IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 1953 C.D. 2008
Workers' Compensation Appeal Board (Kriebel), Respondent	:	Submitted: February 13, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER[1] **FILED: August 28, 2009**

The City of Philadelphia (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that reversed the Workers' Compensation Judge's (WCJ) denial of the Claim Petition and the Fatal Claim Petition filed by Joseph Kriebel's (Decedent) widow, Patricia Kriebel (Claimant), after Decedent's death. The Board, in granting the petitions, concluded that Employer failed to rebut the statutory presumption, set forth in Section 301(e) of the

[1] The majority opinion was reassigned to the authoring judge on July 23, 2009.

Workers' Compensation Act (Act),[2] that Decedent's hepatitis C arose in the course and scope of his employment as a firefighter for Employer. Before this Court, Employer contends that the Board erred in reversing the WCJ's decision denying the petitions because: (1) there is substantial evidence that Employer's medical expert, who was found more credible than Claimant's medical expert by the WCJ, independently opined that Decedent's hepatitis C was the result of drug use and was not work-related; and (2) Decedent/Claimant failed to give proper, timely notice to Employer of the alleged disability.

Decedent died on October 25, 2004, at the age of 52. Claimant filed her Claim Petition on behalf of Decedent on January 12, 2005, alleging "[e]nd stage liver disease due to Hepetitis [sic] C contracted in the course and scope of employment" as a firefighter for Employer. (Claim Petition at 1.) Employer filed an answer to the Claim Petition denying the allegations contained therein and alleging that Decedent/Claimant failed to provide Employer with timely and adequate notice of the disability. A hearing was held before the WCJ on April 15, 2005. At the hearing, the WCJ suggested that Claimant file a fatal claim petition in this matter. Claimant then filed her Fatal Claim Petition on September 14, 2005, alleging that the cause of Decedent's death was "end stage liver disease following Hepatitis C." (Fatal Claim Petition at 1.) Employer filed an answer to the Fatal Claim Petition, again denying the allegations contained therein. The burden of proof for a claim petition and a fatal claim petition are fundamentally identical. Compare Erie Bolt Corp. v. Workers' Compensation Appeal Board (Elderkin), 777 A.2d 1169, 1172 (Pa. Cmwlth. 1998),

[2] Act of June 2, 1915, P.L. 736, added by the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. § 413.

reversed on other grounds, (holding that, in a fatal claim petition, "the claimant bears the burden of proving that the decedent suffered an injury arising in the course of employment and that the decedent's death was causally related to that work injury"), with Waronsky v. Workers' Compensation Appeal Board (Mellon Bank), 958 A.2d 1118, 1123 (Pa. Cmwlth. 2008) (holding that, in a claim petition, "the claimant bears the burden of proving . . . by substantial evidence, that she was injured in the course and scope of employment and that as a result of the injury she was disabled"). Therefore, we, like the Board, will not separately address Claimant's Claim Petition, but will instead focus on Claimant's Fatal Claim Petition.

In support of her Fatal Claim Petition, Claimant testified that Decedent joined Employer's fire department (Fire Department) on August 12, 1974, and worked for Employer until his death. Claimant also testified that Decedent had sporadic employment with an ambulance transport company for two years in the 1970s, and drove a dump truck in the 1990s. Claimant also testified that she and Decedent had one child, Patricia, who was 15½ years old at the time of testimony, lived with the couple prior to Decedent's death, and presently lives with Claimant.

Thomas Meehan testified on behalf of Claimant. Mr. Meehan joined the Fire Department the same day as Decedent, and they worked together for 22 years. Mr. Meehan testified that he had witnessed Decedent respond to fires, car accidents, and other emergencies in which people were bleeding. Mr. Meehan testified that, in the 1980s, before procedures changed, the Fire Department used a "sweep and scoop" policy, which involved getting the victims of accidents out of a situation as quickly as possible and loading them into a vehicle to be transported to the hospital instead of

waiting for a medic unit to arrive. In those instances, Mr. Meehan testified that Fire Department employees were exposed to blood and other bodily fluids, which, at times, would get on their bodies and uniforms. Mr. Meehan indicated that, while Fire Department employees would wear latex gloves and jackets, the gloves and jackets would not always protect the body because those items sometimes tore.

Claimant also submitted the deposition testimony of Victor J. Navarro, M.D., a gastroenterologist/internist who concentrates on patients with liver disease. Dr. Navarro began treating Decedent on November 12, 2002, and continued to do so until Decedent's death. At the time of Decedent's initial exam, Decedent had already been diagnosed by others with hepatitis C and cirrhosis. Dr. Navarro's impression at the time of exam was that Decedent had cirrhosis and probably an early-stage hepatocellular carcinoma (a form of liver cancer). Dr. Navarro opined that there was a direct relationship between Decedent's hepatitis C and his cirrhosis, and he indicated that 20 percent of people with hepatitis C develop cirrhosis over 20 years. Dr. Navarro also stated that carcinoma is a direct consequence of cirrhosis and that he, therefore, considered these three conditions to be related.

