Anderson, Laurie

EXPERT TESTIMONY

Admissibility of opinions

Portions of the testimony of an internist could be excluded to the extent the internist relied on tests not widely used in the medical community to diagnose toxic exposure. **….*In re Laurie Anderson*, BIIA Dec., 93 3571 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 96-2-05615-0.]

SUSPENSION OF BENEFITS (RCW 51.32.110)

No show fees

It is inappropriate to rely upon RCW 51.32.110 and WAC 296-14-410 to assess fees against a worker for failure to appear for an examination when it is subsequently determined the worker's claim is not valid. Those provisions anticipate repayment only where there is not good cause for failing to appear for scheduled examinations and can only be recovered from future benefits -- either time-loss compensation or medical treatment benefits. **….*In re Laurie Anderson*, BIIA Dec., 93 3571 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 96-2-05615-0.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LAURIE K. ANDERSON	**DOCKET NOS. 93 3571 & 93 5627**
CLAIM NO. T-674208	**DECISION AND ORDER**

APPEARANCES:

Claimant, Laurie K. Anderson, by
Casey and Casey, P.S., per
Gerald L. Casey and Carol L. Casey

Self-Insured Employer, Weyerhaeuser Company, by
Kathryn D. Fewell, Corporate Counsel

Department of Labor and Industries, by
The Office of the Attorney General, per
Martha P. Lantz, Assistant

In Docket No. 93 3571, the claimant, Laurie K. Anderson, filed an appeal with the Board of Industrial Insurance Appeals on July 28, 1993, from an order of the Department of Labor and Industries dated June 11, 1993. The order adhered to the provisions of an order dated April 29, 1993, which denied the application for benefits for the reasons that the claimant's condition was not the result of the exposure alleged and her condition was not an occupational disease. The order also provided that provisional time loss benefits were paid from May 20, 1992, through April 20, 1993, in the amount of $14,790.72, while the self-insured employer gathered information needed to make a decision whether to allow the claim. Therefore, the claimant owes the self-insured employer $14,790.72 for the provisional time loss benefits paid. **AFFIRMED.**

In Docket No. 93 5627, the self-insured employer, Weyerhaeuser Company, filed an appeal from a Department order dated October 12, 1993, that denied the employer's request for an order requiring the claimant to reimburse a no-show fee of $2,990 for independent medical examinations she failed to attend on December 9, 1992, and January 6, 1993. **AFFIRMED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the worker and the self-insured employer to a Proposed Decision and Order issued on July 3, 1995, in which the orders of the Department dated June 11, 1993, and October 12, 1993, were affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and notes that this record contains many evidentiary issues. Review has been granted to modify several of the evidentiary rulings. The rulings not specifically addressed in this order are affirmed. However, we find that the ultimate conclusions reached in the Proposed Decision and Order are correct and we affirm the order denying claim allowance, and the order denying the self-insured employer's request for an order demanding reimbursement for fees paid to doctors for examinations which Ms. Anderson did not attend ("no-show" fees).

The first evidentiary issue we address is the self-insured employer's motion to exclude the testimony of Dr. Gordon Baker and Dr. Gunnar Heuser. Both Dr. Baker, an allergist in Washington, and Dr. Gunnar Heuser, an internist in California, testified by deposition on behalf of Ms. Anderson. The basis for Weyerhaeuser's motion is that the opinion testimony of these experts was too speculative and the tests and methodology on which their opinions are based do not meet the standards for "scientific knowledge" enumerated by the supreme court in Daubert v. Merrill Dow Chemicals, 113 U.S. 2786, 125 L. Ed. 2d 469 (1993). Having reviewed the cases cited by the employer in the motion and the addendum to the Petition for Review, and having extensively reviewed this record and the Rules of Evidence, we reach the conclusion that the tests and methodology underpinning Dr. Heuser's opinion do not meet admissibility standards for scientific evidence.

