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COURT OF APPEALS
DIVISION II

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No. 40731-1-II

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

GARY D. HOLLIS, SR.,
Respondent

vs.

DEPARTMENT OF LABOR AND INDUSTRIES,
Appellant

BRIEF OF RESPONDENT, GARY D. HOLLIS, SR.,

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INTRODUCTION

This case is brought pursuant to the Industrial Insurance Act (Act). This state has held in a long line of cases that the intended beneficiary of the Act is the worker and that the provisions of the Act should be “liberally construed in favor of the worker.” *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467 (1987); *Kirk v. Dep’t of Labor and Indus.*, 192 Wash. 671, 674 (1937); *Wilbur v. Dep’t of Labor and Indus.*, 61 Wn.2d 439, 446 (1963).

On May 18, 2004, the Respondent, Gary Hollis, Sr., suffered an industrial injury while working as a garbage man. Mr. Hollis picked up trash spilled on the ground at the personal residence of a dairy farmer in Roseberg, Washington. He jabbed his right index finger with a hypodermic needle disposed of in the trash. Mr. Hollis developed a condition diagnosed as Reiter’s Syndrome and related to the industrial injury by the Department of Labor and Industries’ medical examiner, Peter Mohia, M.D.

A trial was held before a jury of twelve on March 15th and 16th, 2010. The sole issue to be decided was whether Mr. Hollis’ Reiter’s Syndrome was caused by the May 18, 2004 industrial injury. Two medical witnesses testified, both independent medical examiners who examined Mr. Hollis at the request of the Department of Labor and Industries. Rheumatologist Peter Mohai, M.D. testified for the Respondent, Gary

Hollis, Sr. Allergist and clinical immunologist Garrison Ayars, M.D. testified at the request of the Department of Labor and Industries.

The Department of Labor and Industries objected to a portion of Dr. Mohai's testimony under *Frye*. The trial court judge allowed the testimony.

The Jury returned a verdict in favor of Mr. Hollis. The Department did not move for judgment as a matter of law before the case was submitted to the jury, nor after the verdict.

The Department appeals the jury's verdict allowing the condition of Reiter's syndrome under the claim as not supported by the evidence and asks that the verdict be vacated.

ASSIGNMENTS OF ERROR

A. The appellant lists two assignments of error.

- 1) The superior court erred in allowing the evidence that Mr. Hollis' Reiter's Syndrome was proximately caused by being stuck with a hypodermic needle in the pile of trash in the course of his employment.
- 2) The superior court erred in entering judgment on the jury's verdict.

B. Issues

- 1) Whether it was error under *Frye* to allow Rheumatologist

Peter Mohai, M.D.'s testimony as to whether Mr. Hollis's Reiter's syndrome was caused by being stuck by a dirty hypodermic needle in the course of his employment.

- 2) Whether it was error under ER 702 and ER703 to allow Dr. Mohai's testimony as to whether being stuck with a dirty hypodermic needle stick can cause Reiter's syndrome.
- 3) Whether it was error to allow Dr. Mohai's testimony under ER 702 and ER 703 when the contents of the needle are unknown.
- 4) Whether it was error to enter judgment on the jury's verdict.

STATEMENT OF THE CASE

Reiter's Syndrome is a form of reactive arthritis. Deposition of Peter Mohai, M.D. (hereinafter MOHAI) at 23. Reiter's Syndrome which usually occurs in males. MOHAI at 29. It is a condition for which a person is genetically predisposed. MOHAI at 29. If exposed to certain pathogens, the condition is triggered. MOHAI at 29.

Dr. Mohai describes the diagnosis and method in which a person acquires Reiter's Syndrome as follows: A person has an event that gives him a potential infection, subsequently develops conjunctivitis, test positive for HLA-B27 antigen, and develops arthritis. MOHAI at 30. It is different than rheumatoid arthritis in that it is more spotty, it can effect just

one joint or a few joints. MOHAI at 32. The condition is different than osteoarthritis in that osteoarthritis never affects the elbow or the wrists. MOHAI at 32. Other potential inflammatory conditions are ruled out with a negative ANA and negative SED rate. MOHAI at 30. It is not a terribly common condition. MOHAI at 31.

There is a high correlation between Reiter's Syndrome and the HLA-B27 antigen (approximately 95% of people diagnosed with Reiter's Syndrome have a positive HLA-B27 antigen). MOHAI at 31. There have been documented cases where people have developed reactive arthritis from vaccines, the hep B vaccine and MMR for example. MOHAI at 41. Most symptoms develop within on to three weeks of the infection. MOHAI at 68.