Dr. Navarro testified that Decedent was to have a liver transplant in 2003, but the transplant was cancelled because, following the detection of alcohol on Decedent's breath, testing revealed alcohol present in Decedent's blood. Dr. Navarro was unaware that Decedent had an alcohol problem during the time he treated him, and his notes, which were based on information that Decedent reported to him, indicated that Decedent had not consumed alcohol for five years or more. A second liver transplant was scheduled after Decedent had interventions with social workers

and random screens for alcohol yielded negative results. However, the liver transplant was subsequently aborted because Dr. Navarro discovered, while Decedent was on the operating table, that Decedent had pulmonary hypertension.

Dr. Navarro testified that, as of April 2003, Decedent's liver function was deteriorating and that his liver condition ultimately caused his death. Dr. Navarro opined that Decedent's career as a firefighter exposed him to hepatitis C, which he acquired, and which led to other complications. Dr. Navarro stated:

> [I]n Philadelphia, . . . fire fighters were first-responders for many things so they rotated on and off the emergency wagons and that Hepatitis C was not uncommon in the blood supply prior to 1990, that, particularly in the . . . city, where there's a high prevalence -- in many sections anyway -- of drug abusers and also minority populations where Hepatitis C is more common that he probably would have been exposed if he was at all exposed to blood products. So given that and the fact that the only other exposure he has is a tattoo, which the CDC has not -- does not regard as a conventional risk factor, the prevailing thought among practitioners is that people who have [exposure to] blood, particularly as first-responders, are no different than healthcare workers who are exposed through needle stick or blood exposure, that this to us -- to me is where he got his Hepatitis C.

(Navarro Dep. at 20-21.) On cross-examination, Dr. Navarro admitted that he may not have received any history from Decedent regarding exposure to hepatitis C and that he did not have knowledge of Decedent's specific duties as a firefighter. Dr. Navarro agreed that exposure to hepatitis C can occur years or decades before the disease is diagnosed and it, therefore, could not be determined precisely when Decedent was exposed.

In opposition to the Fatal Claim Petition, Employer submitted the deposition testimony of Stephen J. Gluckman, M.D., an internist and specialist in infectious diseases. Although Dr. Gluckman never had an opportunity to examine Decedent, he did examine many of Decedent's medical records, as well as Mr. Meehan's testimony. Dr. Gluckman stated that Decedent was originally diagnosed with hepatitis C in 1997 and that Decedent never received actual treatment for the disease because he had a low platelet count, which created a risk in using certain drugs. In reviewing Decedent's medical records, Dr. Gluckman noted a military medical record from 1971, in which Decedent checked a box answering in the affirmative to the question, "Have you ever been a patient in any type of hospitals? (If yes, specify when, where, why, and name of doctor and complete address of hospital.)" (Military Medical Record, Employer's Ex. C-1.) Next to that question, Decedent wrote "Naval Hos. Phila – Hepatitis Late '69 early '70." (Military Medical Record, Employer's Ex. C-1.) This document was signed by Decedent indicating the "foregoing information . . . is true and complete." (Military Medical Record, Employer's Ex. C-1.) Below Decedent's signature there is a space for the treating doctor to make notes in order to summarize or elaborate on all answers that were answered in the affirmative by the patient. In that section, Herbert Salis, M.D., made the following notation: "Serum Hepatitis from drug usage – Dec. 1969 – NCD." (Military Medical Record, Employer's Ex. C-1.) Dr. Gluckman explained that serum hepatitis is known today as hepatitis B and is "related to drug use. It's transmitted by contaminated needles." (Gluckman Dep. at 15.) Dr. Gluckman explained that hepatitis B is transmitted similarly to hepatitis C and that "[b]y far the most common way [of transmitting hepatitis C] is via drug use, needle related drug use." (Gluckman Dep. at 19.) Dr. Gluckman explained that "[t]he needles become contaminated with blood,

contaminated meaning they have hepatitis C virus on them with blood from somebody who has used the needle and instead of somebody subsequently using a sterile needle for their drug abuse they use the same contaminated needle and expose themselves to the virus." (Gluckman Dep. at 19.) Further, Dr. Gluckman stated that "intact skin is a very, very good barrier to hep C. And there's no evidence that the virus is transmittable via intact skin. It requires something penetrating the skin." (Gluckman Dep. at 20.) Dr. Gluckman testified that the military medical record is a "valid" record he would rely upon in making an opinion or rendering an opinion as to the cause of someone's medical condition. (Gluckman Dep. at 16.)

