COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008549-99**

Michael Whyte	Employee
Wing Fook Limited Partnership	Employer
St. Paul Fire and Marine Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Maze-Rothstein and Costigan)

APPEARANCES
James C. Bradbury, Esq., for the employee
Ronald N. Sullivan, Esq., for the insurer

WILSON, J. The insurer appeals from a decision that awarded the employee workers' compensation benefits for HIV treatment that the judge concluded was causally related to a needle stick he sustained while working. Because the medical evidence falls far short of establishing it was more probable than not that the needle stick caused the employee's HIV infection, we reverse the decision.

The employee is a registered embalmer and licensed funeral director. (Dec. 3.) In June 1998, nine months prior to the needle stick incident, the employee had tested for HIV infection, and testified that he had not sought treatment as a result. (Dec. 3, 7; Tr. I, 91-93.)[1] On February 6, 1999, the employee was stuck at the base of his thumb by a large bore, "Huber" needle that had fallen out of a medical waste container after it was accidentally knocked over, spilling its contents. The employee disposed of the needle and had no knowledge of its source. (Dec. 3-4; Tr. I, 127-130.)

The employee developed symptoms of fatigue and fever. (Dec. 4.) After he went to Lowell Community Health Center to be tested late in February, he was diagnosed as HIV positive on March 2, 1999. (Dec. 4; Tr. I, 123-124.) "He was put on a series of medications known as the 'HAART' regimen and referred to a physician at

[1] References to the testimony taken on the first day of hearing, December 19, 2000, are designated as "Tr. I" and on the second day of hearing, January 26, 2001, as "Tr. II."

Massachusetts General Hospital for entry into a research program studying therapy regimes for patients who had recently been found to be HIV positive." (Dec. 4.) The judge found that the employee has been in a monogamous relationship with a man for over twenty years. She also found that prior to that time, he had been married and divorced, and had told an intake counselor at a health clinic that, "at some unspecified time since 1977, he had had sexual relations with a male partner and a female partner, and heterosexual relations with an injection drug user, a bisexual man, and a person with AIDS or HIV infection." (Dec. 4, 5.) Nonethless, the judge was not persuaded by "the employee's statements to the intake counsellor that, at some unspecified time since 1977, he had engaged in risky sexual activities, because the time was so vague and because [she] credited the testimony of the employee and his partner as to the nature of their long term relationship." (Dec. 9.)

The employee's claim for compensation benefits turns on the medical testimony of the § 11A physician, Dr. Matthew Kaufman, a board certified oncologist, hematologist and internist. Dr Kaufman concluded that "the employee presented with primary retroviral infection in late February and early March 1999, and that the history was consistent with the employee's HIV infection being related to the needle stick exposure," although there was no way of knowing with certainty if this were the case. Dr. Kaufman explained that the acute retroviral symptoms and the elevated viral load were associated with an acute infectious event and manifested weeks or months after the infection. (Dec. 5; Dep. 42-43.) The doctor opined that the employee's elevated viral load and relative preservation of the count of CD4 cells would tend to imply a more recent exposure to infection.[2] Dr. Kaufman opined again at his deposition that it was fair to say that it was

[2] We note the following related testimony. Dr. Kaufman's window for "recent" exposure or infection was "weeks or months." (Dep. 42, 43.) The doctor observed that some of the employee's symptoms indicative of HIV infection – oral thrush, scabies, fatigue and enlarged lymph nodes – predated the needle stick incident. (Dep. 18, 43.) The employee also suffered from gastrointestinal problems prior to the February 6, 1999 needle stick, a symptom that can be indicative of HIV infection as well. (Dep. 54-55.)

possible the needle stick caused the infection, and that it was possible that it did not. (Dec. 6; Dep. 58.)

The judge ruled that the impartial medical testimony of Dr. Kaufman was adequate under § 11A(2), but allowed the parties to introduce additional medical evidence due to the complexity of the medical issues. (Dec. 3, 7-8.) The judge rejected the opinion of the insurer's medical expert, Dr. Jeffrey K. Griffiths, that the employee's infection "well preceded February 6, 1999," and relied on Dr. Kaufman's opinions instead. (Dec. 6-8.)