Gary Hollis worked as a garbage man for Peninsula Sanitation for approximately five years. BR at 8. On May 18, 2004, Mr. Hollis suffered an industrial injury while collecting trash from the personal residence of a dairy farm in Roseberg, Washington. Garbage was spilled on the ground. BR at 8-9. While reaching to pick up garbage, Mr. Hollis jabbed his right index finger with a hypodermic needle disposed of in the garbage. BR p.9. He pulled the needle out and called the office to let them know what happened. BR at 10. His arm swelled and was painful. BR at 9. Mr. Hollis went to the emergency room at Ocean Beach Hospital that night. BR at 10.

In the days that followed, Mr. Hollis had a lot of pain in his elbow. BR at 11. His eyes bothered him. BR at 11. They turned red and he

could hardly see so he returned to the emergency room. BR at 11. He was given antibiotic drops and taken off work for two weeks. BR at 11-12.

The right upper extremity pain worsened, moving up into his arm and shoulder. BR at 12. Pain, weakness and swelling developed in his left upper extremity approximately eight months later. BR at 12.

Mr. Hollis treated with orthopedist Jessop McDonald, M.D. BR at 13 – 15. Treatment consisted of physical therapy, diagnostic testing, carpal tunnel release surgery and trigger finger release. BR at 13. Carpal tunnel syndrome was allowed under the claim. BR at 15.

His right arm pain did not resolve. BR at 12. He still has difficulty grasping and straightening the arm. BR at 16. Mr. Hollis never suffered from right upper extremity pain prior to the industrial injury. BR at 16.

Mr. Hollis underwent testing for the HLA-B27 antigen and tested positive. MOHAI at 23. Some joints are very definitely involved and others are not. MOHAI at 32. Mr. Hollis had a negative ANA which rules out lupus and other related conditions. MOHAI at 30. He had a negative SED rate ruling out rheumatoid arthritis. MOHAI at 30.

The Department of Labor and Industries sent Mr. Hollis to see medical examiner Peter Mohai, M.D., a board certified rheumatologist. MOHAI at 8 and 5. Dr. Mohai's private practice consists of diagnosing and treating rheumatic conditions. MOAHI at 6. Dr. Mohai also instructs students at the University of Washington in rheumatology. MOHAI at 7.

Dr. Mohai reviewed the medical records and examined Mr. Hollis

on November 17, 2007. He felt the exam findings were pretty profound. MOHAI at 36.

Dr. Mohai diagnosed a needle-stick injury of May 18, 2004, a positive HLA-B27 consistent with incomplete Reiter's syndrome, and carpal tunnel syndrome with release. MOHAI at 28.

Dr. Mohai testified, on a more probable than not basis, that the puncture wound by the hypodermic needle was the cause of Mr. Hollis' subsequent arthritis and carpal tunnel syndrome. MOHAI at 34. Dr. Mohai explained that Mr. Hollis had an event that gave him a potential infection, subsequently develops conjunctivitis and then also carpal tunnel, in the presence of a positive HLA-B27, where other inflammatory conditions were negative. MOHAI at 30.

Dr. Mohai performed medical-literature research regarding the causes of Reiter's syndrome, most recently a few weeks prior to his deposition, but has also spent the last 30 to 40 years reading about the condition. MOHAI at 44. As part of his professional practice, Dr. Mohai regularly reviews medical literature and studies regarding rheumatological conditions. MOHAI at 73. Dr. Mohai testified that the medical literature supports his conclusion that Mr. Hollis' Reiter's syndrome is related to the injury at work in that Mr. Hollis was exposed to a pathogen as a result of the hypodermic needle wound, he developed conjunctivitis shortly thereafter, followed by arthritis in some joints but not others, he is male, and he is HLA-B27 positive. MOHAI at 44-45, 70, 74 and 75. Dr. Mohai testified that this is a reasonable clinical conclusion based on what is known in the

literature. MOHIA at 48, 49, 51.

Dr. Mohai felt Mr. Hollis should follow up with a treating rheumatologist because medication therapies currently are highly effective. MOHAI at 35.

Prior to the independent medical examination with Dr. Mohai, the Department of Labor and Industries sent Mr. Hollis to an independent medical examination with Dr. Garrison Ayars, M.D. on August 24, 2007. Deposition No. 1 of Garrison Ayars, M.D. (hereinafter AYARS I) at 37. Dr. Ayars is not a rheumatologist. Dr. Ayars identifies himself as an Allergist. AYARS I at 39. His day to day practice for the last nine years has been allergy and clinical immunology, “wheezers, sneezers and hives”. AYARS I at 6.