Dr. Gluckman also noted that Decedent received a tattoo when he was 17 years old. Dr. Gluckman testified that contaminated needles are a well-known vector of transmission for hepatitis C. While he had no idea of the circumstances of Decedent's tattoo, Dr. Gluckman questioned whether the conditions were sanitary. Additionally, Dr. Gluckman testified that he reviewed the testimony of Mr. Meehan and noted that Mr. Meehan never mentioned an instance in which Decedent came in "contact with blood via needle sticks or sharp instruments or anything that penetrated his skin." (Gluckman Dep. at 17.)

Based on the medical evidence and testimony he reviewed, Dr. Gluckman opined within a reasonable degree of medical certainty that Decedent "got his hepatitis C from his drug use that was dated in 1969 and that was also a time when he also acquired the hepatitis B or serum hepatitis." (Gluckman Dep. at 20.) Dr. Gluckman explained that the basis for his opinion is that:

> By far and away the most common cause of hepatitis C is needle related drug use. It overshadows all other possibilities. And at least the records contained that history for [Decedent]. So he has the right history.
>
> He also has the right timing. The average time between getting exposed or acquiring hepatitis C and developing a pattern of carcinoma, which he had, is about 30 years. It takes a long time to develop it. And his timing is right in that range. So he had the right -- the records show that he had the typical exposure and the typical timing and that's how he acquired [hepatitis C].

(Gluckman Dep. at 21.) Counsel for Claimant objected to Dr. Gluckman's causation opinion, which was based on the military record, claiming it was hearsay. However, the WCJ overruled Claimant's hearsay objection.

Dr. Gluckman testified, on cross-examination, that the military medical record is the only place where drug use was mentioned. The following exchange then took place:

> Q. In fact, there's no record of the word intravenous drug use anywhere in this record, correct?
> A. Correct.
> . . . .
> Q. What you have done is take the risk factor for hepatitis and comment drug use and from that extrapolated that has to be intravenous drug use; is that fair?
> A. Well, not exactly but intravenous, you don't need it in your vein.
> Q. Injection?
> A. Yes. Yes, that's how serum hepatitis which is in the record is transmitted, drug use, so that's why I made that extrapolation.

(Gluckman Dep. at 30-31.) Dr. Gluckman explained that his opinion that Decedent acquired hepatitis C from intravenous drug use was reasonable, even though he did

not know whether Decedent ever came in contact with a contaminated needle or the frequency of his drug use, because:

> [t]hat actually is a standard assumption when we see people with hep C. The risk of injectable drug use is so high that the assumption is -- in fact, we date, if we don't have the date, we date the acquisition of hep C to when they first started using drugs. That's how high the risk is. So that's what it's based on. But I don't have any specifics about his use.

(Gluckman Dep. at 41.) On re-direct examination, Dr. Gluckman testified that there is a correlation between the notation of serum hepatitis and drug usage in the military medical record because serum "means a needle." (Gluckman Dep. at 46.) Further, Dr. Gluckman clarified his testimony by stating that "Hep B is also transmitted by sex but in the context of saying serum hepatitis from drugs, that's injectable drugs. You don't get that, as you mentioned, from smoking marijuana or from snorting cocaine or something like that." (Gluckman Dep. at 48.)

Claimant also submitted into evidence a letter from Dr. Navarro to Claimant's counsel dated December 12, 2005, addressing Dr. Gluckman's deposition testimony and his reference to "serum hepatitis from drug use." Dr. Navarro stated that he has not seen the military medical record and that Decedent never told him that he had a history of drug use. Because there did not appear to be a history of intravenous drug use by Decedent, Dr. Navarro stated that "I do not change my opinion that [Decedent's] most likely route of exposure to hepatitis C was job related." (Letter from Dr. Navarro to Claimant's Counsel (December 12, 2005).) Further, Dr. Navarro stated that "a categorical statement that a period of 20-30 years is required for the development of cirrhosis and liver cancer is not entirely accurate. In fact, there is variability from one individual to the next in regards to the progression of hepatitis C.

. . . Finally, it is accepted that some patients have indolent, non-progressive infection." (Letter from Dr. Navarro to Claimant's Counsel (December 12, 2005).)

Additionally, the record reflects a letter dated April 24, 2006, from Dr. Gluckman to Employer's counsel in response to Dr. Navarro's letter. There, Dr. Gluckman states that the record clearly makes mention of "drug use" by Decedent and that the fact that Decedent did not report a history of drug use to Dr. Navarro "does not change the written contemporaneous record of drug use." (Letter from Dr. Gluckman to Employer's Counsel (April 24, 2006).) With regard to the timing of acquiring hepatitis C, and subsequently developing cirrhosis, Dr. Gluckman writes:

> The fact that the *average* period of time between the acquisition of hepatitis C and the development of cirrhosis is 20-30 years is also well established. As with most biological events some people progress more slowly than average and develop cirrhosis beyond 30 years and some people progress more rapidly and develop cirrhosis in 15-20 years. The typical time, however, is 20-30 years. Most people with hepatitis C who go one [sic] to develop cirrhosis will do so in that time frame. Indeed as Dr. Navarro points out some people do have "indolent, non-progressive infection", but I am at a loss as to what that has to do with [Decedent] since his infection was hardly non-progressive; he died with far advanced hepatitis C.