Specifically, we have the greatest concern with Dr. Heuser's reliance on the Single Photon Emission Computed Tomography (SPECT) scan results as a valid diagnostic tool and objective test to substantiate his diagnosis of chemical exposure or toxic encephalopathy. The SPECT scan is not widely used in the medical community in diagnosing toxic exposure and there have been no studies to document its use in reliably making such a diagnosis. There is no scientific evidence to support what these scans represent, or to what degree these studies are within the control of the patient. The challenge test is also not a recognized medical procedure for establishing a diagnosis of toxic encephalopathy according to Dr. Michael Graham and Dr. Emil Bardana, both of whom are specialists in this area of study.

Dr. Heuser's opinions rely so greatly on the SPECT brain perfusion test that we cannot find his testimony admissible. While the test itself is reliable and scientifically accepted for certain purposes, it is clearly not scientifically accepted for making the diagnosis of toxic encephalopathy due to chemical exposure. Not only is this test not accepted by the medical community or any scientific group as being indicative of toxic encephalopathy, there have been no peer-reviewed articles accepted for publication, no testing that would support this proposition, and nothing but the doctor's subjective opinion that the SPECT test can show toxic encephalopathy.

Dr. Baker's opinion and diagnosis of toxic encephalopathy was made prior to the SPECT testing. While he obviously feels that his diagnosis is vindicated by the SPECT test results, he apparently reached his diagnosis based upon other testing, the history related to him by Ms. Anderson, and his periodic examinations. While we grant the employer's motion to exclude Dr. Baker's references to the SPECT scan results as supportive of his diagnosis, we do not feel that the entirety of his testimony is properly excluded. With regard to any references whatsoever made by Dr. Baker in his testimony concerning the SPECT scan testing or Dr. Heuser's opinions, the

motion is granted and that part of Dr. Baker's testimony is stricken. However, the remainder of Dr. Baker's testimony remains in the record, to be evaluated by the trier of fact.

We accept that the scientific process is advanced by broad, wide-ranging consideration of a multitude of hypotheses, but hypothetical knowledge differs from scientific knowledge. The Rules of Evidence, however, have been designed to assure that testimony admitted into evidence is reliable and accurate, and that it is based upon testimony by experts who have scientific knowledge, which is tested, peer-reviewed, published, and subjected to evaluation to decrease the likelihood of substantive flaws in methodology and ensure reliability. The trier of fact is assigned the task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the issue at hand. The Rules of Evidence provide that if scientific knowledge will assist the trier of fact to understand or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion. The trier of fact is then left to sift through the various adversarial opinions, and to weigh and decide which is most probative and persuasive.

However, "knowledge" connotes more than subjective belief or unsupported speculation. Scientific methodology is based on hypotheses and testing to see if the theories can be verified. After evaluating this record, we conclude that the opinions of Dr. Heuser are based on subjective belief and a testing procedure that has not been shown to be reliable or shown to establish the required level of scientific acceptance. As such, his testimony, since it rests completely on an unreliable scientific basis, is inadmissible and will not be considered by us. We could exercise our discretion in evidentiary matters and allow the references to the SPECT testing to remain in the record and simply accord it no weight in our decision. We feel that this would give some credence that the SPECT test used for diagnosing toxic encephalopathy is minimally probative.

The next evidentiary matter concerns the testimony of Dr. Kenneth Martin. We take his testimony out of colloquy beginning at page 308, deny the motion to strike on page 309, line 2, and overrule the motion at page 312, line 2.

The testimony of Dawn Yeager appearing at page 229, line 24, through page 231, line 19, and at page 233, lines 17 through 23, is removed from colloquy.

The final evidentiary modification is to reject Exhibit 14, a videotaped psychiatric interview of Ms. Anderson by Dr. Voiss. We do not find the videotaped interview to be particularly relevant to any of the issues before us, and find its effect to be more prejudicial than probative. There is undue advantage to Ms. Anderson by allowing her to appear to the trier of fact by videotape, in an unchallenged setting, and not allowing the other witnesses a videotaped presence.

In evaluating the entirety of the remaining testimony, we must conclude that Ms. Anderson has not established by a preponderance of the evidence that she was exposed to substances at work at Weyerhaeuser which caused any medical condition. Dr. Baker's opinions and diagnoses are simply not persuasive. He does not have an accurate history of the onset of Ms. Anderson's problems and he is unaware of the extent of her medical history before beginning work at Weyerhaeuser. His diagnoses of toxic encephalopathy, sick building syndrome, or toxic exposure to chemicals at work are not supported by the more complete history and medical testing provided by and available through other physicians.

