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67722-5

No. 67722-5-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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Jane E. Potter,

Appellant,

v.

Department of Labor & Industries of the State of Washington,

Respondent.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

In this case, Jane Potter asks the Court to recognize Multiple Chemical Sensitivity (MCS) as a remediable condition under the Washington State Industrial Insurance Act (IIA)—colloquially known as workers’ compensation. Ms. Potter developed MCS when she was exposed to various chemical compounds off-gassed by new furniture, paint, carpet, and other by-products of a remodel in a defectively ventilated office. Her symptoms, including increased heart rate, severe fatigue, and inability to concentrate, required that she work from home in order to mitigate chemical exposure, but eventually prevented her from effectively continuing her job as a patent attorney with Davis Wright Tremaine.

Because MCS is a diagnosis generally accepted in the relevant scientific community, each lower court correctly admitted testimony from Ms. Potter’s doctors indicating that she suffers from MCS. However, the superior court, sitting in its capacity as an appellate court in this workers’ compensation case, erred when it affirmed the Board of Industrial Insurance Appeals’s holding that MCS is not cognizable as an occupational disease under the IIA. Because MCS is physiological—rather than psychological—in nature, Ms. Potter’s workers’ compensation claim

should be accepted for proper and necessary treatment and benefits to be determined by the Department of Labor & Industries.

## **II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL**

### **A. Assignments of Error**

1. The superior court erred in affirming the Board of Industrial Insurance Appeals (Board) order dated October 4, 2010, which affirmed the Department of Labor and Industries (DLI) order of May 7, 2009, rejecting Ms. Potter's claim for workers' compensation benefits. CP 109; Certified Appeal Board Record (CABR) at 15-17. (Superior court Conclusions of Law 2.5 & 2.6.)
2. The superior court erred in holding that Ms. Potter's MCS is a psychiatric condition predicated upon subjective fear of exposure to chemicals in the workplace. CP 108; CABR 12. (Conclusion of Law 2.3.)
3. The superior court erred in holding that Ms. Potter's MCS is not an occupational disease within the meaning of RCW 51.08.140. CP 109. (Conclusion of Law 2.4.)
4. The superior court erred in determining that Ms. Potter's chemical exposure was not a "distinctive condition" of her employment. CP 108. (Finding of Fact 1.12.)

5. The superior court erred in finding that there was no evidence that Ms. Potter was exposed to a quantity of chemicals sufficient to cause MCS. CP 108. (Findings of Fact 1.7, 1.9, & 1.10.)

**B. Issues Pertaining to Assignments of Error**

1. Whether Ms. Potter's MCS qualifies as an occupational disease under the Washington Industrial Insurance Act (IIA), RCW 51.08.140, when it is 1) a generally accepted diagnosis under the *Frye* test; and 2) caused by distinctive conditions in Ms. Potter's workplace? (Assignments of error 3, 4, & 5)
2. Whether the superior court and Board erred in determining MCS is a psychological disorder, and is thus non-compensable pursuant to RCW 51.08.142 and WAC 296-14-300, which preclude workers' compensation benefits for claims arising out of "mental conditions or mental disabilities caused by stress?" (Assignments of error 1 & 2)

**III. STATEMENT OF THE CASE**

**A. Factual Background**

The Certified Appeal Board Record (CABR) contains the entire record of proceedings before the Board of Industrial Insurance Appeals, including transcripts of perpetuation depositions and live testimony; and

motions and exhibits attached thereto. The CABR is enormous. In an effort to aid the Court in making sense of the factual record, great care is taken to set out the factual background of this case.

Jane Potter was born in Scotland, and moved to the United States in 1963 where she also attended college. CABR, Testimony of Jane Potter (Hereinafter Potter) at 5.<sup>1</sup> She earned her M.S. in biochemistry from NYU in 1977; she then earned her PhD in biochemistry, also from NYU, in 1978. Id. As part of her training in biochemistry, Ms. Potter completed two years of medical school curricula. Id. After earning her PhD, Ms. Potter held two post-doctoral fellowships at Sloan Kettering in New York, and the Jackson Laboratory in Maine where she performed substantive work in the fields of immunobiology and biochemistry. Id. at 5-6. She subsequently attended law school at the University of Maine, earning her J.D. in 1988. Id. at 6.

After practicing law in Maine, New York, and Washington, D.C., for a number of years in the field of patent law, Ms. Potter moved to Seattle in about 1996 to work for a now-defunct firm called Campbell & Flores. Id. at 6-7. After a two year interlude in California, Ms. Potter moved back to Seattle in 1999 where she went to work for Seed & Berry,

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<sup>1</sup> The section of the CABR containing transcripts of proceedings before the Board of Industrial Insurance Appeals is not paginated; consequently, the page numbers cited go directly to the testimony transcripts.

continuing her practice in biotechnology patent law. Id. at 7. In 2002 Ms. Potter left Seed & Berry to join Davis Wright Tremaine (DWT) in an effort to build up DWT's patent law practice. Id. at 8. As part of her work for DWT, Ms. Potter was appointed as a Special Assistant Attorney General in 2005 to do patent work for Washington State University. Id. at 8-9.

When Ms. Potter first started with DWT, their offices were located on the twentieth through twenty-fifth floors of the Century Square building in downtown Seattle. Id. at 9; see also CABR Testimony of Lisa Wabik, DWT facilities manager (hereinafter Wabik) at 25. In June of 2007, DWT moved into newly remodeled office space on floors seventeen through twenty-four of the Washington Mutual Tower. Potter at 9; see also CABR Testimony of Michelle Collier, DWT human resources manager (hereinafter Collier) at 37.

Ms. Potter testified that in June of 2007, just prior to moving into the new office space in the Washington Mutual Tower, she was in the best health of her life. Potter at 13. When she moved into the new space in June, Ms. Potter noticed that there was still quite a bit of remodeling work going on. Workers continued to install walls, paint, and do general touch up work on the twenty-third floor where Ms. Potter's office was located. Id. at 15. During the first weeks in her new office space, Ms. Potter noticed a

strong chemical odor, and began experiencing a metallic taste in her mouth. Id. at 16. She also started feeling disoriented, and began making mistakes in her work. Id. at 16-17. Before two months had passed, Ms. Potter became so fatigued that when she would arrive home from work, all she could do was lie down and sleep for a few hours. Id. at 17. Additionally, she had a recurring bloody nose. Id.

Ms. Potter testified that the chemical odor was stronger in her office than in other parts of the building. Id. at 20. Sharon Sheridan, Ms. Potter's former legal assistant at DWT, also testified that there was a strong chemical odor in DWT's new office in the Washington Mutual Tower, and that Ms. Potter's office was particularly malodorous. CABR Testimony of Sharon Sheridan (hereinafter Sheridan) at 95; 98.

Additionally, Ms. Sheridan testified that after she and Ms. Potter moved into the new office space, Ms. Potter began to appear confused and disoriented at times. Id. at 101. Ms. Sheridan stated that she had never observed Ms. Potter exhibit these problems at any time during their eleven year professional relationship. Id. at 102; see also id. at 93.

To address her symptoms, Ms. Potter first tried setting up a free-standing air filter in her office. Potter at 21. Eventually, however, her symptoms worsened to the point that she sought medical attention through her long-time family practice physician, Christopher Shuhart, M.D. Ms.

Potter first saw Dr. Shuhart for her symptoms related to chemical exposure on September 5, 2007. Potter at 25; CABR Testimony of Christopher Shuhart, M.D. (hereinafter Shuhart) at 9.<sup>2</sup> Ms. Potter complained to Dr. Shuhart that she was suffering from a burning sensation in her eyes, shortness of breath, fatigue, headache, confusion, and cough. Shuhart at 9. Dr. Shuhart's examination of Ms. Potter was reportedly normal, but his office sought the Material Safety Data Sheets (MSDS) associated with the materials used in the remodel at DWT's new office space. Id. at 11. He also referred Ms. Potter to the Occupational Medicine Clinic at Harborview Medical Center. Id.

Ms. Potter was then seen by Matthew Keifer, M.D., at the Harborview Occ. Med. Clinic on October 8, 2007. CABR Testimony of Matthew Keifer, M.D., (hereinafter Keifer) at 12. Dr. Keifer is board certified in internal medicine and occupational medicine; he maintains two active practices in occupational medicine, and is also a full time tenured professor of occupational medicine at the University of Washington. Id. at 5-7. Dr. Keifer described occupational medicine as a field which "concentrates on the diagnosis of injuries and illnesses related to exposures in the workplace and the environment." Id. at 6.

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<sup>2</sup> The section of the CABR containing transcripts of perpetuation depositions is separate from that containing live testimony. That section, however, is also not paginated, and so the medical testimony is referenced through the deposition transcript pagination for each individual doctor.

Ms. Potter reported her symptoms to Dr. Keifer, who ordered an “environmental history” in order “to rule out the possibility that there’s something not related to the workplace but, instead, related to the home environment or other aspects of her living space that might be causing her symptoms.” Id. at 17. Dr. Keifer found nothing in this history which indicated to him that factors outside Ms. Potter’s workplace were contributing to her symptoms. Id. at 17-18. Dr. Keifer’s initial physical examination of Ms. Potter in 2007 was grossly normal. Id. at 21. Although he had no diagnosis for her at this point, Dr. Keifer’s initial suspicion was that the symptoms Ms. Potter was describing correlated with “an anxiety-induced state of concern triggered by the physical symptoms associated with exposure and the concern about the chemical hazard that that presents.” Id. at 22-23. Dr. Keifer explained that his anxiety theory was merely a construct he develops when assessing patients who have not been exposed to chemicals in quantities usually sufficient to produce neurological deficits. Id. at 23.

Due to his concerns regarding the air quality in Ms. Potter’s office, Dr. Keifer requested the assistance of an industrial hygienist, Nancy Beaudet, to evaluate Ms. Potter’s workplace. Id. at 22. Ms. Beaudet testified that the job of an industrial hygienist involves the “identification, evaluation, and control of a chemical’s physical and biological hazards in

the work setting.” CABR Testimony of Nancy Beaudet (hereinafter Beaudet) at 65.<sup>3</sup> Ms. Beaudet possesses an M.S. in industrial hygiene and is a certified industrial hygienist. Beaudet at 64. She has worked with the physicians at the Harborview Occupational Medicine Clinic since 1994. Id. at 66. In her line of work, Ms. Beaudet regularly deals with issues related to “new furnishings or remodel activities and the offgassing of those activities.” Id. at 68.

Ms. Beaudet arranged an evaluation of Ms. Potter’s office at DWT which eventually took place on January 24, 2008. Id. at 71. Ms. Beaudet analyzed the heating, ventilation, and air-conditioning (HVAC) systems on the twenty-third floor, and particularly in Ms. Potter’s (former) office. Id. at 72. She was accompanied by Lisa Wabik, DWT’s facilities manager. Id. Ms. Beaudet identified two significant issues with Ms. Potter’s office.

First, after obtaining the ventilation system plans for the twenty-third floor from Ms. Wabik, Ms. Beaudet determined that there was a design flaw in the ducting. Id. at 74. Specifically, while there should have been both a supply and return vent in Ms. Potter’s office, the plans erroneously called for two supply vents. Id. Consequently, the ambient pressure in Ms. Potter’s office was higher than the rest of the twenty-third floor, meaning that the air outside her office would flow by, rather than

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<sup>3</sup> The testimony of Ms. Beaudet comes right after that of Ms. Potter in the CABR.

into, the room. Id. at 75. Ms. Beaudet testified that part of the purpose of having supply and return ducts is to “dilute the contaminants . . . that are offgassing from furnishings.” Id.

The second issue identified by Ms. Beaudet was the significant chemical odor emanating from the vinyl blinds in Ms. Potter’s office—seven months after they were installed. When they unrolled the blinds in Ms. Potter’s former office, both Ms. Beaudet and Ms. Wabik noticed a chemical, or “plasticky,” odor. Id. at 76; Wabik at 31. Ms. Wabik noted that the odor was “pretty much isolated to Jane’s office.” Wabik at 31. Ms. Beaudet testified that she was quite surprised that the blinds would still be off-gassing after so much time had elapsed since their installation. Beaudet at 87. Ms. Beaudet recommended correction of the ventilation defect and removal of the blinds in Ms. Potter’s office. Id. at 76. Ms. Beaudet testified that “respiratory irritation, fatigues, [and] headaches” are all symptoms reported in the literature of her field as “associated with the irritants that can offgas from furnishings.” Id. at 80.

By the time Dr. Keifer saw Ms. Potter again on October 22, 2007, he had not yet, of course, received the results of Ms. Beaudet’s testing. Dr. Keifer stated that during that visit, Ms. Potter complained of shortness of breath with exertion and mental fuzziness. Keifer at 26. Dr. Keifer remained suspicious that there was something going on in Ms. Potter’s

workplace with respect to air quality related to the remodel. Id. Dr. Keifer tested Ms. Potter's blood oxygen saturation levels, which were normal, but he was concerned that her pulse rate went up to 153 with mild exertion. Id. at 27. Because of the pulse and shortness of breath issues, Dr. Keifer referred Ms. Potter for other cardiac and pulmonary tests which were essentially normal, with the exception of an unexplained drop in blood oxygen saturation on one other occasion. Id. at 27-28; 31. At that point, Dr. Keifer requested that Ms. Potter stay away from her office until he could figure out what the problem was. Id. at 29.

As a consequence of her symptoms and Dr. Keifer's recommendation that she stay away from the office, Ms. Potter arranged to work from home. Potter at 21. Ms. Potter received a laptop with programs that allowed her to access her work securely offsite; she would meet her assistant, Sharon Sheridan, on occasion in the lobby of the Washington Mutual Tower to review files and sign documents. Id. at 22. While initially Ms. Potter's symptoms did not abate when she started working from home, Ms. Potter started a detoxification regimen in December of 2007 which nearly completely resolved her complaints. Id. at 24; 32-33. Ms. Potter utilized her advanced training as a biochemist to come up with a solution to what she hypothesized was a condition related to the

accumulation of chemicals in her body which would re-circulate when she exerted herself. Id. at 32-33.

When Ms. Potter saw Dr. Keifer again in January of 2008, she felt much better, and she asked Dr. Keifer to clear her to return to her office. Id. at 33-34. Dr. Keifer noted that Ms. Potter's symptoms had abated and cleared her to return to her DWT office. Keifer at 32-33. Unfortunately, when Ms. Potter returned to her office she noted that the chemical odor was still present, and her symptoms began to reappear. Potter at 34. Accordingly, she thus decided to continue working from home. Id. At this point, Ms. Potter also began to notice that her symptoms would also appear when she was exposed to chemicals in other situations, which was a new phenomenon. Id. at 35.

When Ms. Potter's next saw Dr. Keifer in February of 2008, he submitted a claim for workers' compensation benefits on Ms. Potter's behalf under the diagnosis "upper respiratory tract infection," which he related to Ms. Potter's on-the-job chemical exposure on a more-probable-than-not basis. Keifer at 34. Later that month Dr. Keifer finally received the report of Ms. Potter's defectively ventilated office from Ms. Beaudet. Upon receiving that report, he wrote to Ms. Collier, DWT's human resources manager, that Ms. Potter should continue to work from home where she could control her environment better than at her office. Id. at 35.

Ms. Potter continued to work from home, but by the latter half of 2008 she realized her employment with DWT was probably not going to last much longer. Potter at 35-36. In the summer of 2008 she had an extended interview at a firm downtown. Despite prior visits to that firm's office without incident, when Ms. Potter visited the firm for her interview, she experienced a significant recurrence of symptoms including fatigue and elevated heart rate. Id. at 36.

Ms. Potter then requested MSDS for materials used by the contractor who remodeled DWT's offices which she received from DWT on July 23, 2008. Id. Based on her familiarity with MSDS as a biochemist, Ms. Potter then took the relevant portions of the MSDS, including the names and types of chemicals involved, and compiled a more readable seven page summary of chemicals used in the DWT office remodel. Id. at 36-37. This summary was admitted as Exhibit 1 during the initial administrative proceedings; the full copy of the MSDS was admitted as Exhibit 2. See CABR at 223; 2.

When Ms. Potter next saw Dr. Keifer in September of 2008, Dr. Keifer opined that her symptoms "were the result of her exposures at the workplace and the concentration that she was exposed to in the office." Keifer at 38. Dr. Keifer testified that she had improved with a detoxification diet, but that naturopathic detoxification was not an area in

which he was well-versed. Id. Dr. Keifer diagnosed Ms. Potter with MCS. Id. at 39. Dr. Keifer based his diagnosis on criteria originally developed about fifteen years ago by Mark Cullen, a professor of occupational medicine and physician at Yale University, who identified MCS as a condition defined, in Dr. Keifer's words, as:

an overexposure event which cause[s] illness and then recurrent episodes of usually somewhat non-specific symptoms, oftentimes involving central nervous system confusion and a feeling of fuzziness, as well as potentially upper respiratory and mucous membrane irritant symptoms, with exposure to multiple chemicals, so not specifically responding to potentially the single chemical, but, in fact, an expanding number of different chemicals that . . . would bring back this experience.

Id. at 39-40. Dr. Keifer has diagnosed MCS in his patients a number of times over the course of his practice. Id. at 41-42. Dr. Keifer had no "allopathic," or pharmacological, recommendations for Ms. Potter; instead, he recommended that she see a naturopathic specialist, Dr. Allen. Id. at 48.

DLI sent Ms. Potter to two medical examinations after she filed a claim for workers' compensation benefits in order to determine whether her claim would be accepted. Ms. Potter was first sent to John Hamm, M.D., a psychiatrist, on October 23, 2008. CABR Testimony of John Hamm, M.D., (hereinafter Hamm) at 10. Dr. Hamm testified that about half of his current psychiatric practice involves "civil litigation type

consultations,” with the other half dedicated to seeing patients on an outpatient basis. Hamm at 6.