(Letter from Dr. Gluckman to Employer's counsel (April 24, 2006).)

Based on the evidence presented, the WCJ found Claimant and Mr. Meehan credible. With regard to the medical experts' testimony, the WCJ found credible Dr. Gluckman's ultimate conclusion that Decedent's hepatitis C did not result from his job as a firefighter for Employer but, rather, was contracted in 1969 from intravenous drug use that also resulted in Decedent's acquisition of hepatitis B (serum hepatitis). The WCJ found that the military medical record has certain indicia of reliability

because Decedent signed the portion of the report indicating that he was treated for hepatitis at the Naval Hospital. The WCJ also questioned the overall accuracy and thoroughness of the history with which Dr. Navarro worked, based on the liver transplant that was aborted because Decedent's blood tested positive for alcohol, despite Decedent's report to Dr. Navarro that he had not consumed alcohol in over five years. Further, the WCJ noted that there was no evidence that Decedent ever had a needle stick or some other form of skin penetration, rather than exposure to blood on the outside of his skin, in the course of his job duties. Therefore, the WCJ found that Employer successfully rebutted the presumption that Decedent's condition arose out of his employment and that Claimant's case, in response, was not convincing. Accordingly, the WCJ denied the Fatal Claim Petition.

On appeal, the Board reversed. The Board held that the WCJ erred in overruling Claimant's hearsay objection to Dr. Gluckman's causation opinion based on the military medical record. The Board stated that:

> [t]o the extent Dr. Gluckman relied on the causation opinion as contained in that military record – that Decedent contracted "serum hepatitis ***from drug usage***" – his testimony was inadmissible hearsay, as it was based on the causation opinion of another physician that was not subjected to cross examination; it was not based on Dr. Gluckman's own expertise and judgment.

(Board Op. at 9-10 (emphasis in original).) The Board stated, however, that "Dr. Gluckman's reliance on the records as establishing the facts of drug use and the fact that Decedent had serum hepatitis was competent." (Board Op. at 10.) Further, the Board held that Dr. Gluckman's opinion that Claimant's supposed intravenous drug use around 1969, leading to his contracting of hepatitis C, was not based on an adequate factual foundation. The Board stated that Dr. Gluckman's opinion was

based on two assumptions: (1) that "Decedent's drug use was intravenous"; and (2) "that Decedent contracted the Hepatitis C around the time he contracted the Hepatitis B." (Board Op. at 11.) The Board stated that:

> Dr. Gluckman's assumption concerning the intravenous drug use rested on his "extrapolation" from the medical evidence concerning the coexisting factors of drug use and Hepatitis B, in that Hepatitis B is often contracted through intravenous drug use; however, Dr. Gluckman also acknowledged that Hepatitis B is often contracted through other means, such as sexual contact. Because Dr. Gluckman's ultimate conclusion, that Claimant's Hepatitis C was caused by intravenous drug use, rests on these uncertain assumptions, we must reject it. Specifically, we note that because Dr. Gluckman could no longer rely on the causation opinion as stated in the military record that Decedent's serum hepatitis was caused by drug use, a separate causation opinion was required if that premise was to be established. We do not believe Dr. Gluckman's testimony is legally sufficient to establish causation or overcome the presumption in Decedent's favor because his causation opinion admits of other reasonable possibilities; moreover, a causation opinion must be more than a mere statement of statistical probabilities. Rather, we believe that opinion to be equivocal as a matter of law.

(Board Op. at 11-12.) Because the Board determined that Dr. Gluckman's testimony did not constitute competent evidence, Employer was not able to meet its burden to rebut the presumption of causation, and thus, the Board reversed the WCJ's decision and order.

Commissioner Alfonso Frioni, Jr. wrote a dissenting opinion expressing his opinion that the WCJ's decision and order should have been affirmed. Commissioner Frioni states that, unlike the conclusion reached by the majority, he views Dr. Salis's notes on the military medical report "to be just that – notes further elucidating [Decedent's] medical history and not the formulation of a diagnosis." (Board Dissenting Op. at 1.) Commissioner Frioni states that:

> Dr. Gluckman's ultimate conclusion was a clinical diagnosis based on a number of factors including the information on the one page medical report at issue. To criticize Dr. Gluckman for issuing an opinion that was "extrapolated" from the various factors is what doctors are routinely requested to do and so they issue their opinions within a "reasonable degree of medical certainty" and not with absolute medical certainty. . . . [I]t is my opinion that the WCJ formed a conclusion that was based on a legally competent foundation, one that constituted substantial, competent evidence, and one which was within the sole discretion of the WCJ.