We find that Dr. Graham Reedy and Dr. Dorsett Smith offer the most probative evidence concerning Ms. Anderson's problems. Dr. Reedy evaluated Ms. Anderson closest to the time she developed symptoms. He felt that her testing showed a viral or bacterial problem demonstrating a mixed infection and that she initially had symptoms due to a reactivated Epstein Barr virus. He finally concluded that her continued symptoms of sinusitis, lymphadenitis, asthmatic bronchitis, and depression were not precipitated by her work environment. He felt that Ms. Anderson needed

psychological help and that depression was underlying her disease process. Dr. Smith evaluated her in September 1992. On the basis of her medical history showing numerous instances where prior to her employment at Weyerhaeuser, she requested treatment for the same symptoms and complaints she later related to exposure at Weyerhaeuser in November 1991, his examination findings, and a review of blood tests performed by Dr. Baker, Dr. Smith felt that Ms. Anderson's experience did not fit the scenario of someone who had become sensitized to chemicals after an exposure. Dr. Smith indicated that Ms. Anderson's strong belief in her perceived sensitization to fumes creates her ostensible need for an oxygen mask to prevent breathing in fumes, even when an oxygen mask does not actually prevent her from breathing the surrounding air. He also received a history of continued cigarette smoking by Ms. Anderson, which he felt was unusual for persons claiming to have been chemically sensitized since cigarettes contain many harmful chemicals.

In evaluating the record, we conclude that there is an absence of objective evidence of injury or distinctive conditions of employment that could have given rise to the condition complained of. Ms. Anderson has not established that she is entitled to benefits under the Industrial Insurance Act. The Department order denying her application for benefits is correct and is affirmed.

We would note that even if we had not excluded Dr. Heuser's and parts of Dr. Baker's testimony from our consideration, we do not find Ms. Anderson's theory of developing toxic encephalopathy as a result of her secretarial job at Weyerhaeuser to be persuasive in that it lacks scientific reliability, and we, like the industrial appeals judge, would still conclude that the claim should not be allowed. Not only does Ms. Anderson fail to establish exposure to toxic substances on an accidental basis (industrial injury), but she fails to establish exposure as a result of conditions peculiar to her specific employment (occupational disease). She asserts both propositions, but proves neither. Dr. Baker's theory of toxic encephalopathy relies upon Ms. Anderson's inaccurate

description of a work environment similar to a "chemical soup," an environment which simply is not shown to have existed at Weyerhaeuser during her employment.

The employer's Petition for Review also requests that this Board find that Weyerhaeuser is entitled to reimbursement by the claimant for two "no-show" fees amounting to a total of $2,990 which it was required to pay when Ms. Anderson failed to appear at examinations with Dr. Daniel V. Voiss on December 9, 1992, and January 6, 1993. We conclude that it is inappropriate to rely on RCW 51.32.110 and WAC 296-14-410 for assessing no-show fees against a worker alleging an injury or occupational disease and who subsequently is determined not to have a valid industrial injury or occupational disease. The statute contemplates repayment only when there is no good cause for failing to appear at the scheduled exams and can be recovered only from future benefits, either time loss compensation or medical benefits. Where there is no entitlement established by the claimant for either medical benefits or time loss compensation, there is no provision for recovery of no-show fees. As there is no statutory basis to support recovery of the costs of medical examinations which Ms. Anderson did not attend, we will not determine whether she had good cause in failing to attend those examinations. We realize the parties litigated the "good cause" issue at length, but we find that in absence of a statutory basis to recover these monies, there is no need for us to proceed to resolve this factual dispute.

In conclusion, after an exhaustive review of this record, and an evaluation of the Petitions for Review filed by the claimant and the self insured employer, we affirm the order of June 11, 1993, that adhered to the provisions of the order of April 29, 1993, rejecting Laurie Anderson's claim for industrial insurance benefits, and demanding repayment of provisional time loss compensation paid to claimant in the amount of $14,790.72. In addition, we affirm the order of October 12, 1993, that denied the employer's request for reimbursement of $2,990 from the claimant for her failure to appear at two independent medical examinations without good cause.