In his report, Dr. Ayars states that with regard to rheumatological conditions he would defer to a rheumatologist. Ayars I at 40. Following his examination of Mr. Hollis, Dr. Ayars advised the Department of Labor and Industries that a rheumatological evaluation would definitely be reasonable. Ayars I at 42.

The Department of Labor and Industries then sent Mr. Hollis to see Dr. Mohai. After receiving Dr. Mohai’s report, which diagnosed Mr. Hollis’ condition as Reiter’s syndrome and related it to the industrial injury, the Department of Labor and Industries asked Dr. Ayars to write an addendum to his report. Deposition No. II of Garrison Ayars, M.D. (hereinafter AYARS II) at 20.

Prior to preparing the addendum, Dr. Ayars felt it necessary to do

perform a Medline search with regard to Reiter's Syndrome Dr. Mohai diagnosed and related to the industrial injury. AYARS II at 20. Dr. Ayars did not perform the Medline search himself, rather he had the librarian at Overlake Hospital perform the search. AYARS II at 25. From his review of the librarian's Medline search, Dr. Ayars concluded that he thinks experts in the field would agree with him that a needle stick would not lead to Reiter's Syndrome. AYARS I at 20. Dr. Ayars did not contact Dr. Mohai, nor any other rheumatologist, with regard to whether an infection from an infection from a hypodermic needle may cause Reiter's Syndrome. AYARS II at 28.

On February 19, 2008, following Dr. Ayars' addendum regarding Dr. Mohai's report, the department of labor and industries issued an order denying responsibility for Reiter's Syndrome. On February 20, 2008, the department of labor and industries issued an order directing that the claim be closed without an award for permanent partial disability with time-loss compensation ended as paid through August 27, 2007. On April 17, 2008, the claimant filed a protest and request for reconsideration of the orders dated February 19, 2008 and February 20, 2008. On April 18, 2008, the department affirmed the orders dated February 19, 2008 and February 20, 2008. On June 18, 2008, the claimant filed a notice of appeal with regard to the April 18, 2008 order. The matter was tried before the Board of Industrial Insurance Appeals. A proposed decision and order was issued April 30, 2009, affirming the April 18, 2008 order. The claimant filed a petition for review on June 15th 2009. The Board of Industrial Insurance

Appeals denied the petition for review on June 30, 2009. The claimant appealed to the Pacific County Superior Court on July 22, 2009.

The Department of Labor and Industries brought a motion for summary judgment with regard to whether the testimony of Dr. Mohai should be stricken based on a Frye objection. On March 2nd, 2010, the Court entered an order denying the Department's motion for summary judgment.

On March 12, 2010, the Department of Labor and Industries renewed its objections to Dr. Mohai's testimony during a pretrial hearing. The objections were overruled.

The trial was held before a jury of twelve on March 15th and 16th, 2010. The Jury returned a verdict in favor of Mr. Hollis, finding that the industrial injury was the proximate cause of Mr. Hollis' Reiter's syndrome. The Department did not move for judgment as a matter of law before the case was submitted to the jury, nor after the verdict. The Department appeals the jury's verdict allowing the condition of Reiter's syndrome under the claim as not supported by the evidence and asks that the verdict be vacated.

ARGUMENT

A. The Department failed to preserve its right to appeal based on the sufficiency of the evidence

The Department of Labor and Industries argues it is entitled to judgment as a matter of law because Dr. Mohai's testimony should have

been stricken as inadmissible. The Department of Labor and Industries failed to move for judgment as a matter of law before submission of the case to the jury. The Department of Labor and Industries made no post-verdict motion challenging the sufficiency of the evidence. As such, the Department of Labor and Industries failed to preserve its right to appeal based on the insufficiency of the evidence.

B. Dr. Mohai's testimony as to causation is admissible under ER 702

Expert testimony is expressly permitted under ER 702. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

It is undisputed that Dr. Mohai is a qualified expert. He is a board certified rheumatologist. MOHAI at 5. Dr. Moahi's private practice consists of diagnosing and treating rheumatic conditions MOHAI at 6. Dr. Mohai instructs students at the University of Washington in rheumatology. MOHAI at 7. Dr. Mohai has personally seen and treated people with Reiter's syndrome. MOHAI at 31.

As a physician specializing in rheumatology, Dr. Mohai is in a unique position to explain to the jury what Reiter's syndrome is, how the

condition is diagnosed, and to explain to the jury what causes the condition.