Dr. Hamm testified extensively about some issues in Ms. Potter’s past which he suggested were indicative of a history of anxiety disorder. Dr. Hamm cited a note from a prior physician of Ms. Potter’s in 1998 which obliquely mentioned that Ms. Potter had some “panic” symptoms in elevators. Id. at 13. He also referenced records from 2002 which suggested that Ms. Potter was suffering “breathlessness, chest discomfort, and fatigue” due to some stressors in her life. Id. at 14. Next he described an incident some time after the 9/11 attacks when Ms. Potter was apparently carrying valium, a flashlight, and water in her purse when using the elevators in the Columbia Tower. Id. Dr. Hamm testified that she had “episodes of overwhelming fear and doom, breathlessness, dizziness when an elevator failed to open immediately.” Id. Dr. Hamm finally cited to an incident in 2003 where Ms. Potter was working near a copier and noted a “chemical smell.” Id. at 15. Dr. Hamm stated that Ms. Potter would get a stuffy and runny nose when she was exposed to the copier, but that her symptoms were “anxiety-based mental and physical symptoms.” Id. at 15; 16. Based on his review of these records, Dr. Hamm diagnosed Ms. Potter with generalized anxiety disorder, which Dr. Hamm described as a label

given to patients that have a “history of anxiety that can be expressed in different ways.” Id. at 22.

Dr. Hamm testified further that Ms. Potter’s physical symptoms can be explained by his diagnosis of anxiety disorder. Dr. Hamm stated that anxiety can cause physical symptoms, including Ms. Potter’s shortness of breath and fatigue, because it causes “the brain to affect organs in the body.” Id. at 26-27. Dr. Hamm also believed that Ms. Potter had the same physical symptoms during anxiety attacks prior to her chemical exposure beginning in 2007 at DWT’s new offices. Id. at 28. Although he expressed some familiarity with MCS, Dr. Hamm was ambivalent about applying that diagnosis to Ms. Potter because of a lack of specific knowledge regarding which toxic substances she was exposed to. Id. at 44-45; 46.

DLI next sent Ms. Potter to a medical examination with Dennis Stumpp, M.D., an occupational medicine specialist, on November 17, 2008. CABR Testimony of Dennis Stumpp, M.D., (hereinafter Stumpp) at 5; 11. Dr. Stumpp maintains two practices, one at the Occupational Health Clinic at Valley Medical Center, and another as a medical examiner for DLI and insurance companies. Id. at 5-6.

Dr. Stumpp echoed Dr. Hamm’s diagnosis, finding that Ms. Potter’s current symptoms were “likely somatic manifestations of a

generalized anxiety disorder.” Id. at 22. Dr. Stumpp believed that Ms. Potter’s anxiety disorder pre-existed her chemical exposure on the job with DWT and had previously resolved with the use of anti-anxiety medications. Id. With respect to Ms. Potter’s post-2007 symptoms, Dr. Stumpp, like Dr. Hamm, believed that they were the same complaints she had made during previous episodes of anxiety. Id. at 46.

Dr. Stumpp testified that Ms. Potter “probably met the criteria” for MCS, but he does not believe that MCS is a legitimate diagnosis; he believes instead that MCS is a “sociologic phenomenon.” Id. at 25; 26. Dr. Stumpp is of the opinion that, while the symptoms of MCS (he terms it “idiopathic environmental intolerance”) may be real, they are not a result of chemical exposure. Id. When asked whether MCS is a generally accepted medical condition, Dr. Stumpp stated that, despite the fact that it is a “medical phenomenon . . . [with some] criteria for how to include patients in that categorical grouping,” he does not think that MCS is generally accepted because the diagnosis is not “objectively verifiable.” Id. at 28. Dr. Stumpp described the sufferer of MCS’s reaction to chemical odors as “cacosmic”—that is, a physical symptom generated by the brain in response to the odor. Id. at 30. Dr. Stumpp has never diagnosed anyone with MCS. Id. at 94.

Ms. Potter, on the other hand, testified that the symptoms of MCS that she had in 2007 and beyond were “completely different” from anything she had previously experienced. Potter at 30. She stated that she merely had a runny nose when she had been around copy machines previously, which did not impair her ability to work. Id. at 26; 30. With respect to her elevator anxiety issues from 2002, Ms. Potter stated that she had some issues with elevators after she rode out the 2001 Nisqually earthquake on the seventieth floor of the Columbia Tower. Id. at 46. Compounded with this experience, Ms. Potter was nervous in that building in particular after 9/11 because she understood that it was a potential target for terrorists. Id. In fact, with respect to all the anxiety issues which Drs. Stumpp and Hamm identified in Ms. Potter’s past, she testified that they had all completely resolved long before she moved into DWT’s new office space in June of 2007. Dr. Shuhart corroborated Ms. Potter’s account, stating that her current symptoms were not a repeat of anything that Ms. Potter had ever reported to him. Shuhart at 46.

Based on the reports of its medical examiners, on May 7, 2009, DLI rejected Ms. Potter’s claim for workers’ compensation benefits on two separate grounds. First, DLI determined that Ms. Potter’s MCS was a “mental condition or mental disability caused by stress” which pre-existed her employment with DWT. Second, DLI determined that Ms. Potter’s

MCS was not an “occupational disease within the meaning of RCW 51.08.140.” See CABR at 247.

### **B. Procedural History**

Ms. Potter appealed the DLI order rejecting her claim on May 8, 2009, to the Board of Industrial Insurance Appeals. CABR at 246. Hearings were set for the following February. See CABR at 221-223. In January of 2010, DLI filed a motion *in limine* to exclude all evidence of MCS under the *Frye* standard. See CABR at 273. In support of its motion, DLI submitted a declaration from Dr. Stumpp, which largely reiterated his testimony that MCS is a social or cultural phenomenon rather than an organic disease. Id. at 282; 283. Along with Dr. Stumpp’s declaration, DLI submitted a number of exhibits upon which Dr. Stumpp purportedly relied in rendering his opinion that MCS is not a generally accepted diagnosis. See CABR at 286-342.

Ms. Potter opposed DLI’s motion, arguing that evidence regarding MCS was admissible under the *Frye* standard because it is a generally accepted medical diagnosis. See CABR at 364. In addition to multiple federal and state proclamations regarding the recognition of MCS, Ms. Potter recited the fact that her MCS diagnosis was rendered by Dr. Keifer—a recognized authority in the field of occupational medicine. Id. at 382-85. Ms. Potter also submitted declarations from Professor Anne

Steinemann and Dr. Howard Hu in support of her argument that MCS is a generally accepted diagnosis. See CABR at 486; 502. In her Proposed Decision & Order dated June 18, 2010, Industrial Appeals Judge Grant ruled in Ms. Potter's favor, allowing testimony regarding MCS. CABR at 221-22. Judge Grant ultimately concluded that Ms. Potter's claim should be accepted as an occupational disease by DLI. CABR at 242.

DLI subsequently filed a petition for review of Judge Grant's Proposed Decision & Order on July 19, 2010. See CABR at 75. DLI sought to reverse Judge Grant's decision on its motion *in limine* as well as the proposed allowance of Ms. Potter's claim as an occupational disease. The BIIA granted DLI's petition for review, and ultimately reversed Judge Grant's Proposed Decision & Order. The BIIA issued a final Decision & Order on October 4, 2010, affirming DLI's rejection of Ms. Potter's claim for workers' compensation benefits, but upholding Judge Grant's ruling on DLI's motion *in limine*. See CABR at 2; 11. There were two primary grounds upon which the BIIA reversed Judge Grant's Proposed Decision & Order. First, the BIIA found that Ms. Potter failed to prove that any chemical to which she was exposed at DWT was the proximate cause of her MCS under the Intalco Aluminum v. Dep't of Labor & Indus.<sup>4</sup> test. CABR at 11; 13; 16. Second, the BIIA concluded that MCS is not

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<sup>4</sup> 66 Wn. App. 644, 833 P.2d 390 (1992).

cognizable as an occupational disease because it resulted from Ms. Potter's "subjective perception that she was exposed to harmful substances, causing her to have an anxiety disorder"—a condition ostensibly barred by RCW 51.08.142 and WAC 296-14-300. CABR at 12; 14-15.

In accordance with RCW 51.52.110, Ms. Potter filed a timely superior court appeal to the BIIA's final Decision & Order on October 25, 2010. CP at 1-2. Before trial, DLI renewed its objection to testimony in the record regarding MCS, and submitted another motion *in limine* to strike all testimony about MCS from the record. CP at 7-30. Ms. Potter replied, arguing again that MCS satisfies the *Frye* test. Judge Barnett ruled in Ms. Potter's favor, holding that, "[a]lthough the specific etiology of [MCS] remains in dispute, the condition itself is a recognized condition, diagnosable by a differential diagnosis." CP at 86. Judge Barnett accepted Professor Cullen's criteria for MCS, as was proffered through the testimony of Dr. Keifer. CP at 86-87; Keifer at 39-40.

DLI then submitted its "Trial Brief and Motion for Judgment as a Matter of Law" on June 6, 2011. CP at 53. Despite the procedural abnormalities presented by such a motion—CR 50 only allows judgment as a matter of law in jury cases, and a "trial brief" would have been submitted out of order—Ms. Potter construed DLI's motion as one for summary judgment under CR 56, and fashioned her arguments

accordingly. See CP at 89. Ultimately, Judge Barnett signed off on DLI's proposed findings of fact and conclusions of law, which upheld the BIIA's final Decision & Order on the same two grounds—that MCS is a mental condition barred by WAC 296-14-300, and that Ms. Potter's MCS was not proximately caused by distinctive conditions of her employment with DWT. CP at 106-109. Ms. Potter now appeals.

#### **IV. STANDARD OF REVIEW**

Procedure in appeals from final BIIA orders is governed by RCW 51.52.115, which provides that “[t]he hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court.” The BIIA's order is considered “prima facie correct,” but the party seeking to overturn the BIIA's order must show that it was incorrect by a simple preponderance of the evidence. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

##### **A. Appellate Review of Summary Judgment**

Where, as here, “a party appeals from a board decision, and the superior court grants summary judgment affirming that decision, the appellate court's inquiry is the same as that of the superior court.” Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

“Summary judgment is properly granted when the evidence taken in the

light most favorable to the non-moving party demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Ball-Foster Glass Container Co. v. Giovanelli, 128 Wn. App. 846, 850, 117 P.3d 365 (2005); CR 56. Thus this Court has the power to review the issues in Ms. Potter’s case de novo and issue an order directing DLI to accept her claim for workers’ compensation benefits.

### **B. Appellate Review of Statutory Interpretation**

This case necessitates determination of the proper interpretation of WAC 296-14-300 and RCW 51.08.142, which the BIIA and superior court construed to preclude a claim for benefits under the IIA for MCS. The meaning of a statutory term is a question of law reviewed de novo. Malang v. Dep’t of Labor & Indus., 139 Wn. App. 677, 684, 162 P.3d 450 (2007).

While some deference should be given to the BIIA’s interpretation of the IIA, it is not binding. Id.<sup>5</sup> In particular, “deference is inappropriate if the agency’s interpretation conflicts with its statutory directive . . . . to construe the terms of the IIA liberally.” Malang, 139 Wn. App. at 684.<sup>6</sup> Doubts regarding the meaning of statutory terms should be resolved in favor of the injured worker. Cockle v. Dep’t of Labor & Indus., 142

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<sup>5</sup> *Citing Doty v. The Town of South Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005).

<sup>6</sup> *See also* RCW 51.12.010 (“This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.”).

Wn.2d 801, 811, 16 P.3d 583 (2001).<sup>7</sup> Thus, the benefit of any doubt regarding the meaning of WAC 296-14-300 inures to Ms. Potter.

### **C. Appellate Review of *Frye* Rulings**

Ms. Potter does not challenge the BIIA's or Judge Barnett's decisions to allow testimony regarding MCS under the *Frye* test. Presumably, however, DLI will challenge the lower courts' rulings in Ms. Potter's favor. The admissibility of "novel" scientific evidence in Washington courts is governed by the *Frye* test,<sup>8</sup> which requires the court to determine whether the proffered scientific theory "has been generally accepted in the relevant scientific community." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 601, 260 P.3d 857 (2011).<sup>9</sup> Review of a lower court's *Frye* ruling is de novo because it involves mixed questions of law and fact. *Eakins v. Huber*, 154 Wn. App. 592, 599, 225 P.3d. 1041 (2010). In reviewing the lower courts' holdings, the Court should look at "expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions." *Id.*

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<sup>7</sup> *Quoting Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1245 (1987).

<sup>8</sup> *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Ct. App. 1923).

<sup>9</sup> *See also Akzo Nobel*, 172 Wn.2d at 602-03 (discussing applicability of *Frye* test to criminal cases, and stating that the Court would "assume without deciding that *Frye* is the appropriate test for civil cases").

However, *Frye* analysis is only invoked where there are questions regarding whether the underlying science upon which an expert has relied is generally accepted in the relevant scientific community and subject to reliable methodology. Akzo Nobel, 172 Wn.2d at 603. The expert's testimony regarding causation is subject to analysis under ER 702 and must only be based upon reasonable medical certainty or probability. Id. at 606-07. Thus, the lower courts' decisions to admit Dr. Keifer's testimony with respect to the causation element of Ms. Potter's MCS is subject to the normal abuse of discretion standard. See, e.g., University of Washington Medical Center v. Washington State Dep't of Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008).

## V. ARGUMENT

### A. JANE POTTER'S MCS, CAUSED BY DISTINCTIVE CONDITIONS IN HER WORKPLACE, IS COGNIZABLE UNDER THE IIA AS AN OCCUPATIONAL DISEASE BECAUSE IT IS A DIAGNOSIS GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY.

Two types of "injuries" are compensable under the IIA: acute injuries and occupational diseases. RCW 51.08.100 defines an acute injury as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." An occupational disease is defined by RCW 51.08.140 as "such disease or infection as arises

naturally and proximately out of employment under . . . this title.” This somewhat laconic definition has been given meaning by Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 745 P.2d 1295 (1987), and its progeny. Significantly, the Dennis court explicitly rejected the idea that an occupational disease must be caused by conditions “peculiar to, or inherent in,” the injured worker’s particular occupation. Id. at 478-79 (Overruling Dep’t of Labor & Indus. v. Kinville, 35 Wn. App. 80, 664 P.2d 1311 (1983)). Instead, the Dennis court held that the touchstone is whether the injured worker’s condition arose out of “distinctive conditions of his or her particular employment.” Dennis, 109 Wn.2d at 481.

Ms. Potter argues that her MCS was caused by chemical exposure from paint and new furnishings in a defectively ventilated office, and that these conditions were sufficiently distinctive to allow her occupational disease claim under Dennis. As a threshold matter, Ms. Potter argues that the lower courts correctly determined that her MCS diagnosis satisfied the *Frye* inquiry.

1. Testimony Regarding MCS is Admissible Under the *Frye* Test Because it is a Diagnosis Generally Accepted in the Relevant Scientific Community and Diagnosable in Accordance With Well-Established Criteria.

In Akzo Nobel, our Supreme Court recently discussed the applicability of the *Frye* test to determine the admissibility of novel

scientific theories. See generally Akzo Nobel, 172 Wn.2d at 600-12. The Akzo Nobel court ultimately assumed, without deciding, that “*Frye* is the appropriate test for civil cases.” Id. at 603.<sup>10</sup> Ms. Potter thus assumes that the *Frye* standard governs the admissibility of expert testimony on MCS where DLI asserts that the diagnosis is not generally accepted.

Under the *Frye* standard, as articulated in Akzo Nobel, the reviewing court should determine 1) whether the proffered scientific theory has gained general acceptance in the relevant scientific community; and 2) “whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results . . . .” Akzo Nobel, 172 Wn.2d at 603.<sup>11</sup> “The primary goal is to determine whether the evidence offered is based on established scientific methodology.” Id.<sup>12</sup> Generally accepted scientific evidence has been described as inhabiting “the twilight zone between the experimental and demonstrable stages.” Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).<sup>13</sup> Evidence has been considered “generally accepted” even where “some controversy” as

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<sup>10</sup> See also *Akzo Nobel*, 172 Wn.2d at 602 (citing 5B Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 702.19 at p. 88 (2007) (“For the moment, it seems safe to presume that *Frye* continues to apply in civil cases until the Washington Supreme Court explicitly says otherwise.”)).

<sup>11</sup> Quoting *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994) (internal quotations omitted).

<sup>12</sup> Quoting *State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006) (internal quotations omitted).

<sup>13</sup> Quoting *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993) (overruled in part on other grounds by *State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997) (internal quotations and citations omitted)).

to the validity of a particular medical theory remains, but it is regularly diagnosed and treated by professionals in the relevant specialty. State v. Greene, 139 Wn.2d 64, 72-73, 984 P.2d 1024 (1999).

The testimony of Dr. Keifer established that MCS is a generally accepted medical condition diagnosable in accordance with definite criteria. Dr. Keifer diagnosed Ms. Potter with MCS through a process of elimination in accordance with criteria developed by Professor Cullen more than twelve years ago. Keifer at 38-40. Dr. Keifer described Mark Cullen as an “eminent occupational medicine physician and researcher.” Id. at 40. The criteria identified by Professor Cullen are listed on page 14, *supra*. Dr. Keifer stated that the Cullen criteria were reiterated in a consensus report in 1999 by the National Institute of Health. Id. at 42-43. Dr. Keifer also testified that MCS is a diagnosis “oftentimes made in symptomatic individuals [by his] profession.” Keifer at 76.