(Board Dissenting Op. at 3.) Employer now petitions this Court for review.[3]

The main issue in this case is whether the Board erred in reversing the WCJ's determination that Employer successfully rebutted the statutory presumption that Decedent's hepatitis C arose in the course and scope of his employment. Pursuant to Section 301(c)(2) of the Act, 77 P.S. § 411(2), an injury arising in the course of employment includes an "occupational disease as defined in section 108 of [the Act]." In addition, Section 301(c)(2) provides:

> That whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease: And provided further, That if the employe's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable.

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[3] Our review is limited to determining whether the WCJ's findings of fact are supported by substantial evidence, whether "an error of law was committed," or whether the parties' constitutional rights were violated. Andracki v. Workmen's Compensation Appeal Board (Allied Eastern States Maintenance), 508 A.2d 624, 626 (Pa. Cmwlth. 1986).

77 P.S. § 411(2). Section 108 of the Act defines "occupational disease" so as to include hepatitis C infections in professional firefighters:

> (m) Tuberculosis, serum hepatitis, infectious hepatitis or hepatitis C in the occupations of blood processors, fractionators, nursing, or auxiliary services involving exposure to such diseases.
>
> (m.1) Hepatitis C in the occupations of professional and volunteer firefighters . . . . Hepatitis C in any of these occupations shall establish a presumption that such disease is an occupational disease within the meaning of this act, but this presumption shall not be conclusive and may be rebutted. This presumption shall be rebutted if the employer has established an employment screening program, in accordance with guidelines established by the department in coordination with the Department of Health and the Pennsylvania Emergency Management Agency and published in the Pennsylvania Bulletin, and testing pursuant to that program establishes that the employe incurred the Hepatitis C virus prior to any job-related exposure.

77 P.S. § 27.1(m)-(m.1). Further, Section 301(e) provides a rebuttable presumption that an occupational disease is causally related to a claimant's employment. Section 301(e) provides that:

> If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.

77 P.S. § 413. Thus, in this case, the burden was on Employer to rebut the presumption that Decedent's hepatitis C was work-related. See City of Philadelphia v. Workers' Compensation Appeal Board (Sites), 889 A.2d 129, 140 (Pa. Cmwlth. 2005) ("An employer must rebut the statutory presumption with competent,

substantial evidence."). Where the causal connection is not obvious, the burden to prove a causal connection is satisfied with unequivocal medical testimony. Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education), 508 Pa. 360, 365, 498 A.2d 800, 802 (1985). In such cases, "the medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that in his professional opinion the result in question did come from the assigned cause." Id. at 365-66, 498 A.2d at 802. "Medical evidence which is less than positive or which is based upon possibilities" is not legally competent to demonstrate the requisite causal connection. Id. at 366, 498 A.2d at 802.

In this case, Employer presented the testimony of Dr. Gluckman to rebut the presumption that Decedent's hepatitis C was work related. The WCJ specifically credited the testimony of Dr. Gluckman that Decedent's hepatitis C was not caused by his employment as a firefighter with Employer. It is well established that the WCJ has exclusive authority over questions of credibility, conflicting evidence, and evidentiary weight. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164, 168 (Pa. Cmwlth. 2003). The WCJ, as factfinder, may "accept or reject the testimony of any witness, including a medical witness, in whole or in part." Sites, 889 A.2d at 136 n.18.

Employer argues that the Board erred in reversing the WCJ's decision denying Claimant's Fatal Claim Petition because Dr. Gluckman's expert testimony that Claimant's drug use around 1969 led to Decedent contracting hepatitis C was an independent opinion and was based on an adequate factual foundation so as to provide substantial evidence to rebut the statutory presumption. Claimant argues that

the Board's order should be affirmed and contends that Dr. Gluckman's opinion "was not competently supported by the record" because he relied on one medical record in forming his opinion. (Claimant's Br. at 11.) Claimant further contends that Dr. Gluckman's opinion was not competent because he testified that there are other ways to contract hepatitis B, and he acknowledged that there was no record of track marks on Decedent's body or of a history of drug abuse using injectable needles. (Claimant's Br. at 11.)

In Empire Steel Castings, Inc. v. Workers' Compensation Appeal Board (Cruceta), 749 A.2d 1021 (Pa. Cmwlth. 2000), this Court stated:

> It has long been held as an exception to the hearsay rule that a medical witness may express an opinion based upon medical records of others even if those records were not introduced into evidence so long as they are the kind of records upon which the medical profession customarily relies in the practice of their profession.

Id. at 1026. As pointed out by the Board, while an expert may express an opinion based on other medical reports, "[t]he expert must express such opinions as an expert, however, and is not permitted merely to parrot another's conclusions without bringing to bear on the matter his own expertise and judgment." Gustison v. Ted Smith Floor Prods., 679 A.2d 1304, 1309 (Pa. Super. 1996).