FINDINGS OF FACT

1. On June 3, 1992, the Department of Labor and Industries received an accident report alleging an occupational disease incurred by the claimant, Laurie K. Anderson, on approximately November 15, 1991, while in the course of employment with Weyerhaeuser Company.

   On April 29, 1993, the Department issued an order rejecting Ms. Anderson's application for benefits, and directing Ms. Anderson to repay the Weyerhaeuser Company $14,790.72 for provisional time loss previously paid. Following a timely protest and request for reconsideration from the claimant, the Department issued an order adhering to the provisions of the April 29, 1993 order. On July 28, 1993, the Board received the claimant's Notice of Appeal, and on August 16, 1993, the Board issued an order granting the claimant's appeal and assigning it Docket No. 93 3571.

   On October 12, 1993, the Department issued an order denying the self-insured employer's request for reimbursement of $2,990 for Ms. Anderson's failure to appear at two scheduled medical examinations. On October 28, 1993, the Board received Weyerhaeuser's Notice of Appeal from the order of October 12, 1993. On November 15, 1993, the Board issued its order granting the appeal, assigning the self-insured employer's appeal Docket No 93 5627.

2. Laurie K. Anderson was employed by Weyerhaeuser Company beginning in March 1991 at their research and development facility in Federal Way, Washington. She worked as a secretary/administrative assistant in the container board packaging area. She worked in an office setting that maintained a ventilation system completely separate from the laboratories. In November 1991, Ms. Anderson felt that there were ammonia-type smells coming from the ventilation system near her desk. She thereafter gradually developed symptoms of weakness, shortness of breath, and dizziness. After taking time off work, Ms. Anderson felt better and returned to work in December 1991. Upon returning to work, Ms. Anderson developed symptoms again and took another month off work. Within an hour of returning to work in March 1992, she again developed symptoms and stopped work. She returned in May 1992, but again smelled exhaust from forklifts that she felt was coming through the ventilation system and again felt nauseated, dizzy, and fatigued. She initially treated with Dr. Graham Reedy, and then began seeing Dr. Gordon Baker beginning in May 1992. When Ms. Anderson perceives odors she feels she continues to experience respiration problems; dizziness; nausea; diarrhea; weakness; brain problems; and, neuropathy in her arms.. Ms. Anderson uses oxygen when she feels she needs it, as she believes it helps her dizziness and breathing.

3. Ms. Anderson was not exposed to toxic fumes or exhaust from forklifts during her employment at Weyerhaeuser. Ms. Anderson does not have a medical condition proximately caused by fumes emitting from the air ventilation system at Weyerhaeuser in November 1991.

4. Ms. Anderson does not have a medical condition that arose naturally and proximately out of her employment as a secretary for Weyerhaeuser.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.

2. There is no statutory authority for recovering no-show fees from claimants pursuant to RCW 51.32.110 or WAC 296-14-410 except when it is determined the claimant is to receive future benefits. Weyerhaeuser is not entitled to monies expended for Ms. Anderson's failure to appear at examinations with Dr. Voiss on December 9, 1992, and January 6, 1993, since she is not entitled to future benefits.

3. The Department order dated October 12, 1993, denying the self-insured employer's request for an order requiring the claimant to reimburse them no-show fees amounting to $2,990 for independent medical examinations Ms. Anderson failed to attend on December 9, 1992, and January 6, 1993, is correct, and is affirmed.

4. Ms. Anderson's condition is not an occupational disease as defined by RCW 51.08.140.

5. Ms. Anderson's condition is not the result of an industrial injury as defined by RCW 51.08.100.

6. The Department order dated June 11, 1993, that adhered to the provisions of the order dated April 29, 1993, which denied the application for benefits for the reasons that Ms. Anderson's condition was not the result of the exposure alleged and her condition was not an occupational disease, and directing Ms. Anderson to repay the Weyerhaeuser Company $14,790.72 for provisional time loss previously paid, is correct and is affirmed.

It is so ORDERED.

Dated this 23rd day of January, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/ _____
ROBERT L. McCALLISTER Member