Dr. Hu is a professor of internal medicine, epidemiology, and environmental health sciences at the University of Michigan. CABR at 502. He has a medical degree as well as graduate and post-graduate degrees in epidemiology. Dr. Hu’s current research “encompasses clinical syndromes such as chemical sensitivities,” and he has “authored or co-authored over 250 scientific papers and book chapters and co-edited or co-authored seven books.” CABR at 503. Dr. Hu was the principal

investigator for a study of MCS commissioned by DLI in 1999; his report was peer-reviewed, but never published, due to the death of his co-investigator. CABR at 505. In his declaration in support of Ms. Potter, Dr. Hu stated that “the diagnosis of MCS is, in fact, widely accepted in the medical and scientific community and that MCS is diagnosed by significant numbers of occupational medicine specialists.” CABR at 504.

Anne Steinemann is a professor of civil and environmental engineering, and a professor of public affairs at the University of Washington. She has a PhD in civil and environmental engineering from Stanford. Her areas of expertise include “chemical exposures and resulting health effects,” with her current research focusing on “health effects arising from exposure to chemicals in consumer products, and the etiology, symptomatology, and prevalence of Multiple Chemical Sensitivity (MCS).” CABR at 486. Professor Steinemann has researched MCS for over seventeen years, and has published six peer-reviewed articles on “MCS etiology, symptomatology, and prevalence in the U.S.” CABR at 487. As part of her research, Professor Steinemann has identified “over a hundred peer-reviewed scientific publications that indicate MCS is a serious physical illness that is generally accepted in the scientific community.” CABR at 487.

In its motion *in limine* to the BIIA, DLI proffered the declaration

and testimony of Dr. Stumpp. See CABR at 282-85. In his declaration, Dr.

Stumpp reiterated his belief that:

MCS is not generally accepted in the scientific community and in fact has been more appropriately renamed Idiopathic Environmental Intolerance to reflect the fact that there is no objective scientific evidence that it represents a sensitivity as the word is used medically and there is no evidence that it is caused by exposure to chemicals. As such it represents a social or cultural phenomenon of misattribution of symptoms. It is not a disease.

...

Research has shown that individuals receiving the diagnosis of MCS or environmental illness frequently have common psychiatric or medical disorders which are usually recognized or untreated.

CABR at 283-84. In response, Professor Steinemann stated that “the concept that MCS represents an underlying anxiety or other psychological disorder has been the minority opinion in scientific publications,” and that this minority view has been “widely discredited.” CABR at 488. Professor Steinemann cited hundreds of peer-reviewed scientific publications in support of her assertion. See CABR at 490-98. Dr. Hu also took issue with Dr. Stumpp’s assertion that MCS is not a generally accepted diagnosis, stating that it is “widely accepted in the medical and scientific field.” CABR at 504. Dr. Hu further objected to Dr. Stumpp’s contention that MCS had been renamed “Idiopathic Environmental Intolerance,” stating his opinion that “MCS remains the term most commonly used today by scientists and physicians.” CABR at 504-05.

Dr. Stumpp's opinion that MCS is not generally accepted in the scientific community is based on his own outdated beliefs rather than current scientific scholarship. Notably, the publications upon which Dr. Stumpp relied in rendering his opinion are between twelve and twenty-four years old, with the possible exception of the website "quackwatch.org," which is not a scientific, peer-reviewed publication, to say the least. See CABR at 284. Professor Steinemann points out this flaw in her declaration, noting that "Dr. Stumpp's opinion represents an outdated view of MCS that has been discredited by extensive peer-reviewed research." CABR at 487. In fact, forty of the peer-reviewed scientific publications upon which Professor Steinemann relied in rendering her opinions were published *after* the most recent article upon which Dr. Stumpp relied. See generally CABR at 490-98.

In determining the admissibility of evidence under *Frye*, the Court should also look to decisions from other jurisdictions regarding MCS as a guideline. Eakins, 154 Wn. App. at 599. In its motion *in limine* to the superior court, DLI argued that "decisions [from] other jurisdictions have uniformly concluded that the MCS causal theory does not meet *Frye* or even the less stringent *Daubert* [test]." CP at 23. This assertion is misleading, as DLI later acknowledged in its brief

when it stated that it had found “two cases that have held MCS admissible, but *not* under *Frye* or *Daubert*.” CP at 25. Ms. Potter acknowledges that the majority of courts confronted with the issue of whether to allow evidence of MCS—whether under either *Daubert* or *Frye*—have rejected it. However, some courts have admitted MCS as a diagnosis, including two cases which are particularly relevant to the facts at hand.

For instance, in *Kennedy v. Eden Advanced Pest Technologies*, 222 Or. App. 431, 193 P.3d 1030 (Or. Ct. App. 2008), the Oregon Court of Appeals held that the plaintiff’s expert’s diagnosis of MCS was admissible under a seven-step test used by Oregon courts to determine the admissibility of novel scientific evidence. 222 Or. App. at 439. The Oregon test is somewhat of a hybrid *Daubert-Frye* analysis which requires not only “general acceptance” of the theory, but also “the potential rate of error” involved in the theory—akin to the “reliability” requirement of *Daubert*. Id. The court in *Kennedy* recognized that some of the literature “argues against chemical sensitivity as a valid diagnosis,” but found that “some of that literature is dated and the evidence demonstrates that the scientific community is engaged in an ongoing investigation and debate about MCS.” Id. at 449. The Oregon court acknowledged precisely what Ms. Potter is

arguing—that the science relied upon by DLI and Dr. Stumpp which suggests that MCS is not generally accepted is simply outdated.

Most strikingly, in Appeal of Kehoe, 139 N.H. 24, 648 A.2d 472 (1994) (Kehoe I), the Supreme Court of New Hampshire held that MCS is a compensable “occupational disease” under its workers’ compensation laws. 139 N.H. at 26. New Hampshire’s definition of “occupational disease” is even more stringent than Washington’s, requiring that an occupational disease arise out of “causes and conditions characteristic of *and peculiar to* the particular trade.” See N.H. Rev. Stat. Ann. § 281-A:2(XIII) (emphasis added). As previously mentioned, in Dennis, the Washington Supreme Court explicitly rejected a requirement that the conditions giving rise to an occupational disease be “peculiar to, or inherent in,” the injured worker’s employment. Dennis, 109 Wn.2d at 478-79. On remand from the New Hampshire Supreme Court, the New Hampshire workers’ compensation board again denied the plaintiff’s claim on the grounds that “she ‘failed to prove by a preponderance [*sic*] that the MCSS is causally related to a risk or hazard of [her] employment.’” See Appeal of Kehoe, 141 N.H. 412, 415, 686 A.2d 749 (1996) (Kehoe II). The New Hampshire Supreme Court again reversed, holding that the plaintiff met her burden of proof because she presented sufficient

testimony that conditions of her employment caused her MCS. 141 N.H. at 419.

The decisions of other jurisdictions regarding the admissibility of MCS are mixed, and have not, as DLI asserted, “uniformly concluded” that MCS does not meet either the *Frye* or *Daubert* tests. See CP at 23. Moreover, the decisions of other states’ courts, though potentially persuasive, are not binding upon this Court.

The evidence before the BIIA established that Dr. Keifer diagnosed Ms. Potter with MCS according to the criteria developed by Professor Cullen, thus satisfying both parts of the required *Frye* analysis. If, after examining the scientific literature regarding MCS; the testimony of Dr. Keifer; the declarations of Dr. Hu and Professor Steinemann; and the decisions of other jurisdictions, the court is still in doubt as to the general acceptance and diagnostic criteria of MCS, the benefit of that doubt belongs to Ms. Potter. “[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.” Dennis, 109 Wn.2d at 470. Thus, the Court should conclude that the diagnostic criteria of MCS satisfy the *Frye* standard.

2. Once Dr. Keifer Established That Ms. Potter Met the Accepted Criteria for MCS, his Opinion Regarding Causation was not Subject to *Frye* Analysis Under the Supreme Court’s Recent Decision in *Anderson v. Akzo Nobel*.

While the general acceptance of MCS as a diagnosis is subject to *Frye* analysis, under the recent Akzo Nobel decision, Dr. Keifer’s testimony pertaining to the causal relationship between conditions of Ms. Potter’s employment and her MCS is only subject to the requirements of ER 702. “Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified experts to testify if scientific . . . knowledge will assist the trier of fact.” Akzo Nobel, 172 Wn.2d at 603.<sup>14</sup> Consequently, once the Court determines that MCS satisfies the *Frye* standard, it should review the admission of Dr. Keifer’s testimony regarding causation under an abuse of discretion standard.

In addition, the opinions of Drs. Keifer and Shuhart, Ms. Potter’s attending physicians, are subject to “special consideration.” In workers’ compensation matters there is a long-standing rule that the opinions of an injured worker’s attending physician are to be afforded “special consideration.” Hamilton v. Dep’t of Labor & Indus., 111

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<sup>14</sup> Quoting Gregory. 158 Wn.2d at 829-30 (internal quotations omitted).

Wn.2d 569, 571, 761 P.2d 618 (1988). Courts have recognized that the attending physician's opinion on causation is subject to special consideration in these cases in part because "an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." Intalco, 66 Wn. App. at 654. The attending physician's opinion on causation is "sufficient when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes without resort to delicate brain surgery." Id. at 654-55.<sup>15</sup>

Dr. Keifer testified that he diagnosed Ms. Potter with MCS in accordance with the Cullen factors after ruling out other possible physical and psychological etiologies, including anxiety. See Keifer at 22-23; 38-42. Dr. Keifer also stated that the low levels of chemicals to which Ms. Potter was exposed in her office caused her MCS. Keifer at 51-52. Despite the fact that he does not believe it is a valid diagnosis, Dr. Stumpp even acknowledged that Ms. Potter "probably met the criteria for [MCS]." Stumpp at 25. Dr. Stumpp further testified that he believes people with MCS, including Ms. Potter, suffer from very real symptoms—he just does not believe that those symptoms are proximately caused by exposure to chemicals. Stumpp at 26.

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<sup>15</sup> *Citing Halder v. Dep't of Labor & Indus.*, 44 Wn.2d 537, 544-45, 268 P.2d 1020 (1954).

Dr. Keifer treated Ms. Potter over the course of several years, and had witnessed the development and progression of Ms. Potter's symptoms. Dr. Shuhart has been Ms. Potter's primary care physician since 2002. Shuhart at 10. Both of these doctors stated that Ms. Potter's symptoms related to chemical exposure on the job with DWT were not a product of underlying anxiety, and Dr. Shuhart stated further that her current symptoms are unlike anything he had ever treated her for. See Keifer at 51-52; Shuhart at 46. On the contrary, Drs. Stumpp and Hamm each saw Ms. Potter one time, and through their review of her past medical records, came to the conclusion that Ms. Potter suffers from "generalized anxiety," of which Ms. Potter's current complaints were merely a continuation. See Stumpp at 22-23; Hamm at 22-25. This diagnosis, however, contradicts Ms. Potter's statement that she had never before experienced the symptoms she is currently suffering, an account supported by Dr. Shuhart who testified that "Jane's illness in 2007 was not the . . . somatic expression of her underlying anxiety" as Dr. Hamm had diagnosed. Shuhart at 46. Drs. Shuhart and Keifer both stated that Ms. Potter's MCS is related to her on the job chemical exposure at DWT; their opinions should be afforded special consideration as physicians who have evaluated and treated Ms. Potter over a number of years.

3. The Defective Ventilation in Ms. Potter's Office, in Combination With Chemicals Off-Gassing From Recently Installed Furnishings in her Office, Constitutes a Distinctive Condition of her Employment Such That she has Stated a Cognizable Occupational Disease Claim.

Under the Supreme Court's holding in Dennis, as injured worker has the burden of proving that her occupational disease arose out of "distinctive conditions" of her workplace. 109 Wn.2d at 481. Additionally, the injured worker "must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general." Id. "Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace." Id.

Ms. Potter was exposed to various chemicals off-gassing from new furnishings in her recently remodeled office space at DWT. Although no testing identified a specific chemical or assortment of chemicals to which Ms. Potter was exposed, the MSDS contain a list of the chemicals used in the manufacturing of the materials used in the remodel and thus constitute circumstantial evidence of the chemicals present in Ms. Potter's office.

See CABR Exhibits 1 & 2.<sup>16</sup> Moreover, as Ms. Beaudet testified, in general, new furnishings continue to off-gas many volatile organic compounds long after their installation. Beaudet at 73-74.

The fact that Ms. Potter is unable to identify any specific chemical to which she was exposed does not undermine her contention that her MCS was caused by chemical exposure associated with the remodel of her workplace. In Intalco Aluminum v. Dep't of Labor & Indus., this Court held that “the workers' compensation statute does not require the claimant to identify the precise chemical in the work place that caused his or her disease.” 66 Wn. App. at 658. In the Intalco case, the injured workers alleged that exposure to chemicals in their workplace caused various neurological diseases. Id. at 652-53. Despite the fact that the claimants' physicians could not identify “the specific toxic agent or agents that proximately caused the claimants' disease,” the Court held that this was not fatal to their claims because the injured worker must only prove that his or her condition was more probably than not related to distinctive conditions in the workplace. Id. at 655-56. Similarly, Ms. Potter has shown, through MSDS and the testimony of Ms. Beaudet, that she was subjected to chemicals off-gassing from various new furnishings in a defectively ventilated office. Dr. Keifer testified that this was the

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<sup>16</sup> The MSDS are in an un-paginated section of the CABR immediately prior to the section containing deposition transcripts.

proximate cause of Ms. Potter's MCS. Keifer at 50-52. Ms. Potter's exposure to chemicals in a defectively ventilated office while on the job at DWT is sufficiently distinctive of her employment under the Dennis criteria. Thus, this Court should recognize Ms. Potter's MCS diagnosis as a compensable occupational disease.

**B. THE LOWER COURTS ALL ERRED IN DETERMINING THAT COMPENSABILITY OF MCS IS BARRED AS A CONDITION CAUSED BY STRESS UNDER RCW 51.08.142 AND WAC 296-14-300 BECAUSE THE ETIOLOGY OF MCS IS PHYSIOLOGICAL RATHER THAN PSYCHOGENIC.**

Because the superior court did not enter any detailed findings with respect to its conclusion of law 2.3, Ms. Potter relies largely upon the BIIA's reasoning that her MCS is a psychological condition barred by RCW 51.08.142 and WAC 296-14-300. The BIIA apparently ignored the evidence of chemical exposure and the nature of MCS, holding that "Ms. Potter's subjective perception that she was exposed to harmful substances, causing her to have anxiety disorder . . . would not be compensable pursuant to [the above rules]." CABR at 12. The BIIA determined that WAC 296-14-300(1)(i), which bars occupational disease claims predicated upon "fear of exposure to chemicals," precluded Ms. Potter's claim, largely on its erroneous finding that "Dr. Keifer's explanation of [MCS] sounds very much like a psychiatric condition, and not a physical condition." CABR at 12-13.

However, the BIIA erroneously cited to page 23 of Dr. Keifer's deposition transcript, where he discusses one of his early hypotheses that Ms. Potter may be suffering "an anxiety-induced state of concern triggered by the physical symptoms associated with exposure and the concern about the chemical hazard that that presents." Keifer at 22-23. This early hypothesis, however, was ruled out as were other hypotheses before Dr. Keifer arrived at his final conclusion that Ms. Potter suffers from MCS. Dr. Keifer explained that his anxiety hypothesis was "merely a construct" he uses when individuals are not exposed to large quantities of chemicals; moreover, his statement about possible anxiety was made in October of 2007, nearly a year before he diagnosed Ms. Potter with MCS in September of 2008. Keifer at 23; 39.

Because recent medical literature indicates that MCS is a physiological, rather than psychogenic, disorder, it is compensable as an occupational disease. Moreover, even to the extent that there is *any* component of anxiety associated with Ms. Potter's MCS, it is not a condition barred by WAC 296-14-300 because that rule only bars conditions *caused by stress*. Any anxiety associated with MCS stems from the legitimate fear of exposure to chemicals which the individual knows will cause physical symptoms; this is not the type of condition the legislature had in mind when it crafted RCW 51.08.142.

The plain language of, and legislative intent behind, RCW 51.08.142 and WAC 396-14-300 only prohibits occupational disease claims arising out of an individual's reaction to stressful conditions in the workplace. In 1988, the legislature passed RCW 51.08.142, directing DLI to "adopt a rule . . . that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140." See Laws of 1988, ch. 161, § 17. Section 17 was a Senate amendment promulgated in response to the Supreme Court's 1987 decision in Dennis. See Final Bill Report, HB 1396, Laws of 1988, ch.161, Synopsis as Enacted (Appendix).

The legislature was concerned that the Dennis court had extended coverage of occupational diseases under the IIA to include on-the-job aggravation of pre-existing, non-occupational "mental stress" related conditions. Id. Previously, in the Kinville case, Division II suggested that a "mental condition" might be cognizable as an occupational disease if the injured worker's "job environment exposed her to a greater risk of developing [a] mental condition than employment generally or nonemployment life." Kinville, 35 Wn. App. at 88-89. Dennis, in adopting the "distinctive conditions" test and overruling Kinville, apparently created concern with the legislature that mental conditions caused by

stress could constitute occupational diseases.<sup>17</sup>

DLI then promulgated WAC 296-14-300, which defines “claims based on mental conditions or mental disabilities caused by stress” to include: “[f]ear of exposure to chemicals, radiation biohazards, or other perceived hazards.” See WAC 296-14-300(1)(i). This rule does not apply to Ms. Potter’s case. First, it only forbids “mental conditions or mental disabilities *caused by stress*.” Ms. Potter’s MCS was not “caused by stress”—it was caused by chemical exposure. See Keifer at 51. Nor does it involve Ms. Potter’s subjective “fear of exposure to chemicals.” While Dr. Keifer testified that he does not necessarily separate anxiety from MCS, he stated that anxiety is “associated with the symptomatic presentation of [MCS]”—not stress or fear of exposure per se. Id. at 41.