We agree with Employer that Dr. Gluckman's opinion of causation did not "parrot" the opinion of Dr. Salis in the military medical record and that Dr. Gluckman's expert testimony constituted substantial, competent evidence to rebut the statutory presumption.

Contrary to Claimant's contention that Dr. Gluckman only relied on one document in forming his opinion, Dr. Gluckman, in addition to reviewing the military medical record, also reviewed Decedent's numerous other medical records, as well as the testimony from Mr. Meehan. Dr. Gluckman testified that the military medical record is a "valid" record he, as a medical expert, would normally rely upon in making a determination as to causation of an injury. (Gluckman Dep. at 16.) Based on the facts from the military medical record and the testimony from the other witnesses, Dr. Gluckman credibly opined to a reasonable degree of medical certainty that Decedent "got his hepatitis C from his drug use that was dated in 1969 and that was also a time when he also acquired the hepatitis B or serum hepatitis." (Gluckman Dep. at 20.)

Dr. Gluckman explained the basis for his opinion. Dr. Gluckman referenced the note by Dr. Salis in the military medical record that stated, "Serum Hepatitis from drug usage – Dec. 1969 – NCD." (Military Medical Record, Employer's Ex. C-1.) He testified that this medical document clearly indicates that Decedent had serum hepatitis, which today is known as hepatitis B, from drug usage, dating back to December 1969. (Gluckman Dep. at 15.) Dr. Gluckman, drawing on his own expertise, admitted that there are other ways of contracting hepatitis B via sexual relations, contaminated blood penetrating the skin, or getting a tattoo with a contaminated needle; however, Dr. Gluckman unequivocally opined that Decedent did not contract hepatitis B in any of those ways. Dr. Gluckman testified that Decedent contracted hepatitis B by using contaminated needles to inject drugs. (Gluckman Dep. at 15.) Dr. Gluckman clarified his testimony by stating that "in the context of saying serum hepatitis from drugs, that's injectable drugs," which cannot

be transmitted by smoking marijuana or snorting cocaine. (Gluckman Dep. at 48.) In fact, Dr. Gluckman testified that there is a correlation between the notation of serum hepatitis and drug usage in the military medical record because serum "means a needle." (Gluckman Dep. at 46.) Thus, Dr. Gluckman reasonably inferred from Dr. Salis's note that Decedent contracted hepatitis B from drug use via contaminated needles. Dr. Gluckman also testified that the most common way to contract hepatitis C is from contaminated needles. (Gluckman Dep. at 19.) Because there was no evidence that Decedent's skin was penetrated by a needle stick or that there were other documented incidents involving other modes of transmission during the course of his employment, and because there was medical evidence that Decedent suffered from hepatitis B "from drug usage," Dr. Gluckman formulated an independent expert opinion that the cause of Decedent's hepatitis C was not work related. In addition, Dr. Gluckman noted the timing between the period when Dr. Gluckman opined that Decedent contracted hepatitis C and when Decedent developed cirrhosis and carcinoma. Based on the military medical record indicating Decedent's hepatitis B stemming from 1969, and the fact that Decedent died of liver disease in 2005, Dr. Gluckman, again, independently concluded that the timing of Decedent's cirrhosis and carcinoma was consistent with the typical progression of hepatitis C. (Gluckman Dep. at 21.) For these reasons, Dr. Gluckman formulated an independent expert opinion, within a reasonable degree of medical certainty, that Decedent contracted hepatitis C before he was employed as a firefighter. We fail to see how Dr. Gluckman's opinion as to causation of Decedent's hepatitis C is anything but independent. The use of medical records, such as the military medical record in this case, and the notes made therein, is at the very heart of defending against a statutory presumption of work-relatedness. Dr. Gluckman did nothing inappropriate, and we

question why this military medical record was never received and reviewed by Dr. Navarro, who treated Decedent for his liver disease.

Accordingly, the Board erred in reversing the WCJ's determination that Claimant was exposed to hepatitis C before he began his employment with Employer as a firefighter. Because Employer successfully rebutted the presumption with substantial, competent evidence of record, we reverse the Board's order.[4]

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RENÉE COHN JUBELIRER, Judge

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[4] Because of our disposition, we need not reach Employer's last issue regarding notice of Decedent's alleged injury.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
	:	
v.	:	No. 1953 C.D. 2008
	:	
Workers' Compensation Appeal Board (Kriebel), Respondent	:	

ORDER

NOW, August 28, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **reversed**.

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RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 1953 C.D. 2008
Workers' Compensation Appeal Board (Kriebel), Respondent	:	Submitted: February 13, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY FILED: August 28, 2009

I respectfully dissent.