C. Frye is inapplicable as there is nothing new or novel about the methods of proof or scientific principles employed by Dr. Mohai in offering his opinion regarding causation

A Frye inquiry addresses novel scientific methodology, it does not deal with medical opinion based on established scientific technique. *Bruns v. Paccar*, 77 Wn. App 201, 215 (Div 1 1995). The conclusion reached by the expert is by definition fact-specific and need not be generally accepted in the scientific community. *Ruff v. Department of Labor and Indus.* 107 Wn. App 289, 300 (Div 1, 2001). Evidence that does not involve new methods of proof or new scientific principles from which conclusions are drawn is not subject to the Frye test. *Kaech v. Lewis County PUD*, 106 Wn. App. 260 (Div II 2001); *Ruff* at 300; *Bruns* at 215.

There is nothing new or novel about the methods of proof or scientific principles employed by Dr. Mohai in offering his opinions. It is well accepted that Reiter's syndrome is a form of reactive arthritis triggered by exposure to certain pathogens. MOHAI at 29. There is no one specific test for Reiter's syndrome. MOHAI at 41. There are various components. MOHAI at 41. When there are a sufficient number of components, the diagnosis of Reiter's syndrome is appropriate. MOHAI at 41. The Department of Labor and Industries does not dispute this.

In offering his opinion on causation, Dr. Mohai relied on the history of the puncture wound by the dirty hypodermic needle, the onset of pain and swelling, the onset of conjunctivitis, the positive HLA-B27 antigen, that some joints were very involved while others were not, the negative ANA and SED rates, his review of the medical records and diagnostic reports, as well as his own examination of Mr. Hollis in concluding that Mr. Hollis' Reiter's syndrome was caused by a pathogen contained in the dirty needle.

The requirement that expert medical testimony be based on the methods generally accepted in the scientific community pertains to the methods used by, and not the conclusions of the expert witness. *Intalco Aluminum v. Labor and Industries*, 66 Wn. App. 644, 662 (Div 1 1992). The methods used by Dr. Mohai are not challenged. The medical history, the description of injury, the onset of symptoms, the HLA-B27 antigen test, ruling out other potential conditions through ANA and SED rates, are the methods used to diagnose Reiter's syndrome. There is nothing new or novel with regard to the methods of proof or scientific principles employed by Dr. Mohai.

The Department of Labor and Industries relies on *Ruff v. Department of Labor and Indus.*, 107 Wn. App. 289 (Div 1 2001) and *Grant v. Boccia*, 133 Wn. App. 176 (Div III 2006) for the premise that Dr.

Mohai's testimony should be excluded under *Frye*. *Ruff* and *Grant* are inapplicable here as the department agrees that Reiter's syndrome is a form of reactive arthritis triggered by exposure to a pathogen. *In Ruff*, the Department of Labor and Industries argued that the theory of chronic porphyria caused by odor-level chemicals lacked general acceptance in the medical community. *Ruff* at 301. In *Grant*, the issue was whether the theory that fibromyalgia is caused by trauma was a novel scientific theory or principle that had not achieved general acceptance in the relevant scientific community. *Grant* at 179. There is no dispute as to the cause of Reiter's syndrome. It is a form of reactive arthritis triggered by exposure to a pathogen.

There is no question that Mr. Hollis suffered from an infection caused by the puncture wound from the hypodermic needle. When seen by Dr. Kim Smith at the Ocean Beach Hospital on May 19, 2004, Dr. Smith diagnosed needle stick infection. AYARS II at 5-6. Dr. Mohai believes the pathogen caused Reiter's syndrome.

D. The source of the opinion is important as to whether the injury caused Reiter's syndrome

Both doctors were hired by the Department of Labor and Industries to examine Mr. Hollis, diagnose his condition and arrive at conclusions regarding whether the diagnosis were related to the injury and if so whether

Mr. Hollis was in need of further treatment.

Dr. Ayars was hired first. He did not diagnose a rheumatological condition. He is not a rheumatologist. He is an allergist. Dr. Ayars does not treat people with Reiter's syndrome. Dr. Ayars deferred to the opinion of a rheumatologist regarding rheumatological conditions and agreed that a rheumatological exam was appropriate. So the Department of Labor and Industries sent Mr. Hollis to Dr. Mohai for a rheumatological examination.

Dr. Mohai's specialty is rheumatology. He is board certified. His private practice consists of diagnosing and treating rheumatic conditions. He keeps up with the medical literature with regard to his specialty. He teaches students rheumatology. He has read about Reiter's syndrome in medical journals for the past 30 – 40 years, most recently about three weeks before he testified. Based on Dr. Mohai's expertise, Mr. Hollis' Reiter's syndrome was caused by the industrial injury.