The precise etiology of MCS is yet unknown. However, the modern consensus is that it is a physiological condition, not a mental health condition. In his declaration, Dr. Hu stated that “MCS is a real clinical problem (not a purely psychogenic problem, such as a somatization disorder, or malingering) for which the biology remains unclear.” CABR at 504. Moreover, based on his review of medical literature, clinical experience, and his own research, Dr. Hu stated that “the biology of MCS involves the central nervous system and genetic

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<sup>17</sup> *See, e.g.,* Judd v. Dep’t of Labor & Indus., 63 Wn. App. 471, 474 n. 2, 820 P.2d 62 (1991) (noting the role of *Kinville* in passing RCW 51.08.142).

susceptibility factors on a more likely than not basis.” Id. Professor Steinemann provided a similar opinion, citing over a hundred scientific, peer-reviewed articles which indicate that “MCS is a serious physical illness.” CABR at 487. Furthermore, Professor Steinemann stated that “the concept that MCS represents an underlying anxiety or other psychological disorder has been the minority opinion” which has been “widely discredited.” CABR at 488. In fact, according to Professor Steinemann’s own research, “[o]nly 1.4 % of [individuals] with MCS had a history of prior emotional problems.” CABR at 487.

Legislation and gubernatorial proclamations make it clear that MCS is widely recognized as a serious condition. For instance, in 1994 the legislature passed ESHB 2696, which added RCW §§ 51.32.350, 360, and 370. See Laws of 1994, ch. 265, §§ 1, 3, & 5. RCW 51.32.350 required DLI to “establish interim criteria and procedures for management of claims involving chemically related illness to ensure consistency and fairness in the adjudication of these claims.” RCW 51.32.360 & 370 require DLI to work with the state Department of Health in conducting research on chemically related illnesses. DLI’s own claims adjudication manual states that chemically related illnesses, including MCS, are handled by a special claims management unit in accordance with RCW 51.32.350. See WASHINGTON STATE DEPARTMENT OF LABOR &

INDUSTRIES, WORKERS' COMPENSATION ADJUDICATOR MANUAL at 3-29 (2010) (appendix). Additionally, Governor Gregoire has consistently proclaimed May as "Multiple Chemical Sensitivity Awareness Month." See CABR at 621-23. Governor Gregoire's proclamation notes that MCS is "recognized by numerous organizations which support the health and welfare of the chemically injured including the World Health Organization, the Americans with Disabilities Act, the Social Security Administration, the U.S. Department of Housing and Urban Development, and the Environmental Protection Agency." CABR at 621.

MCS is a serious physical illness deserving of further research to identify its precise etiology. But the fact that no specific cause, besides chemical exposure, has yet been identified is not fatal to Ms. Potter's claim for workers' compensation benefits. One thing is certain: MCS is not a condition caused by stress or predicated upon fear of exposure to chemicals. Thus, Ms. Potter's claim is not barred by RCW 51.08.142 or WAC 296-20-014. Even if this Court has *any* doubt as to whether Ms. Potter's MCS is subject to the prohibition of claims based on stress, the benefit of that doubt belongs to Ms. Potter. Cockle, 142 Wn.2d at 811. The IIA is to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment." RCW 51.12.010.

### **C. ATTORNEY FEES**

Under RCW 51.52.130 and RAP 18.1, the appellant is entitled to fees and costs if the BIIA's decision is "reversed or modified."

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary . . . a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

RCW 51.52.130. Ms. Potter's attorneys thus respectfully request that if the Court determines her claim for benefits should be accepted by DLI, they be awarded reasonable fees for work done before this Court and the superior court.

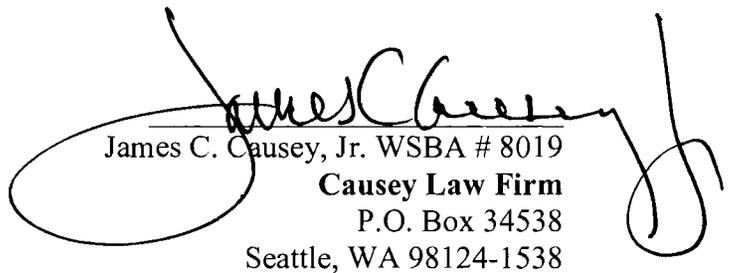
### **VI. CONCLUSION**

Jane Potter's Multiple Chemical Sensitivity, acquired due to chemicals off-gassing from new furnishings in a defectively ventilated office, is compensable as an occupational disease under the IIA. The BIIA and superior court correctly determined that MCS is a generally accepted diagnosis, but erred in determining that Ms. Potter's MCS is a psychological condition predicated upon stress or fear of chemical exposure. MCS is a serious physical condition, the precise etiology of which is not yet known but is the subject of ongoing medical research. Despite the fact that we are not yet sure what causes some individuals to

become hyper-sensitized to chemical compounds, it is clear that it is a very real phenomenon diagnosable in accordance with definite criteria.

Ms. Potter was diagnosed with MCS by Dr. Keifer, a well-known and well-respected professor and practitioner of occupational medicine. Dr. Keifer has referred Ms. Potter to a naturopathic physician for treatment, coverage of which is allowed under the IIA. See, e.g., WAC 296-20-01002 (defining “attending physician” to include naturopathic physicians). By reversing the BIIA and allowing Ms. Potter’s claim for workers’ compensation benefits, this Court will enable her to get the treatment she needs in order to live life the way she did before the onset of her symptoms.

Respectfully submitted this 5<sup>th</sup> day of January, 2012.

  
James C. Causey, Jr. WSBA # 8019  
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**Proof of Service**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 5<sup>TH</sup> day of January, 2012, at Seattle, Washington

  
\_\_\_\_\_  
Brian M. Wright  
Legal Intern

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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# APPENDIX

## **APPENDIX A:**

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## **APPENDIX B:**

*Kennedy v. Eden Advanced Pest Technologies*, 222 Or. App. 431, 193 P.3d 1030 (Or. Ct. App. 2008)

## **APPENDIX C:**

*Appeal of Kehoe*, 139 N.H. 24, 648 A.2d 472 (1994) (Kehoe I)

## **APPENDIX D:**

*Appeal of Kehoe*, 141 N.H. 412, 415, 686 A.2d 749 (1996) (Kehoe II)

## **APPENDIX E:**

N.H. Rev. Stat. Ann. § 281-A:2

## **APPENDIX F:**

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WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS' COMPENSATION ADJUDICATOR MANUAL p. 3-29 & 3-30 (2010)

# **APPENDIX A**

## **Certified Appeal Board Record**

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# **APPENDIX B**



Caution  
As of: Jan 05, 2012

**THOMAS KENNEDY, Plaintiff-Appellant, v. EDEN ADVANCED PEST TECHNOLOGIES, a Washington corporation, GLEN HOWELL, and GREG PRATER, Defendants-Respondents.**

**A132638**

**COURT OF APPEALS OF OREGON**

*222 Ore. App. 431; 193 P.3d 1030; 2008 Ore. App. LEXIS 1336*

**April 4, 2008, Argued and Submitted  
October 1, 2008, Filed**

**PRIOR HISTORY:** [\*\*\*1]

CV04120346. Clackamas County Circuit Court.  
Thomas J. Rastetter, Judge.

**DISPOSITION:** Reversed and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff homeowner sought review of the decision of the Clackamas County Circuit Court (Oregon), which found in favor of defendants, a pest company, employee, and another individual (defendants), on the homeowner's fraud and Unlawful Trade Practices Act (UTPA), *Or. Rev. Stat. §§ 646.605 to 646.656*, claims. The jury found for the homeowner on his negligence and trespass claims.

**OVERVIEW:** Following defendants' application of pesticides to the homeowner's house and yard, the homeowner brought an action alleging claims for fraud, violation of the UTPA, negligence, intentional infliction of emotional distress, and trespass. The jury found for defendants on the fraud and UTPA claims and for the

homeowner on the negligence and trespass claims. The trial court entered judgment for plaintiff in the amount of nearly \$ 120,000 and the homeowner appealed. The appellate court reversed the judgment, stating that a doctor's testimony was relevant to the homeowner's claims of injury and would have assisted the jury in determining a fact in issue, which was whether, and to what extent, the homeowner's injuries were caused by defendants' conduct. Further, had the testimony been admitted, it was unlikely to have caused confusion or have misled the jury. The homeowner's evidence also established that the doctor was a medical doctor who had practiced for a long period of time, belonged to relevant professional organizations, and examined over 30,000 patients. Evidence also indicated that many legitimate entities viewed multiple chemical sensitivity as a legitimate diagnosis.

**OUTCOME:** The appellate court reversed and remanded the judgment.

**LexisNexis(R) Headnotes**

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > Witness Qualifications***

[HN1] See Or. Evid. Code 104(1).

***Civil Procedure > Appeals > Standards of Review > General Overview******Evidence > Scientific Evidence > General Overview***

[HN2] Appellate courts review the exclusion of scientific evidence for errors of law.

***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN3] "Scientific evidence" is "evidence that draws its convincing force from some principle of science, mathematics and the like. A medical diagnosis is scientific evidence. Scientific evidence is treated differently from other types of evidence. That different treatment is based on the premise that evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. In light of that premise, appellate courts have described the role of the trial court as that of a "gatekeeper," whose job is to ensure that the persuasive appeal is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert. Propositions that a court finds possess significantly increased potential to influence the trier of fact as scientific assertions, therefore, should be supported by the appropriate scientific validation. This approach ensures that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science.

***Evidence > Relevance > Confusion, Prejudice & Waste of Time******Evidence > Relevance > Relevant Evidence******Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN4] The admissibility of scientific evidence is determined by applying Or. Evid. Code 702 (addressing expert testimony) together with Or. Evid. Code 401 and 403 (addressing relevance and the balancing of probative value against the potential for unfair prejudice, respectively). In applying Or. Evid. Code 401, 702, and 403, the court must identify and evaluate the probative value of the proffered scientific evidence, consider how that evidence might impair rather than help the trier of

fact, and decide whether truth-finding is better served by admission or exclusion.

***Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Helpfulness******Evidence > Testimony > Experts > Qualifications***

[HN5] See Or. Evid. Code 702.

***Evidence > Relevance > Relevant Evidence***

[HN6] See Or. Evid. Code 401.

***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

[HN7] See Or. Evid. Code 403.

***Evidence > Scientific Evidence > General Overview***

[HN8] To help the court perform the function in the admission of scientific evidence, the Brown factors are to be considered as guidelines: (1) The technique's general acceptance in the field; (2) The expert's qualifications and stature; (3) The use which has been made of the technique; (4) The potential rate of error; (5) The existence of specialized literature; (6) The novelty of the invention; and (7) The extent to which the technique relies on the subjective interpretation of the expert. The existence or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence.

***Evidence > Scientific Evidence > General Overview***

[HN9] "SPECT" stands for Single Photon Emission Computed Tomography. It is a type of brain scan that is used primarily to view how blood flows through arteries and veins in the brain.

***Evidence > Scientific Evidence > General Overview***

[HN10] Differential diagnosis is the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of clinical findings.

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor******Evidence > Scientific Evidence > General Overview***

[HN11] In regard to the gatekeeping function of trial courts in determining whether to allow a jury to consider proffered scientific evidence, each case presenting such an issue must necessarily be decided on its own facts in light of the guiding principle that scientific evidence should be excluded only when it is so unhelpful or so potentially confusing or prejudicial that any probative value is substantially outweighed. A difference of opinion in a scientific community alone is insufficient to exclude evidence from the jury's consideration. Controversy within the scientific community is not necessarily a ground for exclusion of scientific evidence. In deciding whether to admit scientific evidence, a court need not resolve disputes between reputable experts; the evidence may be admissible even though a dispute exists. The witness who testifies to an expert opinion is subject to cross-examination concerning how he or she arrived at that opinion, and the cross-examiner is to be given great latitude in eliciting testimony to vitiate the opinion.

***Evidence > Scientific Evidence > General Overview***

[HN12] The patient history is one of the primary and most useful tools in the practice of clinical medicine. Even in this era of sophisticated medical testing protocols, it is estimated that 70 percent of significant patient problems can be identified, although not necessarily confirmed, by a thorough patient history.

***Evidence > Procedural Considerations > Weight & Sufficiency******Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN13] There are many generally accepted hypotheses in science for which the mechanism of cause and effect is not understood fully. The expert's inability to explain the mechanism of plaintiff's condition goes to weight, not to admissibility. A plaintiff does not have to meet every Brown factor. There are many generally accepted hypotheses in science where the mechanism of cause and effect is not understood.

***Evidence > Scientific Evidence > General Overview***

[HN14] Even if an expert is not able to eliminate all alternative causes, the testimony nevertheless may be reliable and admissible if sufficient potential causes are

eliminated for the expert to identify one particular cause as the likely cause of the condition. When ruling in potential causes of a condition or injury for purposes of differential diagnosis, a trial court should insist that the causation theory be biologically plausible, that is, that the exposure could have caused plaintiff's injury. For that reason, a particular possible cause should not necessarily be excluded on the grounds that the expert cannot describe the precise mechanism of causation or point to statistical studies of cause and effect.

***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN15] Under Oregon law the proper inquiry is not whether multiple chemical sensitivity chemical sensitivity is a "valid" diagnosis or is recognized by other jurisdictions; rather, court must, on the record in a case, decide whether truth-finding is better served by admission or exclusion. Regardless of what other courts have held, the Court of Appeals of Oregon has an obligation to independently construe the relevant provisions of the Oregon Evidence Code. Even though Or. Evid. Code 702 has as its origin the federal evidence code, the commentary to Or. Evid. Code 702 emphasizes that whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier of fact.

***Civil Procedure > Trials > Jury Trials > Province of Court & Jury******Evidence > Testimony > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN16] When qualified experts disagree about the validity of medical diagnoses or other scientific evidence, judges are in no better position to resolve that dispute than are juries. Rather, the usual techniques for truth-finding (cross-examination, presentation of contrary evidence, and instruction on the burden of proof) should be applied. In Oregon, juries are trusted to be able to find the truth in the classic battle of the experts. It is the role of a jury, not a judge acting pretrial, to determine where the truth lies.

**COUNSEL:** Ken Dobson argued the cause for appellant. With him on the briefs was The Dobson Law Firm LLC.

Thomas W. Brown argued the cause for respondents. With him on the brief were Wendy M. Margolis and Cosgrave Vergeer Kester LLP.

**JUDGES:** Before Edmonds, Presiding Judge, and Wollheim, Judge, and Sercombe, Judge.

**OPINION BY:** EDMONDS

**OPINION**

[\*\*1031] [\*433] EDMONDS, P. J.

Following defendants' application of pesticides to plaintiff's house and yard, plaintiff brought this action, alleging claims for fraud, violation of the Unlawful Trade Practices Act (UTPA), negligence, intentional infliction of emotional distress, and trespass. The jury found for defendants on the fraud and UTPA claims and for plaintiff on the negligence and trespass claims.<sup>1</sup> The trial court entered judgment for plaintiff in the amount of nearly \$ 120,000. Plaintiff appeals, raising three assignments of error. Because we agree that plaintiff's first assignment of error requires reversal, we do not address his other claims.

1 The record does not reveal the disposition of the intentional infliction of emotional distress claim, but it appears that it was dismissed.

[\*\*1032] In the early 1990s, [\*\*\*2] plaintiff began having health problems that he eventually attributed to the mercury amalgam in his dental fillings, which he had removed. At that time, according to his testimony, he was diagnosed with chemical sensitivity.<sup>2</sup> As a result, he took various precautions to modify his house so that it would not exacerbate his health problems. For example, plaintiff installed wooden floors, a water filter, and air filters. He used organic bedclothes, and he ate almost exclusively organic foods. Plaintiff also testified that his condition made it difficult to travel and to engage in certain social activities.

2 For purposes of this opinion, we treat the term "chemical sensitivity" as synonymous with "multiple chemical sensitivity" or "MCS."

In May 2004, plaintiff saw carpenter ants in his yard. In determining what to do about the ants in light of his sensitivity to chemicals, plaintiff consulted a book that provided information for healthy indoor living. Plaintiff read in the book that a chrysanthemum flower product called Tri-Die could be used to combat ant problems. Plaintiff telephoned a number of pest control companies listed in the phone book that he thought might have

non-toxic products, [\*\*\*3] asking each about Tri-Die. Eventually, he called defendant Eden Advanced Pest Technologies and asked if they used Tri-Die. As a result of the telephone call, in mid-June, defendant [\*434] Howell, an Eden employee, came out to plaintiff's house to discuss treatment options.

Plaintiff asked Howell about Tri-Die, and Howell responded that defendants did not use Tri-Die, but that they had another product that was, according to plaintiff's testimony, "a non-toxic chrysanthemum oil product that could be used on carpenter ants." Howell told plaintiff that the product he would use, Termidor, was safe for people with chemical sensitivities. Plaintiff and Howell discussed at some length exactly where the Termidor would be placed and how it would be applied. According to plaintiff, Howell stated that he would be present for the Termidor application to make sure it was done exactly as he and plaintiff had discussed. They scheduled the application of the Termidor for June 23.