As noted by the Majority, in this case, the burden was on Employer to rebut the statutory presumption in the Pennsylvania Workers' Compensation Act[1] that Decedent's hepatitis C was a work-related "occupational disease" with substantial competent evidence. City of Philadelphia v. Workers' Compensation Appeal Board (Sites), 889 A.2d 129 (Pa. Cmwlth. 2005), petition for allowance of appeal denied,

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4; 2501 – 2708.

595 Pa. 709, 938 A.2d 1054 (2007).[2] In support of this burden, Employer presented the deposition testimony of its medical expert, Dr. Gluckman.

Dr. Gluckman testified that, although he never had the opportunity to examine Decedent, he examined Decedent's medical records, including Exhibit C-1, as well as Dr. Navarro's deposition testimony and Mr. Meehan's testimony. RR at 92a. Dr. Gluckman noted that he normally relies upon such military records in rendering an opinion as to the cause of someone's medical condition. Id. at 93a. In reviewing Exhibit C-1, Dr. Gluckman noted that "[i]t was written as a comment on that that he had serum hepatitis from drug usage in 1969." Id. Dr. Gluckman explained that serum hepatitis is now known as hepatitis B and that it "[i]s related to drug use. It's transmitted by contaminated needles." Id. He also explained that "B is transmitted similarly to C." Id. at 94a. Further, he explained that "[t]he needles become contaminated with blood, contaminated meaning they have hepatitis C virus on them with blood from somebody who has used the needle and instead of someone subsequently using a sterile needle for their drug abuse they use the same contaminated needle and expose themselves to the virus." Id.

Based upon the medical records and testimony that he reviewed, Dr. Gluckman opined, within a reasonable degree of medical certainty, that Decedent "[g]ot his hepatitis C from his drug use that was dated in 1969 and that was also a time when he also acquired the hepatitis B or serum hepatitis." RR at 94a. Dr. Gluckman explained:

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[2] The determination of whether the testimony of a medical witness is competent is a question of law fully reviewable by this Court. Buchanan v. Workmen's Compensation Appeal Board (City of Philadelphia), 659 A.2d 54 (Pa. Cmwlth.), petition for allowance of appeal denied, 542 Pa. 675, 668 A.2d 1137 (1995). Our review must encompass the entire testimony of the medical witness, and not merely isolated statements, in reaching our conclusion. Id.

> By far and away the most common cause of hepatitis C is needle related drug use. It overshadows all other possibilities. And at least the records contained that history for [Decedent]. So he has the right history.
>
> He also has the right timing. The average time between getting exposed or acquiring hepatitis C and developing a pattern of carcinoma, which he had, is about 30 years. It takes a long time to develop it. And his timing is right in that range. So he had the right – the records show that he had the typical exposure and the typical timing and that's how he acquired it.

Id.[3]

However, on cross-examination, Dr. Gluckman acknowledged that the information upon which he relied in rendering his opinion had no record of Decedent receiving in-patient drug treatment, and that there was never any finding of track marks or other indicia of drug use. RR at 96a. In addition, Dr. Gluckman testified in pertinent part, as follows:

> Q. Now, your opinion that [Decedent] developed hepatitis C from drug use in 1969 is based entirely on the history found in the medical records that you told us about from the military in 1971, correct?
>
> A. Yes.
>
> Q. Okay. In all of the records that you were provided there's no other reference to him being a drug abuser; is that correct?
>
> A. That's correct.
>
> * * *

[3] Claimant interposed an objection to Dr. Gluckman's use of Dr. Salis's diagnosis in this regard, see RR at 93a, which was ultimately overruled by the WCJ. See WCJ Decision at 2.

Q. Now, when you testified on direct-examination I noted that you referenced the big risk factor for hepatitis C would be essentially dirty needles or contaminated needles, correct?

A. Right, needles that drug users use.

Q. There’s no specific records of him sharing needles in any record?

A. No.

Q. There’s no specific record of any needle he ever used being from another person who had hepatitis B, C or A, correct?

A. No, but most of them wouldn’t know that.

Q. And there is no reference to the frequency, if any, that he supposedly used drugs, correct?

A. Correct.

Q. In fact, there’s no record of the word intravenous drug use anywhere in this record, correct?

A. Correct.

Q. Meaning the word intravenous drug doesn’t exist?

A. Correct.

Q. What you have done is take the risk factor for hepatitis and comment drug use and from that extrapolated that has to be intravenous drug use; is that fair?

A. Well, not exactly but intravenous, you don’t need it in your vein.

Q. Injection?

> A. Yes. Yes, that's how serum hepatitis which is in the record is transmitted, drug use, so that's why I made that extrapolation.

RR at 96a, 97a.