The Department of Labor and Industries did not want to accept the opinion of their rheumatologist, so they asked Dr. Ayars to write an addendum to his IME evaluation. Dr. Ayars had a librarian perform a medline search regarding Reiter's syndrome, admittedly out of his area of expertise, reviewed the results and opined that the condition was not related to the industrial injury. Dr. Ayars did not contact Dr. Mohai with regard to his opinion. Dr. Ayars did not contact any rheumatologist.

Given Dr. Mohai's expertise, experience, ongoing review of the medical literature with regard to the area of rheumatology, his is the more credible opinion.

E. Dr. Mohai's opinion was not based on speculation

Reiter's syndrome is a form of reactive arthritis triggered by exposure to certain pathogens. MOHAI at 29. There is no one specific test for Reiter's syndrome. MOHAI at 41. There are various components. MOHAI at 41. When there are a sufficient number of components, the diagnosis of Reiter's syndrome is appropriate. MOHAI at 41.

In the present case, Mr. Hollis suffered a puncture wound by a dirty hypodermic needle. He went to the emergency. He had signs and symptoms of infection. Dr. Kim Smith diagnosed a needle stick infection. AYARS II at 5-6. There was a rather immediate onset of pain and swelling, the onset of conjunctivitis, the positive HLA-B27 antigen, some joints were very involved while others were not, the negative ANA and SED rates, Dr. Mohai's examination of the arthritic condition. Dr. Mohai felt there were a sufficient number of components to conclude that Mr. Hollis' suffered from Reiter's syndrome and that the condition was caused by a pathogen contained in the dirty needle.

Although Dr. Mohai may not know precisely what the needle

contained or what it was contaminated with, he knows it caused an infection that set off the reactive arthritis.

It is not necessary to identify the precise toxic agent in the workplace that causes the disease. *Intalco Aluminum v. Department of Labor and Industries*, 66 Wn. App. 644, 658 (Div 1 1992). The claimant is only required to demonstrate that conditions in the workplace more probably than not caused the disability. *Id.* To prove causation, the physicians in *Intalco* were not required to pinpoint the specific toxin as the basis for their conclusion that pot room exposures were more probably than not the cause of the claimant's disease. *Id.* Similarly, in *Bruns v. Paccar*, the drivers did not need to identify the specific chemical to show a design defect in a toxic tort products liability case. *Bruns at 213.*

It is not speculative to say that a pathogen in or on the dirty hypodermic needle caused Mr. Hollis' Reiter's syndrome. There is evidence of infection from the hypodermic needle which resulted in pain and swelling. Taken with the conjunctivitis, positive HLA-B27 antigen, the involvement of some joints and not others, and the negative ANA and SED rates, leads to the logical conclusion that Mr. Hollis suffers from Reiter's syndrome as a result of the industrial injury.

F. The respondent is entitled to attorney fees in defending this appeal

CONCLUSION

The court did not err in allowing Dr. Mohai's testimony with regard to causation. Reiter's syndrome is a rheumatic condition treated by a rheumatologist. Dr. Mohai was the only rheumatologist to testify in this matter. He is the doctor that recognized the condition. He recognized the condition because of his expertise in the field and the many years he has spent reading the medical literature.

In contrast, Dr. Ayars did not recognize the condition. Once Dr. Mohai diagnosed Reiter's syndrome, Dr. Ayars did not speak with a rheumatologist regarding whether the condition could be triggered by an infection from a hypodermic needle. Instead he relied on a medline search performed by a librarian at the hospital, concluding there is no support for Dr. Mohai's opinion. He originally deferred to a rheumatologist, then offered his own expert opinion, admittedly outside his area of expertise.

As to entry of the jury verdict, the Department of Labor and Industries did not preserve its right to appeal based on sufficiency of the evidence. The Department of Labor and Industries did not move for judgment as a matter of law before submission of the case to the jury. The Department of Labor and Industries made no post-verdict motion challenging the sufficiency of the evidence.

Mr. Hollis asks that the Court uphold the jury's decision and award

attorney fees in responding to this appeal.

Dated this 29 day of November, 2010.


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

GARY D. HOLLIS, SR.,)	
Respondent)	NO.: 40713-1-II
)	
v.)	DECLARATION OF
)	SERVICE BRIEF OF
DEPARTMENT OF LABOR)	RESPONDENT,
AND INDUSTRIES)	GARY D. HOLLIS, SR.
)	
Appellant.)	
_____)	

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the BRIEF OF RESPONDENT, GARY D. HOLLIS, SR., to be served on the following:

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VIA U.S. MAIL
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SIGNED this 29th day of November, 2010.


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