Plaintiff left the house early on the morning of June 23 for a flight to Phoenix, Arizona, where he spent the day. He testified that, as soon as he walked into the house on his return that evening, he knew he "was having a reaction." [\*\*\*4] He experienced a bad taste in his mouth, he was nauseated, and he was jittery. Throughout the night, plaintiff continued to experience those and a number of additional symptoms. Plaintiff awakened several times during the night and, during one of those periods of sleeplessness, he found a document near his front door that had been left by Eden's employee. The document indicated that, in addition to Termidor, a product called Cy-Kick had been applied to plaintiff's house. In light of his symptoms and because he did not know what Cy-Kick was, plaintiff telephoned Eden in the morning and then defendant Howell directly. In response to plaintiff's inquiry, Howell investigated and reported to plaintiff that the person who had applied the pesticides had run out of Termidor and had substituted Cy-Kick for the remainder of the application. Howell also told plaintiff that, although he, Howell, had met the person applying the pesticides at the house, he had been unable to stay for the application because of other obligations.

Plaintiff testified that, in the following weeks and months, he continued to experience severe symptoms. Eden, [\*435] for its part, made attempts to remedy the situation by providing [\*\*\*5] an ozone generator (with the goal of neutralizing the pesticide in the house) and

applying Neutrasol, a neutralizing agent. According to plaintiff, neither attempt to remedy the problem appeared to help his physical condition, and he eventually incurred thousands of dollars in expenses for the removal of soil, substitute housing, and medical treatment.

As part of his efforts to obtain a diagnosis and treatment for his condition, plaintiff went to Texas in November 2004 to see Dr. William Rea. Rea, who founded the Environmental Health Center in Dallas, diagnosed plaintiff with chemical sensitivity, toxic encephalopathy, [\*\*1033] toxic effects of pesticides, allergic gastroenteritis, chronic fatigue, malabsorption, hormone imbalance, muscle pain, hypogammaglobulinemia, acute rhinosinusitis, and abdominal pain. Rea concluded that plaintiff had been suffering from those conditions before June 2004 and that his exposure to defendants' pesticides in June 2004 exacerbated those conditions. Rea prescribed dietary restrictions, injection therapy, nutrient therapy, heat therapy, massage and exercise therapy, and immune therapy.

Plaintiff ultimately filed the complaint in this case, alleging that defendants' [\*\*\*6] actions had caused him \$ 750,000 in damages. His first claim was for fraud, based on the theory that Howell had misrepresented that Termidor was nontoxic and that he personally would be present during the pesticide application. His second claim, brought under the UTPA, *ORS 646.605 to 646.656*, was that Howell and Eden had made or conspired to make false or misleading representations concerning the "characteristics, ingredients, and qualities of Termidor and the proposed pesticide application." Plaintiff's third claim was a negligence claim, based on the theory that defendants had made misrepresentations about Termidor, had failed to disclose their planned use of Cy-Kick, had misrepresented that the employee applying the pesticides would be properly supervised, and had negligently performed the actual application. Plaintiff's fourth claim was against Eden and was based on a theory of trespass. Finally, plaintiff included claims for intentional infliction of emotional distress and for declaratory relief.

[\*436] The jury returned a verdict finding that Howell made false representations to plaintiff and that defendants violated the UTPA, but that plaintiff suffered no damages as a result of defendants' [\*\*\*7] conduct. The jury also found that defendants were negligent, but

that plaintiff was also 40 percent negligent. Finally, the jury found that defendants Prater and Eden had trespassed on plaintiff's property. Based on the jury's verdicts, the trial court entered judgment in favor of plaintiff on the negligence and trespass claims, and dismissed the UTPA and fraud claims. Plaintiff appeals.

As noted, plaintiff raises three assignments of error on appeal. First, he argues, the trial court erred in excluding the testimony of Rea, plaintiff's treating physician and a purported expert in the area of chemical sensitivity. In his second assignment of error, plaintiff asserts that the trial court erred in excluding other expert testimony regarding chemical sensitivity. Finally, in his third assignment of error, plaintiff contends that the trial court erred in denying his motion to amend his complaint to plead entitlement to punitive damages. For the reasons explained below, we agree that the trial court erred in excluding Rea's testimony.

Pretrial, defendants moved to exclude Rea's testimony and requested a hearing under OEC 104(1), which provides:

[HN1] "Preliminary questions concerning the qualification [\*\*\*8] of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (2) of this section. In making its determination the court is not bound by the rules of evidence except those with respect to privileges."

Specifically, defendants moved to exclude "(1) all testimony of plaintiff's proposed expert Dr. William J. Rea, including testimony as to his diagnoses, opinions of causation, and recommended treatment for plaintiff; and (2) the testimony of any other witness that relies on Dr. Rea's work or opinions."

Following a hearing at which both plaintiffs and defendants' experts (but not Rea) testified, the trial court ruled that Rea would not be allowed to testify:

[\*437] "The burden of proof is on the plaintiff to prove by a preponderance of the evidence that the proffered testimony is scientifically valid. And while there's some evidence to suggest that it is a

legitimate diagnosis, I cannot find by a preponderance of the evidence that it is a--legitimate diagnosis.

"The greater weight of the evidence is to the contrary, that it is not. So I will find that the proffered testimony does not meet [\*\*1034] the *Daubert* [\*\*\*9] standard,<sup>3</sup> and it will not be admissible, \* \* \* nor will any derivative evidence that relies on it. So I will adopt the findings that are stated in Defendant's memorandum on that issue. That will be the order of the Court."

<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 113 [\*\*1035] S Ct 2786, 125 L Ed 2d 469 (1993).

In its written order, the trial court concluded that

"plaintiff has failed to establish by a preponderance of the evidence that the proffered 'scientific' evidence concerning the diagnosis, cause, and/or treatment of chemical sensitivity and related chemical injuries satisfies the standard for scientific evidence as set forth in *State v. O'Key*, [321 Ore. 285, 899 P.2d 663 (1995)], and its progeny."

On appeal, plaintiff argues that Rea's testimony was admissible as scientific evidence under the tests set out in the seminal cases of *State v. Brown*, 297 Ore. 404, 687 P.2d 751 (1984), *State v. O'Key*, 321 Ore. 285, 899 P.2d 663 (1995), and *Jennings v. Baxter Healthcare Corp.*, 331 Ore. 285, 14 P.3d 596 (2000). Defendants respond:

"The trial court did not err in excluding the testimony of Dr. Rea regarding the diagnosis, cause, and/or treatment of 'chemical sensitivity' because plaintiff [\*\*\*10] failed to establish by a preponderance of the evidence that the condition, as advocated by Dr. Rea and other practitioners of 'clinical ecology,' satisfies Oregon's standard for admissible scientific evidence. Reputable medical organizations across a wide range of disciplines repeatedly and consistently have rejected the existence of 'chemical

sensitivity,' virtually every federal court that has considered the admissibility of expert testimony on the subject has excluded it as lacking scientific validity, and the underlying methodology has not progressed since those cases were decided, much less to the point of scientific knowledge capable of assisting a jury."

[\*438] [HN2] We review the exclusion of scientific evidence for errors of law. *Jennings*, 331 Ore. at 301.

[HN3] "Scientific evidence" is "evidence that draws its convincing force from some principle of science, mathematics and the like." *Brown*, 297 Ore. at 407. Here, the parties do not dispute--and we agree--that Rea's diagnosis and related testimony constitute scientific evidence. See *State v. Sanchez-Cruz*, 177 Ore. App. 332, 341, 33 P.3d 1037 (2001), rev den, 333 Ore. 463, 42 P.3d 1245 (2002) (stating that "a medical diagnosis is scientific evidence"). Accordingly, [\*\*\*11] the issue that we must address is whether the trial court erred, as a matter of law, in excluding Rea's testimony. For the reasons explained below, we conclude that it did.

Scientific evidence is treated differently from other types of evidence. That different treatment is based on the premise that "[e]vidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power." *O'Key*, 321 Ore. at 291 (footnote omitted). In light of that premise, appellate courts have described the role of the trial court as that of a "gatekeeper," whose job

"is to ensure that the persuasive appeal is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert. Propositions that a court finds possess significantly increased potential to influence the trier of fact as scientific assertions, therefore, should be supported by the appropriate scientific validation. This approach 'ensure[s] that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science.'"

*Id. at 291-92* (quoting John William [\*\*\*12] Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 Ore. L Rev 349, 361 (1992)) (citations omitted).

In *O'Key*, adopting and relying in part on the analysis applied by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993), the Oregon Supreme Court reiterated its earlier statement in *Brown* that [HN4] the admissibility of scientific evidence is determined by applying OEC 702 [\*439] (addressing expert testimony) together with OEC 401 and 403 (addressing relevance and the balancing of probative value against the potential for unfair prejudice, respectively).<sup>4</sup> 321 Ore. at 297-99. "In applying OEC 401, 702, and 403, the court must identify and evaluate the probative value of the proffered scientific evidence, consider how that evidence might impair rather than help the trier of fact, and decide whether truthfinding is better served by admission or exclusion." *Id. at 299* (footnote omitted).

4 OEC 702 provides:

[HN5] "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 [\*\*\*13] qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

OEC 401 provides:

[HN6] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

OEC 403 provides:

[HN7] "Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

[HN8] To help the court perform that function, the Supreme Court in *Brown* identified seven factors that "are to be considered as guidelines":

"(1) The technique's general acceptance in the field;

"(2) The expert's qualifications and stature;

"(3) The use which has been made of the technique;

"(4) The potential rate of error;

"(5) The existence of specialized literature;

"(6) The novelty of the invention; and

"(7) The extent to which the technique relies on the subjective interpretation of the expert."

297 Ore. at 417.<sup>5</sup> But, the court cautioned,

[\*440] "[t]he existence [\*\*\*14] or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence \* \* \*."

*Id. at 417-18* (footnotes omitted).

<sup>5</sup> In *Marcum v. Adventist System/West*, 345 Ore. 237, 244 n 7, 193 P.3d 1, 2008 Ore. LEXIS 673, \*11 n 7 (September 16, 2008), the Supreme Court noted that, in *Brown*, it had "joined 11 additional considerations" to the seven listed

factors.

We turn to the evidence adduced at the pretrial hearing on defendants' motion to exclude Rea's testimony. The record reveals the following facts.<sup>6</sup> Rea received his medical degree from Ohio State University in 1962. Following additional training, Rea became board certified in general surgery and cardiovascular surgery. In addition, Rea testified that he is "board certified" in environmental medicine, a statement that will be discussed in more detail below. Rea testified at his deposition that he has authored "four definitive textbooks" on chemical sensitivity, as well as a number of other [\*\*\*15] books and book chapters, and "about 140 peer reviewed or scientific articles on vascular disease in the environment." Rea has practiced environmental medicine for about 40 years, treating over 30,000 patients. He is a Fellow of--among others--the American College of Surgeons, the American Academy of Environmental Medicine, the American College of Allergists, and the American College of Preventative Medicine. He belongs to a number of medical associations, has held a number of teaching posts, and has received a number of honors.

6 [\*\*1036] As noted, Rea did not testify at the OEC 104 hearing. Portions of Rea's deposition testimony, his curriculum vitae, and a number of other documents were submitted by the parties for the court to consider in connection with defendants' motion to exclude Rea's testimony.

As noted above, Rea diagnosed plaintiff as suffering from chemical sensitivity and related conditions. Rea testified that the "foundation" of his diagnoses was plaintiff's medical history, including his history of exposure to mercury and the more recent exposure to pesticides. Rea also testified that his physical examination of plaintiff supported his diagnoses. Rea examined plaintiff's eyes, ears, [\*\*\*16] nose, throat, heart, lungs, skeletal muscles, and blood vessels. He also determined, using a "tandem Romberg" test and a "stress [\*441] Romberg" test, that plaintiff could not walk a straight line and that he could not stand on his toes. Rea also ordered a SPECT scan in diagnosing plaintiff's condition.<sup>7</sup> Rea testified that a SPECT scan is used to "rule out things like schizophrenia and depression, things like that." Rea also sent plaintiff to Dr. Didriksen, a psychologist, for evaluation. Rea testified that he performed a differential diagnosis in reaching his

conclusion about plaintiff's condition.<sup>8</sup>

7 [HN9] "SPECT" stands for "Single Photon Emission Computed Tomography." It is a type of brain scan that is used primarily to view how blood flows through arteries and veins in the brain.

8 [HN10] Differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of clinical findings." *Stedman's Medical Dictionary* 492 (27th ed 2000). For a discussion of the use of differential diagnoses generally, see *Marcum*, 345 Ore. at 246-50.

Rea ordered or performed a number of [\*\*\*17] laboratory tests. Those tests included a plasma cholinesterase test that suggested that plaintiff had been exposed to an insecticide. Rea also ordered a "T&B lymphocyte" test, the result of which, in his view, supported his conclusion that plaintiff had suffered a chemical exposure. In addition, a "CMI, or cell mediated immunity" test was performed, which also revealed an abnormal result, suggesting that plaintiff had been exposed to toxic chemicals. Rea also performed "skin tests" by injecting various substances into plaintiff's skin and measuring the reaction to those substances; Rea concluded that those tests showed "multiple abnormalities." He also ordered a stool culture, which showed abnormal growth of candida, a fungus. Rea stated that such an abnormal growth is seen "frequently in chemical injury." In addition, Rea performed two autonomic nervous system tests, the heart rate variability test and the pupillography test; he concluded that the results of both tests were abnormal. Finally, Rea performed a thermography test, which revealed "multiple organ dysfunction involving inflammation, toxicity of various organs."

Rea testified that each of the techniques and tests he employed [\*\*\*18] in diagnosing plaintiff's condition was an accepted diagnostic tool. As noted above, based on plaintiff's history, his physical examination, and the laboratory tests, Rea [\*442] stated that he believed, to a reasonable degree of medical certainty, that plaintiff's exposure to pesticides in June 2004 exacerbated his preexisting conditions.

In addition to Rea's deposition testimony (which defendants had submitted as an exhibit), plaintiff called

Dr. Lipsey, an expert in toxicology who earned his doctorate in toxicology in 1972. Lipsey testified that he was familiar with the condition known as chemical sensitivity and that he had spoken on the subject to the American Academy of Environmental Medicine (AAEM), an organization that was composed of medical doctors, nurses, and others. Lipsey stated that many outside of the AAEM recognize chemical sensitivity as a diagnosable condition, including the Canadian government, which recognizes chemical sensitivity as a disability. Lipsey also testified that Rea is "highly respected in the American Academy of Environmental Medicine."

At the OEC 104 hearing, defendants challenged Rea's qualifications and methods through their expert, Dr. Burton, a physician [\*\*\*19] specializing in occupational and environmental toxicology. Burton disagreed with virtually every aspect of Rea's deposition testimony, testifying that the tests Rea performed and the research he relied on either did not support his diagnoses or were inappropriate in determining the existence of chemical sensitivity. For example, Burton stated, "If you're asking me can dental fillings cause mercury poisoning, the answer, of course, is [\*\*1037] no." Burton testified that the heart rate variability test and pupillography are "novel tests \* \* \* published in obscure journals for which we don't know anything about peer review or other aspects of the testing procedure." Burton testified that many of the journal articles on which Rea relied in fact contradicted his conclusions. Burton stated that the SPECT scan "has no utility. It's not a test that a medical toxicologist would ever use to diagnose a toxic illness." Pupillography, Burton testified, is a test that "is no better than reading a palm." According to Burton, "a stool culture has nothing to do with toxicology."

Underlying Burton's testimony was the belief that there is no such condition as "chemical sensitivity." As Burton explained,

[\*443] "The--the [\*\*\*20] concept of chemical sensitivity or multiple chemical sensitivity, which has gone through a few name changes, was--was first proposed by--by a physician who called himself a clinical ecologist back in the 1940s. \* \* \* He--he formed a belief and found followers that something in the environment--he wouldn't say what it

was--but something caused people to develop a variety of symptoms. And the symptoms could be just about anything you could imagine.

"And Dr. Rea became one of his disciples and published extensively in a journal called Clinical Ecology, and he became the mouthpiece, so to speak, for the clinical ecology movement. But the--the difficulty with--with this concept is that it's never had any scientific underpinnings. One cannot demonstrate exposure to any particular substance of a--of any duration or intensity that can cause human disease, nor can the condition be defined in such a way that anybody can properly diagnose it.

"\* \* \* \*

"And so as--as of today, we continue to see a number of physicians who have that kind of practice that use diagnostic tests that are not validated. They continue to make the diagnosis of multiple chemical sensitiv[ity], or MCS, or chemical sensitivity [\*\*\*21] or sometimes it's been renamed to idiopathic environmental intolerance. None of these are legitimate diagnosable medical conditions for which criteria exist."

Burton testified that, after the practice of clinical ecology "was reviewed and multiple publications came out repudiating the practice and the diagnostic techniques," its adherents started calling themselves practitioners of environmental medicine. According to Burton, "[n]o medical toxicologist subscribes to this sort of nonsense."

Burton also challenged Rea's credentials. He testified that, in contrast to the subspecialty of preventative medicine, the American Board of Medical Specialties does not recognize "environmental medicine" as a specialty; an exhibit submitted by defendants supports that statement. Burton testified that Rea "certainly doesn't have the background, training, expertise, [or] board certification that would be required of a medical toxicologist to diagnose--to evaluate or [\*444] diagnose toxic illness." According to Burton, Rea is "practicing something that is not mainstream medicine, for sure.

That, I can tell you."