The judge concluded that "the impartial medical examiner did not express the ultimate conclusion on causation in terms that would permit [her] to find it reasonably probable that the employee's HIV infection was caused by the industrial accident," (Dec. 8); that "there [was] no evidence that the needle was infected with HIV, or came from an infected source, no evidence as to how long the needle was in the container, and, according to the impartial medical examiner, the odds of becoming infected with HIV from a single needle stick [were] very low." (Dec. 9.) The judge, having first stated a correct legal conclusion, then deviated from that course and set out the following: "I have found that the employee was free of HIV infection before the industrial accident, and there were no other likely sources of infection at the time the impartial medical examiner [said] he likely became infected. In addition, the impartial medical examiner opined that the employee's HIV infection was 'more likely to be relatively recent,' *that is, that the employee was infected at the time of the needle stick.*" (Dec. 10; emphasis added.) The judge then concluded that the employee was entitled to medical treatment under §§ 13 and 30 for his HIV infection. (Dec. 11.)

The insurer contends that the decision is arbitrary and capricious, as the judge's reasoning with regard to causal relationship was flawed. We agree.

First, the insurer is correct that the judge's finding that the employee was free of HIV infection prior to the needle stick is arbitrary and capricious. The evidence established only that the employee had been tested in June 1998, and that he had not sought treatment as a result of that test. (Tr. I, 92-93.) These facts say nothing about the

nine months between that test and the needle stick. Moreover, a "negative" result is not established by the employee's testimony, which was the only evidence of the anonymous June 1998 test. Hence, there was no evidence supporting the judge's finding that the employee was free of HIV infection prior to the needle stick.

With this error as the backdrop, the judge next embellished the impartial physician's temporally-based opinion that the needle stick *possibly* caused the employee's HIV infection, and converted it into an opinion that she concluded satisfied the employee's burden of proving a probable causal connection, again without support in the evidence. Indeed, the evidence points in the other direction.

The medical evidence established only that the infection was of recent origin, that being weeks or months prior to the test findings in March 1999 that indicated elevated viral load and relative preservation of the CD4 cells. (Dep. 31, 42-43.) This evidence supports nothing more than the mere possibility of causal connection, as articulated by Dr. Kaufman. Moreover, it is undisputed that the determination of the employee's HIV-positive status was based on a blood test that occurred late in February 1999, the results of which the employee received on March 2, 1999. (Tr. I, 123-124.) The employee also testified that the test occurred at least around a week or weeks before he received the test results. (Tr. II, 34-35.) Along with this lay testimony, there was Dr. Kaufman's testimony that set the minimum period between infection and a positive test result as twenty-two days. (Dep. 35-36, 58-59.) The record evidence thus established that the very earliest a test would pick up an infection that occurred on February 6, would be February 28. In other words, the only set of facts that would allow for even the mere possibility of causal connection would be if the employee had been tested on February 28, two days before he received the results of the test on March 2. Thus, even as a statement of causal relationship based solely on a temporal confluence, which itself would not be entitled to any weight as an expert opinion in a complex case such as this, see Bean v. Tenavision, 15 Mass. Workers' Comp. Rep. 217, 220 (2001), Dr. Kaufman's opinion of *possible* causal connection hangs on a gossamer thread not supported by the employee's testimony. Finally, the evidence was also undisputed that employee was

having symptoms indicative of HIV infection prior to the February 6 needle stick. As such, this is not a case that invited a Bedugnis approach. See Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803-804 (1995)(opinion of something less than probability of causal relationship in conjunction with lay testimony can meet employee's burden of proof in certain circumstances). There was nothing in the evidence from which the judge could make the inference that it was more probable than not that the "relatively recent infection" identified by Dr. Kaufman was the needle stick. Compare Young v. Cape Cod Hosp., 15 Mass. Workers' Comp. Rep. 323, 326 (2001).

Accordingly, we reverse the decision.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **September 16, 2003**

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge