluded that the employee's condition was caused by the employee's exposures at work.

(Dec. 6.)

In his "General Findings and Rulings of Law," after crediting the employee's testimony about his work area and the employer's facility, the judge made the following findings and rulings about causal relationship:

> I have adopted the opinions of Dr. Philip Harold Thielhelm, the 11A physician. He opined that the environment at the employer led to the employee's reactive airway disease. He specifically found that the exposure to various chemical fumes led to the condition. As Dr. Thielhelm did not have specific information regarding the exact chemicals that the employee was exposed to his opinion was less specific than would be ideal. He did note the proximity of the spray booths to the employee's work area as well as the apparent limited ventilation in the area as being key factors in his conclusion. I agree with this conclusion based on the adopted testimony of the employee. He opined that the lacquer fumes were sufficient to cause such a reaction, even though he did not know the specific chemical make up of the specific lacquer and paints being used. He ultimately concluded that there was a causal relationship based primarily on the temporal relationship to the employee's development of the problem and the lacquering process. I agree and adopt this conclusion.

(Dec. 8.) Therefore, the judge concluded the employee suffered a personal injury under c. 152, and awarded a closed period of § 34 benefits. (Dec. 7-9.)The insurer contends that the impartial physician's opinion based on temporal relationship is not competent to support a finding of causal relationship between the work and the claimed disability. See, e.g., Koonce v. Bay State Bus Corp., 14 Mass. Workers' Comp. Rep. 238, 240 (2000)(doctor's statement of temporal relationship is not expert opinion on causal relationship). We agree. The questionable quality of this conclusion is underscored by the fact the impartial physician never mentioned, and apparently did not know, that the employee's symptoms arose with exposure to lacquer fumes, as opposed to anything else. We must therefore examine whether the impartial physician's opinion is otherwise supportive of the judge's finding of causal relationship. For the following reasons, we conclude it is not.

Dr. Thielhelm admitted he had no information indicating what, if any, chemicals the employee would have been exposed to at work, (Dep. 14-15), and he had no specific information regarding the quantities of chemicals with which the

employee would have had contact in the workplace. (Dep. 15.) In regard to these issues, the doctor testified: "He gave me the impression that his work space was frequently contaminated with dust and chemicals, that it wasn't set up to isolate him from this process of cleaning and spray painting these - - this furniture." (Dep. 16.) Regarding the specific description of the building, the doctor testified: "From his description, it sounded like it was an open area that had some partitioning, but it was not enclosed," and the doctor admitted he had seen no photographs, diagrams, or other information regarding the specifics of the workplace, nor had he seen any engineering report regarding the air quality of the work space. (Dep. 16.)

The diagnosis in the doctor's report was "reactive airway dysfunction syndrome." (Ex. 2.) The judge sustained both of employee's counsel's objections to the insurer's deposition inquiry as to whether the doctor formed his diagnosis based upon an assumption about chemicals in the workplace, and whether he had assumed there were particular toxins in the workplace when he made the diagnosis. (Dep. 20-21; Dec. 11.) As a result, the doctor's opinion that there were chemicals in the workplace capable of adversely affecting lung function - - which he testified was based on the employee's description of the workplace and his own knowledge of chemistry - - should not have been part of the adopted opinion. (Dec. 8.) Pertinently, when asked whether he had any knowledge of any particular chemicals in the employee's workplace the doctor answered, "No." (Dep. 21.)

That the doctor's knowledge of the nature and conditions of the employee's workplace exposure was vague at best is reflected consistently throughout the deposition:

> Q: Can you isolate the particular toxin or chemical or group of chemicals that - - with a reasonable degree of medical certainty that Mr. Ciano came in contact with?
>
> A: It would help me to know the type of paint that was used in the work environment. But assuming that it was metal surfaces that were being

> painted, then the types of paint used are frequently oil based or have a component of TDI.[1]
>
> Q: Did you assume, when you came to your conclusions, that Mr. Ciano was working with paint on metal surfaces?
>
> A: He described these tables as wooden with metal legs, and the same with the chairs.
>
> Q: Well, are you basing your opinions about what types of chemicals he may have come into contact with on the assumption that he was painting metal surfaces or exposed to items that were painted that were metal surfaces?
>
> A: He indicated to me that he was in an area where painting was occurring. As I indicated, I did not know the specific type of paint being used. And in part of the cleaning - scratch that - of the painting, the surfaces needed to be repaired. And how that was specifically done, he did not indicate that to me.

(Dep. 37-38.)

At this point, the insurer renewed its motion to strike the doctor's opinions regarding diagnosis and causal relationship on the ground that the doctor lacked an adequate factual foundation to form those opinions, citing specifically Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Commonwealth v. Lanigan, 419 Mass. 15 (1994), for want of a sufficient showing of scientific reliability with regard to the diagnosis made as well as the causal relationship opinion.[2] (Dep. 39.) The insurer renews its arguments on appeal.

We do not reach the insurer's argument under Daubert, because this case is more readily and appropriately analyzed in accordance with the holding of Patterson v.

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[1] The doctor did not explain what the letters "TDI" stand for, nor is there any other evidence in the record indicating what that substance is.

[2] The insurer had previously raised this motion at the hearing, at which time it was denied. (Tr. 5-7.)

Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586 (2000). In that case, the court concluded that the employee failed to meet her burden of proving her respiratory disability was causally related to her alleged work exposure to latex. The exclusive medical evidence, provided (as it was in the present case) by the § 11A physician, was based on an evidentiary foundation that was lacking:

> [The doctor] several times admitted that he could not identify and did not know what asthma-inducing allergen or toxin Patterson might have come in contact with at the hospital, other than latex. Even as to latex . . . he acknowledged that Patterson herself had testified that exposure to latex had produced a skin rash but not respiratory problems; that he had no actual evidence Patterson in fact had an allergy to latex which could produce a respiratory response . . . and that he had no information regarding the levels of latex in the hospital operating rooms but rather relied on "reasonable assumptions[s]" about hospital operations generally . . . .

Patterson, supra at 594. Accordingly, the court held "that there was no competent evidentiary basis for [the impartial doctor'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." Id. at 595.

We see the present case as indistinguishable from Patterson. Because the impartial opinion here was grounded in nothing but assumptions about the employee's exposure to various undetermined toxins in the workplace, and the temporal relationship between the alleged exposure and the later onset of symptoms, the employee's claim must fail for lack of competent medical proof of causal relationship.

The decision is reversed.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***March 30, 2009***