In response to defense counsel's questions about each of the seven *Brown/O'Key* factors, Burton testified [\*\*\*22] that Rea's diagnosis and proposed testimony failed to meet each of the factors. He denied that the "theory or techniques applied by Dr. Rea [have] been tested and shown to have scientific validity." As noted, he essentially scoffed at the question whether Rea's "qualifications and stature" were adequate. Burton testified that, although Rea's "approach \* \* \* has been subject to generally recognized peer review and publication," that review had universally rejected Rea's views on chemical sensitivity. Defense counsel asked, "What is the general degree of acceptance of Dr. Rea's approach \* \* \* within the medical--recognized medical community?" Burton responded, "Oh, not at all in the recognized medical community." Burton, in response to a question about potential error rates, responded, "Well, I--I would regard the error rate as a hundred percent, because it hasn't been substantiated as--as--as a scientific method." When counsel asked whether Rea's approach involves subjective interpretation, Burton responded, "Well, it's all his subjective interpretation." Counsel concluded by pointing out that a [\*\*1038] number of other courts had rejected Rea's testimony, a point that we return to later.

On [\*\*\*23] cross-examination, Burton took the position that no physician had diagnosed plaintiff with chemical sensitivity, because there is no such condition: "They may have thought they did, but they did not." <sup>9</sup> Burton also admitted that he "did not spend a great deal of time reviewing the literature cited by Dr. Rea because it--it's not really worthy of much review." Finally, Burton conceded that a SPECT scan is an appropriate technique by which to diagnose brain injuries.

<sup>9</sup> Dr. Green, a medical doctor, also diagnosed plaintiff with chemical sensitivity.

In support of their motion to exclude Rea's testimony, defendants submitted several documentary exhibits, [\*445] including portions of witnesses' depositions and other documents. Among other documents, they submitted a 2002 "Statement on Dental Amalgam" by the American Dental Association. According to that statement, which addressed the safety of the material plaintiff believes to have caused his initial chemical sensitivity, "[d]ental amalgam has been studied and reviewed extensively, and has established a record of

safety and effectiveness. \* \* \* [N]o valid scientific evidence has ever shown that amalgams cause harm to patients." (Internal quotation [\*\*\*24] marks and citations omitted.)

Defendants also submitted a 1992 report by the American Medical Association (AMA) Council on Scientific Affairs that discussed both the discipline of clinical ecology and multiple chemical sensitivity. That report stated:

"No evidence based on well-controlled clinical trials is available that supports a cause-and-effect relationship between exposure to very low levels of substances and the myriad symptoms purported by clinical ecologists to result from such exposure. Several articles and books are available that seek to provide a scientific basis for such an association. Such publications, while thought provoking and interesting, fail to provide proof based on well-controlled clinical studies."

(Footnotes omitted.) Also, defendants submitted a 1999 position statement on idiopathic environmental intolerances (IEI) by the American Academy of Allergy, Asthma and Immunology (AAAAI). The AAAAI equated idiopathic environmental intolerances with multiple chemical sensitivity and noted that

"[t]he diagnosis of IEI is typically made on the basis of the patient's history, without any defining criteria. There are no diagnostic symptoms, and there are no diagnostic objective [\*\*\*25] physical signs. Many different tests and procedures have been proposed, but no single test or combination of tests has been validated as diagnostic."

"Studies to date," the AAAAI report stated, "have failed to confirm that any immunologic tests are diagnostic for chemically induced symptomology. The diagnostic validity of the other procedures has yet to be tested." (Footnotes omitted.) The American College of Occupational and Environmental [\*446] Medicine (ACOEM) issued a 1999 position paper expressing similar sentiments. Among other things, the ACOEM concluded, "ACOEM concurs with many prominent medical organizations that evidence does not yet exist to

define MCS as a distinct entity." <sup>10</sup>

<sup>10</sup> See generally Bernard D. Goldstein and Mary Sue Henifin, *Reference Guide on Toxicology*, in *Reference Manual on Scientific Evidence* 416 n 43 (Federal Judicial Center, 2d ed 2000) (explaining lack of acceptance of MCS and clinical ecology).

In light of the record before the trial court, we return to the [HN11] gatekeeping function of trial courts in determining whether to allow a jury to consider proffered scientific evidence. We are mindful that each case presenting such an issue must necessarily be decided on its [\*\*\*26] own facts in light of the guiding principle that scientific evidence should be excluded only when it is so unhelpful or so potentially confusing or prejudicial that any probative value is substantially outweighed. Our approach to that issue is informed by the Oregon Supreme Court's admonishment that a difference of opinion in a scientific community alone is insufficient to exclude evidence from the jury's consideration:

[\*\*1039] "[C]ontroversy within the scientific community is not necessarily a ground for exclusion of scientific evidence. In deciding whether to admit scientific evidence, a court need not resolve disputes between reputable experts; the evidence may be admissible even though a dispute exists. \* \* \* [T]he witness who testifies to an expert opinion is subject to cross-examination concerning how he or she arrived at that opinion, and the cross-examiner is to be given 'great latitude' in eliciting testimony to vitiate the opinion."

*State v. Lyons*, 324 Ore. 256, 278-79, 924 P.2d 802 (1996) (quoting *Bales v. SAIF*, 294 Ore. 224, 235 n 4, 656 P.2d 300 (1982)). Focusing on the applicable evidence code sections--as the Supreme Court has instructed--we conclude that Rea's testimony is relevant [\*\*\*27] to plaintiff's claims of injury, that it would have assisted the jury in determining a fact in issue (whether, and to what extent, plaintiff's injuries were caused by defendants' conduct), and that, had it been admitted, it was unlikely to have caused confusion or have misled the jury.

[\*447] On appeal, defendants address each of the seven *Brown/O'Key* factors, arguing that each of the factors supports the trial court's decision to exclude Rea's testimony. But defendants' analysis fails to give adequate attention to plaintiff's evidence, both in the form of Rea's deposition testimony and the testimony of Lipsey. When that evidence is considered, the most that can be said is that there is a controversy in the medical community about whether chemical sensitivity or MCS is a valid diagnosis. <sup>11</sup>

<sup>11</sup> Indeed, the trial court appeared to recognize that "there's some evidence to suggest that [MCS] is a legitimate diagnosis[.]"

We briefly discuss the *Brown/O'Key* factors to explain why we have reached the above conclusion. The first question is whether Rea's diagnostic methodology is generally accepted "in the field." In a broad sense, Rea's diagnostic techniques--that is, the taking of a patient's history, [\*\*\*28] the examination of the patient, and the performance or ordering of tests of the patient's functions--are the very foundation of medical diagnosis. <sup>12</sup> To be sure, defendants' expert disagreed with Rea's choice of tests and their applicability to diagnosing chemical sensitivity (a diagnosis that defendants' expert denied exists), but Rea testified that the tests he uses are generally accepted as diagnostic tools. Thus, defendants' evidence demonstrates only that other experts on toxicology disagree with the use of those tests to diagnose chemical sensitivity.

<sup>12</sup> [HN12] "The patient history is one of the primary and most useful tools in the practice of clinical medicine. \* \* \* Even in this era of sophisticated medical testing protocols, it is estimated that 70% of significant patient problems can be identified, although not necessarily confirmed, by a thorough patient history." Mary Sue Henifin *et al.*, *Reference Guide on Medical Testimony*, in *Reference Manual on Scientific Evidence* 452-53 (Federal Judicial Center, 2d ed 2000).

In a related argument, defendants point out that Rea could not explain the physical mechanism by which patients become chemically sensitive. Although that fact is relevant [\*\*\*29] to the inquiry, we note the Supreme Court's statement in *Jennings*, 331 Ore. at 309, that [HN13] "[t]here are many generally accepted hypotheses in science for which the mechanism of cause and effect is

not understood fully. [The expert's] inability to explain the mechanism of plaintiff's condition [\*448] goes to weight, not to admissibility." <sup>13</sup> In this case, Rea appears to have based his diagnosis in part on his clinical experience of treating numerous patients over many years with symptoms similar to plaintiff's, not unlike what occurred in *Jennings*.

13 This court made the same point in its opinion in *Jennings*:

"[P]laintiff does not have to meet every *Brown* factor, nor does [the expert] have to understand the mechanism of how the silicone causes the conditions or symptoms as predicate to the admissibility of his conclusion. There are many generally accepted hypotheses in science where the mechanism of cause and effect is not understood."

*Jennings v. Baxter Healthcare Corp.*, 152 Ore. App. 421, 430, 954 P.2d 829 (1998).

Rea's qualification to make such a diagnosis similarly was contested by defendants. Nonetheless--and despite Burton's statement that Rea does not have the background, [\*\*1040] training, or expertise [\*\*\*30] to diagnose or evaluate toxic illness--plaintiff's evidence established that Rea is a medical doctor who has practiced for a long period of time, belongs to relevant professional organizations, and has examined over 30,000 patients. Although the American Board of Medical Specialties does not recognize "environmental medicine" as a specialty, the American Academy of Environmental Medicine does. Again, the implication from those facts is that there exists a legitimate debate within the scientific community between two groups of scientists. For example, Rea testified that his technique for determining the existence of chemical sensitivity in a patient is commonly used in the medical community to which he belongs. In contrast, Burton suggested that only "fringe" medical practitioners would diagnose for toxic illness in the manner that Rea does. In our view, the trial court, in performing its gatekeeping function, need not keep from the jury evidence that demonstrates only such a conflict among professionals.

Moreover, we observe that the evidence is in conflict about the "potential rate of error" of Rea's diagnostic technique. Burton testified that the error rate is 100 percent, a statement [\*\*\*31] that follows ineluctably from his view that chemical sensitivity does not exist. But a jury might not have been persuaded of that premise in light of Rea's qualifications and clinical experience, particularly when considered together with Lipsey's testimony and the other evidence presented by [\*449] defendants. See *Sanchez-Cruz*, 177 Ore. App. at 342 ("Defendant \* \* \* principally objects to the potential rate of error for this diagnosis and to the extent to which it relies upon an expert's subjective interpretation. Both objections, however, may be said of many recognized medical diagnoses."). Again, those kinds of conflicts between qualified experts go to the weight to be given to plaintiff's evidence and not its admissibility.

There can be no doubt that specialized literature exists on the subject of chemical sensitivity. To be sure, some of the literature--such as the documentary evidence submitted by defendants--argues against chemical sensitivity as a valid diagnosis. However, some of that literature is dated and the evidence demonstrates that the scientific community is engaged in an ongoing investigation and debate about MCS. That some of the literature rejects conclusions reached regarding [\*\*\*32] chemical sensitivity does not make the methodology used in arriving at those conclusions any less scientific. See *State v. Sampson*, 167 Ore. App. 489, 508, 6 P.3d 543, rev den, 331 Ore. 361, 19 P.3d 354 (2000) ("The difficulty with defendant's argument is that it attacks the credibility of the literature bolstering the reliability of the DRE protocol, not its existence."). Indeed, even defendants' expert agreed that chemical sensitivity is not a new or previously unheard of diagnosis, having been first proposed in 1940.

Moreover, evidence adduced at the hearing indicated that many legitimate entities view MCS as a legitimate diagnosis. For example, the Canadian government recognizes chemical sensitivity as a disability. And the "ICD-9" (International Classification of Diseases, Ninth Revision), which is maintained by the National Center for Health Statistics, includes chemical sensitivity as a diagnosis. Testimony at the OEC 104 hearing also demonstrated that the State of Washington maintains a registry for those with chemical sensitivities, and that the United States Housing Authority recognizes the diagnosis. See also *SAIF Corp. v. Scott*, 111 Ore. App.

222 Ore. App. 431, \*449; 193 P.3d 1030, \*\*1040;  
2008 Ore. App. LEXIS 1336, \*\*\*32

99, 102-03, 824 P.2d 1188, rev den, 313 Ore. 300, 832 P.2d 456 (1992) [\*\*\*33] (concluding that substantial evidence supported the board's determination that the claimant's employment was the major contributing cause of his multiple chemical sensitivities). Also, the United States Social Security [\*450] Administration recognizes MCS as a medically determinable impairment for Social Security disability income purposes. *Creamer v. Callahan*, 981 F Supp 703, 705 (D Mass 1997).

The evidence that there are competing schools of scientific thought about whether MCS is a legitimate diagnosis and whether plaintiff's injuries were caused by his exposure to defendants' pesticides demonstrates why the trial court erred in exercising its gatekeeping function. As the Supreme Court explained in *Marcum v. Adventist Health System/West*, 345 Ore. 237, 248-49, 193 P.3d 1, 2008 Ore. LEXIS 673, \*18-21 (September 16, 2008),

[HN14] "Even if the expert is not able to eliminate *all* alternative causes, the testimony nevertheless may be reliable and admissible if sufficient potential causes are eliminated for the expert to identify one particular cause as the likely cause of the condition. \* \* \* [W]hen 'ruling in' potential causes of a condition or injury for purposes of differential diagnosis, a trial court [\*\*\*34] should insist that the causation theory be 'biologically plausible,' that is, that the exposure *could* have caused plaintiff's injury. For that reason, a particular possible cause should not necessarily be excluded on the grounds that the expert cannot describe the precise mechanism of causation or point to statistical studies of cause and effect."

(Emphasis in original; citations omitted.) Here, according to plaintiff's evidence, MCS is a biologically plausible diagnosis--that is, plaintiff's diagnosis is based on a scientific methodology (an interpretation of plaintiff's history and the scientific tests that were performed) from which plaintiff's expert, who is qualified to draw such conclusions, concluded that the exposure could have caused plaintiff's injuries. Although defendants' experts reject the methodology and the conclusions reached by plaintiff's expert, the competing views between the two

schools of scientific thought did not authorize the trial court in its gatekeeping function to exclude plaintiff's evidence. That is so because each school of thought reaches a conclusion that is "biologically plausible," as that phrase was used by the Supreme Court in *Marcum*.

We conclude [\*\*\*35] by addressing defendants' assertion that "virtually all courts that have considered the issue have refused to allow expert testimony--including Drs. Rea and [\*451] [his associate] Johnson--on the diagnosis of chemical sensitivity." Defendants' survey of the law in other jurisdictions is correct. The court in *McNeel v. Union Pacific Railroad Company*, 276 Neb 143, 753 NW.2d 321 (2008), recently described the state of the law in most jurisdictions:

"A number of courts have determined that toxic encephalopathy, also known as multiple chemical sensitivity or idiopathic environmental intolerance, is a controversial diagnosis unsupported by sound scientific reasoning or methodology. Some courts have specifically rejected or discredited the opinions of Rea and Didriksen on this subject."

*Id.* at 153-54, 753 NW2d at 331 (footnotes omitted); <sup>14</sup> see also *Coffey v. County of Hennepin*, 23 F Supp 2d 1081, 1086 (D Minn 1998) ("[F]ederal courts do not consider environmental illness or MCS a scientifically valid diagnosis.").

14 In the omitted footnotes, the *McNeel* court cited the following cases: *Summers v. Missouri Pacific R.R. System*, 132 F.3d 599 (10th Cir 1997); *Bradley v. Brown*, 42 F.3d 434 (7th Cir 1994); [\*\*\*36] *Brown v. Shalala*, 15 F.3d 97 (8th Cir 1994); *Coffey v. County of Hennepin*, 23 F Supp 2d 1081 (D Minn 1998); *Frank v. State of New York*, 972 F Supp 130 (NDNY 1997); *Sanderson v. IFF*, 950 F Supp 981 (CD Cal 1996); *Myhre v. Workers Compensation Bureau*, 2002 ND 186, 653 NW 2d 705 (ND 2002); *Jones v. Ruskin Mfg.*, 834 So.2d 1126 (La App 2002).

[HN15] Under Oregon law, however, the proper inquiry is not whether MCS or chemical sensitivity is a "valid" diagnosis or is recognized by other jurisdictions; rather, we must, on the record in this case, "decide

222 Ore. App. 431, \*451; 193 P.3d 1030, \*\*1041;  
2008 Ore. App. LEXIS 1336, \*\*\*36

whether truthfinding is better served by admission or exclusion." *O'Key*, 321 Ore. at 299. <sup>15</sup> Regardless of what other courts have held, we have an obligation to independently construe the relevant provisions of the Oregon Evidence Code. Even though OEC 702 has as its origin the federal evidence code, the commentary to OEC 702 emphasizes that "[w]hether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier of fact." Legislative Commentary to OEC 702, reprinted in Laird C. Kirkpatrick, *Oregon Evidence* § 702.02 (5th ed 2007). Here, given the Oregon legislature's [\*452] strong policy to aid the trier of fact [\*\*\*37] to understand the evidence presented at trial in the context of [\*\*1042] the parties' theory of the case, we believe that the legislature intended controversial evidence like Rea's testimony to be presented to the jury.

15 On appeal, plaintiff argues that the trial court improperly ruled on Rea's ultimate opinion, rather than on his methodology. Although the trial court's ruling is unclear in that respect, we agree that, to the extent that the trial court focused on the "legitimacy" of Rea's diagnosis and not on his methodology, that focus was incorrect.

We conclude on this record that plaintiff has carried his burden of showing that Rea's testimony is relevant, that it will assist the trier of fact to understand why plaintiff reacted as he did to the pesticides that defendants

applied, and that it is not unfairly prejudicial, misleading, or confusing. [HN16] When qualified experts disagree about the validity of medical diagnoses or other scientific evidence, judges are in no better position to resolve that dispute than are juries. Rather, the usual techniques for truthfinding--cross-examination, presentation of contrary evidence, and instruction on the burden of proof--should be applied. In Oregon, [\*\*\*38] we trust juries to be able to find the truth in the classic "battle of the experts." See *Stoeger v. Burlington Northern Railroad Co.*, 323 Ore. 569, 577, 919 P.2d 39 (1996) ("[I]t is the role of a jury--not a judge acting pretrial--to determine where the truth lies."). The circumstances of this case present such an issue. <sup>16</sup>

16 In *Jennings*, the Supreme Court explained that, "[i]n the past, this court has stated that a published decision affirming the admissibility of certain forms of scientific evidence will mean that the proponent of the evidence need not lay a scientific foundation for it again." 331 Ore. at 310. The court nonetheless chose not to apply that general rule in *Jennings*. In this case, although we conclude that, on this record, the trial court erred in excluding Rea's testimony, we do not hold that testimony about chemical sensitivity will, as a matter of law, always be admissible.

Reversed and remanded.

# APPENDIX C



Caution  
As of: Dec 30, 2011

**APPEAL OF DENISE KEHOE (New Hampshire Department of Labor  
Compensation Appeals Board)**

**No. 92-723**

**SUPREME COURT OF NEW HAMPSHIRE**

*139 N.H. 24; 648 A.2d 472; 1994 N.H. LEXIS 102*

**September 26, 1994, Decided**

**PRIOR HISTORY:** [\*\*\*1] Compensation Appeals Board

**DISPOSITION:** Vacated and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant workers' compensation claimant sought review of the decision of the New Hampshire Department of Labor Compensation Appeals Board, which denied her claim for workers' compensation benefits.

**OVERVIEW:** The claimant suffered from asthma and multiple other respiratory problems. She sought workers' compensation benefits claiming that her workplace environment contributed to her disease, multiple chemical sensitivity. Her expert diagnosed asthma and multiple chemical sensitivity disorder, attributing it to chronic exposure to toxic chemicals in the work place. The employer's expert concluded that multiple chemical sensitivity was a controversial diagnosis. The Board denied benefits, reasoning that the claimant had failed to prove that she suffered from occupational asthma. On

appeal, the court vacated the decision, stating that the claimant did not base her claim on occupational asthma. Rather, the court concluded, she presented a claim based on multiple chemical sensitivity syndrome, which manifested itself in a wide range of symptoms. Because multiple chemical sensitivity was a recognized occupational disease under workers' compensation law, the Board should have determined whether the evidence warranted a finding that the effects on this claimant of exposure to chemicals in the workplace constituted a compensable disease under the statute, *N.H. Rev. Stat. Ann. § 281-A:2, XIII*.

**OUTCOME:** The court vacated the decision of the compensation board, which denied the claimant benefits, and it remanded to the Board for consideration of whether there was evidence of chemical sensitivity syndrome and if so, whether the workplace caused or contributed to the disease.

**LexisNexis(R) Headnotes**

139 N.H. 24, \*; 648 A.2d 472, \*\*;  
1994 N.H. LEXIS 102, \*\*\*1

**Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview**

**Workers' Compensation & SSDI > Compensability > Injuries > Occupational Diseases**

[HN1] "Occupational disease" is defined in *N.H. Rev. Stat. Ann. § 281-A:2, XIII*, as an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation, or employment. If the employment is attended with unusual chemicals the problem of satisfying the distinction from the ordinary is not serious. Even a disease which is rare and which is due to the claimant's individual allergy or weakness combining with employment conditions will usually be held to be an occupational disease if the increased exposure occasioned by employment in fact brought on the disease. The quantitative size or extent of the exposure is immaterial, if it was sufficient to produce the disease in combination with the worker's unusual sensitivity. Multiple chemical sensitivity syndrome due to workplace exposure to chemicals is an occupational disease compensable under our workers' compensation statute.

**Administrative Law > Judicial Review > Reviewability > Factual Determinations**

**Workers' Compensation & SSDI > Administrative Proceedings > General Overview**

**Workers' Compensation & SSDI > Compensability > Injuries > Occupational Diseases**

[HN2] Orders or decisions of the New Hampshire Department of Labor Compensation Appeals Board shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. *N.H. Rev. Stat. Ann. § 541:13* (1974). The board's findings of fact and decision made pursuant to those findings will not be set aside if supported by competent evidence in the record. These principles of judicial review of the board's decisions rests on the presumption that the board has made findings of fact sufficient to form the basis for meaningful judicial review.

**HEADNOTES**

**1. Workers' Compensation--Rehearings and Appeals--Standard of Review**

Orders or decisions of the labor compensation

appeals board shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable; the board's findings of fact and decision made pursuant to those findings will not be set aside if supported by competent evidence in the record. *RSA 541:13*.

**2. Workers' Compensation--Injuries or Illnesses Compensable-- Occupational Diseases**

Labor compensation appeals board erred in denying claim for workers' compensation benefits, where claimant presented claim of occupational disease based on multiple chemical sensitivity syndrome which manifested itself in bronchospasms, headaches, and reactions to a wide range of substances, arising out of course of employment; board must determine whether claimant suffers from syndrome, and if so, whether workplace caused or contributed to disease. *RSA 281-A:2, XIII*.

**COUNSEL:** Kahn & Brown, of Nashua (James H. Leary on the brief and orally), for the claimant.

Kelliher & Clougherty and Elizabeth Cazden, of Manchester (Thomas W. Kelliher and Ms. Cazden on the brief, and Mr. Kelliher orally), for respondents Lockheed-Sanders Co. and Liberty Mutual Insurance Co.

**JUDGES:** BROCK

**OPINION BY:** BROCK

**OPINION**

[\*\*472] [\*24] BROCK, C.J. The claimant, Denise Kehoe, appeals an adverse decision by the New Hampshire Department of Labor Compensation Appeals Board (the board) denying her claim for workers' compensation benefits. We vacate [\*\*473] and remand for further proceedings consistent with this opinion.

The claimant was employed at Lockheed-Sanders from August 1979 to September 1991. During those twelve years, she was regularly exposed to numerous chemicals while performing her job. Over a period of time, the claimant developed symptoms including severe headaches, breathing difficulties, and allergies. By 1991, her symptoms were disabling, and she filed a claim for workers' compensation benefits. The claim was denied by a hearings [\*\*\*2] officer, and the claimant appealed to

the board.

Following a hearing, the board denied the claim. The board concluded:

[\*25] The majority of the panel does not find that the claimant has met her burden of proof that her symptoms are an occupational disease under *RSA 281-A:2, XIII* or arise out of and in the course of her employment at Sanders. The majority of the panel believes that the diagnosis of occupational asthma is not proven due to the equivocal opinions of the physicians at the Hitchcock Clinic and the claimant's medical history of severe migraine problems and stress not associated with employment as well as other factors in the claimant's environment such as smoking in the residence, and other allergies.

The claimant argues: (1) that the board abused its discretion in finding that she failed to meet her burden of proof that her disability is an occupational disease or arises out of or in the course of her employment where "overwhelming evidence" shows that her injury or illness is the result of her exposure to chemicals in the work place; (2) that the board erred as a matter of law in interpreting the term "occupational disease" under *RSA 281-A:2, XIII* (Supp. 1993); (3) that [\*\*\*3] the term "occupational disease" includes the aggravation of a pre-existing condition or disease; and (4) that the board misinterpreted her diagnosis as occupational asthma, as opposed to multiple chemical sensitivity, and thereby reached an erroneous conclusion of fact and law.

The board's decision includes the following summaries of testimony provided by the physician witnesses:

In September 1991 the claimant began treating with Daniel Kinderlehrer, M.D., who is board certified in internal medicine and specializes in environmental medicine and practices with the New England Center for Holistic Medicine. Dr. Kinderlehrer testified on behalf of the claimant. He has diagnosed asthma and multiple chemical sensitivity disorder. Dr.

Kinderlehrer is of the opinion that the claimant developed these conditions from chronic exposure to toxic chemicals in the work place. His opinion is based upon the history given by Mrs. Kehoe, and the material data safety sheets she provided which she stated pertained to chemicals she often used in the work place . . . . According to Dr. Kinderlehrer because of Mrs. Kehoe's long term exposure to chemicals in the work place she became sensitized to even [\*\*\*4] low levels, i.e. below the OSHA standard, of these chemicals in the environment. (multiple chemical sensitivity disorder). In Dr. Kinderlehrer's opinion the claimant is disabled from [\*26] work because she now reacts to extremely low levels of chemicals found the [sic] work place, e.g. ink, perfumes, gasoline, newsprint etc.

....

The employer presented the testimony of Robert Godefroi, M.D., the medical director at Lockheed-Sanders. Dr. Godefroi is board certified in occupational medicine and family medicine. . . . Dr. Godefroi opined that multiple chemical sensitivity is a controversial diagnosis, and it is not supported by scientific data showing that small amounts of chemicals can cause a change in the immune system. In his opinion multiple chemicals sensitivity is a psychiatric disorder causing anxiety due to chemicals. (Dr. Kinderlehrer and the claimant's attorney did submit a [sic] medical literature supporting the contention that multiple chemical sensitivities syndrome is an accepted medical diagnosis). Dr. Godefroi reviewed the claimant's medical records and concluded that her complaints were not occupational asthma, but a number of different factors caused the asthma [\*\*\*5] including respiratory infections, [\*\*474] stress, and headaches along with . . . . psychiatric and emotional factors.

139 N.H. 24, \*26; 648 A.2d 472, \*\*474;  
1994 N.H. LEXIS 102, \*\*\*5

[HN1] "Occupational disease" is defined in *RSA 281-A:2, XIII* as "an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment." "If the employment is attended with unusual . . . chemicals . . . the problem of satisfying the distinction from the 'ordinary' is not serious." 1B A. Larson, *The Law of Workmen's Compensation*, § 41.33(a) (1993). "Even a disease which is rare and which is due to the claimant's individual allergy or weakness combining with employment conditions will usually be held to be an occupational disease if the increased exposure occasioned by employment in fact brought on the disease." *Id.* § 41.00. "The quantitative size or extent of the exposure is immaterial, if it was sufficient to produce the disease in combination with the worker's unusual sensitivity." *Id.* § 41.62(d); see *Strahan v. Hunter Hosiery Co.*, 109 N.H. 96, 100, 244 A.2d 432, 435 (1968); *Moore v. Company*, 88 N.H. 134, 137, 185 A. 165, 167 (1936). [\*\*\*6] Little doubt exists that multiple chemical sensitivity syndrome due to workplace exposure to chemicals is an occupational disease compensable under our workers' compensation statute. Cf. *Kouril v. Bowen*, 912 F.2d 971 (8th Cir. 1990); [\*27] Richman, *Legal Aspects of Asthma in the Workplace*, Pa. Bar Ass'n Q. 161, 165 (July 1993).

[HN2] Orders or decisions of the board "shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the

evidence before it, that such order is unjust or unreasonable." *RSA 541:13* (1974). The board's findings of fact and decision made pursuant to those findings will not be set aside if supported by competent evidence in the record. See *Xydias v. Davidson Rubber Co.*, 131 N.H. 721, 723-24, 560 A.2d 627, 628 (1989). These principles, however, rest on the presumption that the board has made findings of fact sufficient to form the basis for meaningful judicial review.

The board's decision denies benefits because the claimant failed to prove that she suffers from occupational asthma. The claimant, however, did not base her claim on occupational [\*\*\*7] asthma. Rather, she presented a claim of occupational disease based on multiple chemical sensitivity syndrome which manifested itself in bronchospasms, headaches, and reactions to a wide range of substances. The board should have determined whether the evidence warrants a finding that the effects on this claimant of exposure to chemicals in the workplace constituted a compensable disease under the statute. We therefore vacate and remand to the board for a determination of whether the claimant suffers from multiple chemical sensitivity syndrome and, if she does, whether the workplace caused or contributed to the disease. See *Appeal of Lambrou*, 136 N.H. 18, 20, 609 A.2d 754, 756 (1992).

*Vacated and remanded.*

All concurred.

# **APPENDIX D**



Caution  
As of: Dec 30, 2011

**APPEAL OF DENISE KEHOE (New Hampshire Compensation Appeals Board)**

No. 95-316

**SUPREME COURT OF NEW HAMPSHIRE**

*141 N.H. 412; 686 A.2d 749; 1996 N.H. LEXIS 116*

**November 13, 1996, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*] Rehearing Denied December 20, 1996. Released for Publication December 23, 1996.

**PRIOR HISTORY:** Compensation Appeals Board.

**DISPOSITION:** Reversed and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Claimant sought a second appeal from respondent New Hampshire Compensation Appeals Board, which had denied her workers' compensation benefits, finding that claimant suffered from multiple chemical sensitivity syndrome (MCSS), but concluding that she failed to prove by a preponderance that the MCSS was causally related to a risk or hazard from her former employment, and thus failing to meet her burden of proving causation.

**OVERVIEW:** Claimant had taken a medical leave when she began experiencing headaches at work, which had worsened. The board upheld the denial of her workers' compensation benefits, finding that claimant did not suffer from an occupational disease as defined in the

workers' compensation statute, *N.H. Rev. Stat. Ann. § 281-A:2, XIII* (Supp. 1995). On appeal, the court reversed, holding that MCSS was a compensable occupational disease, and remanded to the board for a determination of whether she suffered from MCSS and whether the workplace caused or contributed to the disease. On remand, the board denied the claim, finding that claimant suffered from MCSS, but that she failed to meet her burden of proving causation. On subsequent appeal, the court reversed the board's denial of the claim and remanded to the board only for a calculation of claimant's benefits. The court held that based on the medical evidence presented in the record, no reasonable finder of fact could have concluded that claimant did not meet her burden of demonstrating that it was more likely than not that her exposure to toxic chemicals at work contributed to, or aggravated, her disabling condition.

**OUTCOME:** The court reversed the board's denial of claimant's workers' compensation claim and remanded to the board only for a calculation of claimant's benefits.

**LexisNexis(R) Headnotes**

***Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review Governments > Local Governments > Administrative Boards***

[HN1] The court will overturn the decision of the New Hampshire Compensation Appeals Board (board) only for errors of law, or if the court is satisfied by a clear preponderance of the evidence before it that the order is unjust or unreasonable. *N.H. Rev. Stat. Ann. § 541:13* (1974). The board's findings of fact will not be disturbed if they are supported by competent evidence in the record upon which the board's decision reasonably could have been made.

***Labor & Employment Law > Preemployment Practices Workers' Compensation & SSDI > Compensability > Course of Employment > Causation Workers' Compensation & SSDI > Compensability > Injuries > Preexisting Conditions***

[HN2] To make out a claim for workers' compensation, a claimant is required to show that her injuries arose out of and in the course of her employment. *N.H. Rev. Stat. Ann. § 281-A:2, XI* (Supp. 1995). To show this, the claimant must prove by a preponderance of the evidence that her work-related activities probably caused or contributed to her disability. The test for causation has two prongs; a claimant must prove both legal causation and medical causation. Legal causation entails a showing that the claimant's injury is in some way work-related, while medical causation requires a showing that the injury was actually caused by the work-related event or condition. The legal causation test defines the degree of exertion that is necessary to make the injury work-connected. The test to be used depends upon the previous health of the employee. Where a claimant had a preexisting disease or condition prior to employment, she must show by a preponderance of the evidence that her employment "contributed something substantial" to her medical condition by demonstrating that the work-related conditions presented greater risks than those encountered in her non-employment activities. Where there is no preexisting condition, any work-related activity connected with the injury as a matter of medical fact would be sufficient to show legal causation.

***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview Workers' Compensation & SSDI > Compensability > Course of Employment > Causation***

***Workers' Compensation & SSDI > Defenses > Comparative & Contributory Negligence***

[HN3] The test for medical causation requires the claimant to establish, by a preponderance of the evidence, that the work-related activities probably caused or contributed to the employee's disabling injury as a matter of medical fact. Even if the work-related activities did not directly cause or contribute to her injury, it would be sufficient to show that the activities caused the activation of her disabling symptoms. Medical causation is a matter properly within the province of medical experts, and the board is required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion. Because a claimant's treating physicians have great familiarity with her condition, their reports must be accorded substantial weight.

***Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses***

[HN4] Although the New Hampshire Compensation Appeals Board is entitled to ignore uncontradicted medical testimony, it must identify the competing evidence or the considerations supporting its decision to do so.

***Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview***

[HN5] The New Hampshire Compensation Appeals Board must base its decision on evidence presented and may not base its decision "solely upon its own lay opinion."

**HEADNOTES**

**1. Workers' Compensation--Rehearings and Appeals--Standard of Review**

The supreme court will overturn the compensation appeals board's decision only for errors of law, or if satisfied by a clear preponderance of the evidence that the board's order is unjust or unreasonable. *RSA 541:13*.

**2. Workers' Compensation--Proceedings to Secure Compensation--Burden of Proof**

To make out a claim for workers' compensation, a claimant is required to show that her injuries arose "out of and in the course of [her] employment"; to show this, a claimant must prove by a preponderance of the evidence

that her work-related activities contributed to or probably caused her disability. *RSA 281-A:2, XI.*

### 3. Workers' Compensation--Injuries or Illnesses Compensable--Causation

Where the record clearly indicates that the claimant exhibited no unusual degree of headaches and experienced no respiratory or bronchial disease prior to going to work for her employer, the supreme court can presume that the claimant had no preexisting condition and where there is no preexisting condition, *any* work-related activity connected with the injury as a matter of medical fact would be sufficient to show legal causation. *RSA 281-A:2, XI.*

### 4. Workers' Compensation--Proceedings to Secure Compensation--Burden of Proof

Where the claimant presented evidence, through expert medical witnesses and medical records, to connect her multiple chemical sensitivity syndrome to her work environment, the board could not reasonably have found that the claimant had not met her minimal burden of establishing legal causation. *RSA 281-A:2.*

### 5. Workers' Compensation--Proceedings to Secure Compensation--Burden of Proof

The test for medical causation requires the claimant to establish, by a preponderance of the evidence, that the work-related activities contributed to or probably caused the employee's disability. *RSA 281-A:2.*

### 6. Workers' Compensation--Injuries or Illnesses Compensable--Causation

Medical causation is a matter properly within the province of medical experts, and the board is required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion. *RSA 281-A:2.*

### 7. Workers' Compensation--Rehearings and Appeals--Evidentiary Standards

Where no physician who treated or evaluated the claimant expressed any doubt that work contributed to, or at a minimum aggravated, her condition, and the board did not cite any competing evidence or considerations to explain its rejection of the claimant's uncontroverted evidence that her work environment contributed to her symptoms, its decision was therefore unreasonable. *RSA*

*281-A:2; 541:13.*

### 8. Workers' Compensation--Proceedings to Secure Compensation--Burden of Proof

The board may not speculate as to the existence of some as yet unidentified cause for the claimant's condition; moreover, even if the board's suspicion held true, it would not be dispositive of the claimant's claim -- the fact that her work environment probably *contributed to* or *aggravated* her multiple chemical sensitivity syndrome would be sufficient to meet her burden of proof. *RSA 281-A:2.*

### 9. Workers' Compensation--Proceedings to Secure Compensation--Findings

Based on the medical evidence presented in the record, no reasonable finder of fact could conclude that the claimant did not meet her burden of demonstrating that it was more likely than not that her exposure to toxic chemicals at work contributed to, or aggravated, her disabling condition. *RSA 281-A:2.*

**COUNSEL:** Sullivan & Gregg, P.A., of Nashua (James H. Leary on the brief and orally), for the claimant.

Kelliher & Clougherty, of Manchester (Thomas W. Kelliher on the brief), and Elizabeth Cazden, of Manchester, by brief and orally, for the respondents, Lockheed-Sanders Company and Liberty Mutual Insurance Company.