I firmly believe that the foregoing testimony is not sufficient to satisfy Employer's burden of proof in this case. It is true that a medical witness may express an opinion based, in part, upon the opinions and diagnoses of other medical experts, so long as it is the type of material upon which a medical professional customarily relies in the practice of his profession. Gunn v. Grossman, 748 A.2d 1235 (Pa. Super.), petition for allowance of appeal denied, 564 Pa. 711, 764 A.2d 1070 (2000); Sheely v. Beard, 696 A.2d 214 (Pa. Super. 1997). See also Pa.R.E. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

However, as the Pennsylvania Superior Court has noted:

> The above analysis depends, of course, on the expert actually acting as an expert and not as a mere conduit or transmitter of the content of an extrajudicial source. An "expert" should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment. Obviously in such a situation, the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination. The applicability of the rule permitting experts to express opinions relying on extrajudicial data depends on the circumstances of the particular case and demands the exercise, like the admission of all expert testimony, of the sound discretion of the trial court. Where, as here, the expert uses several sources to arrive at his or her opinion, and has noted the reasonable and ordinary reliance on similar sources by experts in the field, and has coupled this reliance with personal

> observation, knowledge and experience, we conclude that the expert's testimony should be permitted.

Primavera v. Celotex Corporation, 608 A.2d 515, 521 (Pa. Super. 1992), petition for allowance of appeal denied, 533 Pa. 641, 622 A.2d 1374 (1993) (footnote omitted). Thus, it is clear that it was appropriate for Dr. Gluckman to rely upon the opinion of Dr. Salis contained in Exhibit C-1, in part, in formulating his own expert opinion in this case.

However, Dr. Gluckman could not rely upon Dr. Salis's opinion that Decedent was exposed to "serum hepatitis from drug usage" to support the facts underlying that opinion. Indeed, as the Pennsylvania Supreme Court has noted:

> An expert cannot base his opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based upon mere conjecture…. "It is the function of opinion evidence to assist the jury in arriving at a correct conclusion upon a given state of facts. To endow opinion evidence with probative value it must be based on facts proven or assumed, sufficient to enable the expert to form an intelligent opinion. The opinion must be an intelligent and reasonable conclusion, based on a given stated of facts, and be such as reason and experience have shown to be a probable resulting consequence. The basis of the conclusion cannot be deduced or inferred from the conclusion itself. *In other words, the opinion of the expert does not constitute proof of the facts necessary to support the opinion.*" (Emphasis added).

Collins v. Hand, 431 Pa. 378, 390, 246 A.2d 398, 404 (1968) (citations omitted).

Thus, although Dr. Gluckman could rely upon Dr. Salis's opinion contained in Exhibit C-1, he could not use that opinion as proof of the fact that Decedent had engaged in drug use involving the use of needles, or that he was exposed to hepatitis B through the use of those needles, and then "extrapolate" from

those inferred facts that Decedent was then also exposed to hepatitis C at the same time through the use of those needles. Dr. Gluckman's expert opinion, based upon these presupposed facts, "[c]an only be classified as mere guess or conjecture and 'would be to build a presumption on a presumption, which would build a smoke ladder into the skies of irresponsible speculation, which, fortunately, the law prohibits.'" Collins, 431 Pa. at 391, 246 A.2d at 404 (citation omitted).

As noted above, Dr. Gluckman conceded that his expert opinion in this regard was based entirely upon Dr. Salis's opinion contained in Exhibit C-1. There is absolutely no competent evidence in this case, spanning a period of over thirty years, which indicates that Decedent had engaged in any drug use at any time either with or without the use of needles. As a result, there are simply no competent facts in the record of this case to support Dr. Gluckman's expert opinion regarding how or when Decedent was exposed to hepatitis C.

In short, I believe that Dr. Gluckman's expert testimony in this case is not competent and cannot support Employer's burden of proof, and that the Board did not err in reversing the WCJ's Decision. See, e.g., Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Company), 547 Pa. 639, 647, 692 A.2d 1062, 1066 (1997) ("[W]hile an expert witness may base an opinion on facts of which he has no personal knowledge, those facts must be supported by evidence of record. *See Kozak v. Struth*, 515 Pa. 554, 558, 531 A.2d 420, 422 (1987). Dr. O'Donnell's testimony was incompetent in that it was unsupported by the medical record and by the factual history of the accident….").[4]

[4] See also Viener v. Jacobs, 834 A.2d 546, 558 (Pa. Super. 2003), petition for allowance of appeal denied, 579 Pa. 704, 857 A.2d 680 (2004) ("[I]t is well settled that expert testimony is incompetent if it lacks an adequate basis in fact. The expert is allowed only to assume the truth of testimony already in evidence. While an expert's opinion need not be based on an absolute

(Continued…)

Accordingly, unlike the Majority, I would affirm the Board's order in this case.

JAMES R. KELLEY, Senior Judge

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certainty, an opinion based on mere possibilities is not competent evidence. This means that expert testimony cannot be based solely upon conjecture or surmise. An expert must do more than guess. His or her assumptions must be based upon such facts as the jury would be warranted in finding from the evidence.") (citations omitted).