**JUDGES:** BROCK, C.J. HORTON, J. did not sit; the others concurred.

**OPINION BY:** BROCK

### OPINION

[\*\*751] [\*414] BROCK, C.J. This is the claimant's second appeal from the New Hampshire Compensation Appeals Board's (board) denials of workers' compensation benefits. We reverse and remand for calculation of benefits.

The claimant, Denise Kehoe, worked as an assembler at the Lockheed-Sanders Company (Sanders) from August 1979 to March 1991. During those twelve years, she was regularly exposed to numerous chemicals while performing her job, including lacquer thinner, HumiSeal,

isopropyl alcohol, RTV adhesive sealant, trichloroethane, and chemical adhesives such as Loctite. Many of these substances were rated by [\*\*\*2] their manufacturers as posing a health hazard, with health hazard ratings as high as "three" ("four" being the most hazardous). The claimant used many of these chemicals on a daily basis, breathing their fumes as she applied them with a brush to seal joints or to clean or dissolve substances. Her work sometimes entailed heating joints previously soldered with HumiSeal (a "serious" hazard rating of "three") in order to disassemble the materials; the heated compound exposed her to additional fumes beyond those emanating from the unheated HumiSeal containers.

Prior to her employment at Sanders, the claimant did not have severe headaches or breathing difficulties. Approximately two months after commencing her employment at Sanders, the claimant began experiencing headaches at work. As time passed, her headaches worsened into migraines and additional symptoms developed, such as dizziness, sinus irritation, and muscle aches. Beginning in 1989, her tenth year at Sanders, she began experiencing breathing disorders, including bronchospasm and chronic sinus problems. By March 1991, the combination of symptoms was so debilitating that she was compelled to take a medical leave from work. Although [\*\*\*3] her condition improved during her leave, her symptoms recurred during two separate visits to Sanders, and she was forced to extend her medical leave. In May 1991, her doctors advised her not to return to work. At this point, she had developed hypersensitivities to a wide variety of chemicals, including not only the chemicals she worked with at Sanders but also many household cleaners, perfumes, and other things encountered in ordinary non-work life.

During the years that the claimant was employed at Sanders, her treating physician, Dr. Alexis-Ann Bundschuh, had difficulty diagnosing [\*415] her condition, in part because the symptoms accelerated in both number and degree over the years. Dr. Bundschuh referred the claimant to several specialists, including a pulmonary consultant who diagnosed her as suffering from chronic asthma, and an occupational health specialist who diagnosed her as suffering from bronchospastic airway disease reactive to nonspecific irritants with . . . sensitivity to a vast array of various at-home and at-work fumes and smells." Soon after leaving her job, the claimant also saw Dr. Daniel Kinderlehrer, a specialist in environmental medicine, who

diagnosed her as "suffering [\*\*\*4] from Multiple Environmental Sensitivities, with a severe Multiple Chemical Sensitivity Disorder." This diagnosis was "evident on the basis of her significant symptomology provoked by exposure to low doses of chemicals."

The claimant filed for workers' compensation benefits in 1991. Her claim was denied by a hearings officer, and the claimant appealed to the board. After a hearing, the board upheld the denial, finding that the claimant did not suffer from an occupational disease as defined in *RSA 281-A:2, XIII* (Supp. 1995). She appealed and we reversed, holding that multiple chemical sensitivity syndrome (MCSS) due to workplace exposure to chemicals is an occupational disease compensable under our workers' compensation statute. *Appeal of Kehoe, 139 N.H. 24, 26, [\*\*752] 648 A.2d 472, 474 (1994)*. We remanded to the board "for a determination of whether the claimant suffers from [MCSS] and, if she does, whether the workplace caused or contributed to the disease." *Id. at 27, 648 A.2d at 474*.

On remand, the board held a new hearing and again denied the claim. The board found that the claimant does suffer from MCSS, but concluded that she "failed to prove by a preponderance that the MCSS [\*\*\*5] is causally related to a risk or hazard of employment at Sanders," and therefore "failed to meet her burden of proving causation." This appeal followed.

[HN1] We will overturn the board's decision only for errors of law, or if we are satisfied by a clear preponderance of the evidence before us that the order is unjust or unreasonable. *Appeal of Lambrou, 136 N.H. 18, 20, 609 A.2d 754, 755 (1992)*; *RSA 541:13 (1974)*. The board's findings of fact will not be disturbed if they are supported by competent evidence in the record, *Lambrou, 136 N.H. at 20, 609 A.2d at 755*, upon which the board's decision reasonably could have been made. See *Appeal of Normand, 137 N.H. 617, 619, 631 A.2d 535, 536 (1993)*; *Town of Hudson v. Wynott, 128 N.H. 478, 483, 522 A.2d 974, 977 (1986)*.

[HN2] To make out a claim for workers' compensation, a claimant is required to show that her injuries arose "out of and in the course of [\*416] [her] employment." *RSA 281-A:2, XI* (Supp. 1995). To show this, the claimant must prove by a preponderance of the evidence that her work-related activities "probably caused or contributed to [her] disability." *Appeal of Cote, 139 N.H. 575, 578, 660 A.2d 1090, 1093 (1995)*.

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1996 N.H. LEXIS 116, \*\*\*5

The [\*\*\*6] test for causation has two prongs; a claimant must prove both legal causation and medical causation. *Id. at 578, 660 A.2d at 1093*. Legal causation entails a showing that the claimant's injury is in some way work-related, while medical causation requires a showing that the injury was actually caused by the work-related event or condition. *Id. at 578-79, 660 A.2d at 1093*. The board did not make clear whether it found that the claimant failed to meet her burden with respect to legal or medical causation. We hold, however, that no reasonable board could have found that the claimant failed to meet her burden of proving either legal or medical causation on the record in this case. See *id. at 579-80, 660 A.2d at 1094*.

"The legal causation test defines the degree of exertion that is necessary to make the injury work-connected." *Appeal of Briggs, 138 N.H. 623, 628, 645 A.2d 655, 659 (1994)*. "The test to be used depends upon the previous health of the employee." *Id.* Where a claimant had a preexisting disease or condition prior to employment, she must show by a preponderance of the evidence that her employment "contributed something substantial" to her medical condition by [\*\*\*7] demonstrating that the work-related conditions presented greater risks than those encountered in her non-employment activities. *New Hampshire Supply Co. v. Steinberg, 119 N.H. 223, 231, 400 A.2d 1163, 1168 (1979)*. Where there is no preexisting condition, any work-related activity connected with the injury as a matter of medical fact would be sufficient to show legal causation. *Id.*

Here, although the board did not make an express finding as to whether the claimant's MCSS was a preexisting condition, the record clearly indicates that the claimant exhibited no unusual degree of headaches and experienced no respiratory or bronchial disease prior to going to work for Sanders. On the record before us, we can presume that the claimant had no preexisting condition. It is equally clear from the record that the claimant presented evidence, through expert medical witnesses and medical records, to connect her MCSS to her work environment. Although the board found this evidence unpersuasive on the ultimate issue of causation, we conclude that the board could not reasonably have found that the claimant had not met her minimal burden of establishing legal causation. See *Appeal [\*\*\*8] of Cote, 139 N.H. at 579, 660 A.2d at 1094*.

[\*417] [HN3] The test for medical causation requires the claimant to establish, by a preponderance of the evidence, that the work-related activities "probably caused or contributed [\*\*753] to the employee's [disabling injury] as a matter of medical fact." *Bartlett Tree Experts Co. v. Johnson, 129 N.H. 703, 709, 532 A.2d 1373, 1376 (1987)*; see *Wheeler v. School Admin. Unit 21, 130 N.H. 666, 672, 550 A.2d 980, 983 (1988)*. Even if the work-related activities did not directly cause or contribute to her injury, it would be sufficient to show that the activities caused the activation of her disabling symptoms. *Appeal of Briand, 138 N.H. 555, 560, 644 A.2d 47, 50 (1994)*; see also *Bothwick v. State, 119 N.H. 583, 588, 406 A.2d 462, 465 (1979)* (finding medical evidence of aggravation of preexisting condition by work-related activities sufficient evidence of medical causation).

Medical causation "is a matter properly within the province of medical experts, and the board [is] required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion." *Appeal of Cote, 139 N.H. at 579-80, 660 [\*\*\*9] A.2d at 1094*. In the instant case, no physician who treated or evaluated the claimant expressed any doubt that work contributed to, or at a minimum aggravated, her condition. See *id. at 580, 660 A.2d at 1094; Bothwick, 119 N.H. at 588, 406 A.2d at 465*. "Because a claimant's treating physicians have great familiarity with [her] condition, their reports must be accorded substantial weight." *Appeal of Morin, 140 N.H. 515, 519, 669 A.2d 207, 210 (1995)* (quotation omitted). Dr. Albee Budnitz, a pulmonary consultant, concluded that the claimant suffered from "asthmas of mixed variety, probably with multiple factors as precipitants including stress, respiratory infections, some degree of allergy and certainly multiple chemical irritants the most obvious of which is T.D.I." HumiSeal contains T.D.I. Dr. Barbara O'Dea, an occupational health specialist, who was also consulted on referral, opined that although "it would be difficult to say that her chronic exposures at work initiated her basic problem," the claimant did "show[] evidence that exposures to fumes at work cause exacerbation of her underlying condition . . . ."

Dr. Bundschuh ultimately concluded: "Given that [the [\*\*\*10] claimant] currently does have hypersensitivity syndrome, exposure to her work environment, on [a] historical basis, does seem to be precipitating symptoms." Although unable to "prove that

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[the claimant's] exposure to her work environment caused her breathing problems," Dr. Bundschuh believed that such exposure "more probably than not" was causing the symptoms which made the claimant "unable to work." Dr. Kinderlehrer expressed a similar opinion that the claimant's condition was "causally related to exposure to toxic [\*418] xenobiotic agents in the workplace." He found her asthma to be "consistent with two classic types of occupational asthma," and noted that "once a patient has been sensitized [to the chemical agents], extremely low concentrations may result in airway spasm." In addition, he stated that her headaches and muscle pain were "consistent with chemical toxicity."

To counter the unanimous opinions of the claimant's treating physicians on the issue of causation, the respondents relied on two medical experts, Dr. John A. Davis and Dr. Charles Godefroi. Neither, however, offered a direct opinion about the causation issue. One took issue with our holding in the claimant's first [\*\*\*11] appeal that MCSS is an occupational disease, see *Appeal of Kehoe*, 139 N.H. at 26, 648 A.2d at 474, and both opined that the claimant did not, in their medical opinions, "meet all the established criteria" for MCSS. This testimony bears on the question of whether the claimant has MCSS, a question the board answered in the affirmative. Read broadly, the record reveals only minimal evidence from the respondent's experts which can be viewed as bearing on causation, and none of this evidence was responsive to the question of whether the claimant's work environment "activated" or "aggravated" her MCSS. See *Appeal of Briand*, 138 N.H. at 560, 644 A.2d at 50; *Bothwick*, 119 N.H. at 588, 406 A.2d at 465.

The overwhelming balance of medical evidence relating to causation is the opinions offered by the claimant's treating physicians. Nevertheless, the board found that the claimant did not meet her burden as to causation. Having acknowledged "several references [made] by treating physicians to the fact that the environment at Sanders was contributing [\*\*754] to her present symptoms," the board concluded that "the medical opinions post 1991 drawing a connection between chemical [\*\*\*12] exposure at work and the resulting complaints were largely conjectural based upon claimant's history generated after the fact." (Emphasis added.) The board cited no medical evidence to support this conclusion and relied instead on its own lay opinion as to the reliability of the evidence presented by the claimant. *Appeal of Briggs*, 138 N.H. at 629, 645 A.2d at

659. This was error. Id.

The medical evidence presented by the claimant's physicians consisted of informed medical conclusions, not merely conjectural opinions, based on the claimant's well-documented medical history. See *Wynott*, 128 N.H. at 485, 522 A.2d at 978. The doctors "did not serve merely as a conduit for the claimant's complaints." Id. [HN4] Although the board is entitled to ignore uncontradicted medical testimony, it must identify the competing evidence or the considerations [\*419] supporting its decision to do so. See *Wynott*, 128 N.H. at 484-85, 522 A.2d at 978; 2A A. Larson, *The Law of Workmen's Compensation* § 79.52(d), at 15-426.156 (1996). The board did not cite to any competing evidence to explain its rejection of the claimant's uncontroverted evidence that her work environment contributed to her [\*\*\*13] symptoms, and its decision was therefore unreasonable. See *Appeal of Normand*, 137 N.H. at 619, 631 A.2d at 536; see also *RSA 541:13*.

In concluding that the claimant's physicians' medical opinions were "largely conjectural," the board expressed some concern regarding the claimant's medical records. First, the board noted that "none of the doctors throughout the 80's were willing to make a diagnosis of MCSS." Second, the board observed "the fact that prior to 1991 there were no references within the medical records of complaints registered by [the] claimant about the chemicals encountered at work." Finally, the board articulated its "strong suspicion" that the "MCSS with which [the claimant] is afflicted is derived from some non-work related cause which no one has really pinpointed."

These concerns are speculative and insufficient to justify the board's rejection of the claimant's medical evidence. [HN5] The board must base its decision on evidence presented and may not base its decision "solely upon its own lay opinion." *Appeal of Briggs*, 138 N.H. at 629, 645 A.2d at 659. Therefore, the board may not speculate as to the existence of some as yet unidentified cause for the [\*\*\*14] claimant's MCSS. Second, even if the board's suspicion held true, it would not be dispositive of the claimant's claim; the fact that her work environment probably contributed to or aggravated her MCSS would be sufficient to meet her burden of proof. See *Bartlett Tree*, 129 N.H. at 709, 532 A.2d at 1376; *Bothwick*, 119 N.H. at 588, 406 A.2d at 465. As the record reveals, the claimant presented uncontroverted

141 N.H. 412, \*419; 686 A.2d 749, \*\*754;  
1996 N.H. LEXIS 116, \*\*\*14

evidence on this issue.

We caution that our holding today should not be construed as mandating a grant of workers' compensation benefits for every claimant who presents uncontroverted medical testimony. See *Wynott*, 128 N.H. at 486, 522 A.2d at 978. Based on the medical evidence presented in the record before us, however, no reasonable finder of fact could conclude that the claimant did not meet her burden of demonstrating that it was more likely than not that her exposure to toxic chemicals at work contributed

to, or aggravated, her disabling condition. See *Appeal of Cote*, 139 N.H. at 579, 582, 660 A.2d at 1094-95. The claimant met her burdens as to both legal and medical causation. We therefore reverse the board's denial of the [\*420] claimant's workers' compensation [\*\*\*15] claim and remand to the board only for a calculation of the claimant's benefits.

Reversed and remanded.

HORTON, J. did not sit; the others concurred.

# APPENDIX E

# TITLE XXIII

## LABOR

### CHAPTER 281-A

#### WORKERS' COMPENSATION

##### Section 281-A:2

**281-A:2 Definitions.** – Any word or phrase defined in this section shall have the same meaning throughout RSA 281-A, unless the context clearly requires otherwise:

I. "Call or volunteer firefighter" means a firefighter who is not regularly employed by a fire department of any city, town or precinct in the state but who answers for duty only to fire alarms and who has been appointed by the fire department with which the firefighter serves.

I-a. [Repealed.]

I-b. "Board" means the compensation appeals board established in RSA 281-A:42-a.

I-c. "Blood" means human blood, human blood components, and products made from human blood.

I-d. "Bloodborne disease" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).

I-e. "Critical exposure" means contact of an employee's ruptured or broken skin or mucous membrane with a person's blood or body fluids, other than tears, saliva, or perspiration, of a magnitude that can result in transmission of bloodborne disease.

II. "Commissioner" means the labor commissioner appointed as provided in RSA 273.

III. "Contractor" means a person or organization which contracts with another to have work performed of a kind which is a regular and recurrent part of the work of the trade, business, occupation or profession of such person or organization performing the work.

IV. "Subcontractor" means a person who contracts with a contractor to perform the work described in paragraph III.

IV-a. "Date of maximum medical improvement" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability.

V. "Dependent" means the employee's widow, widower, children, parents, persons in the direct line of ascent or descent, or next of kin, who were wholly or partially dependent, in fact, upon the earnings of the employee for support at the time of the injury. A common law wife or husband of the deceased and posthumous children shall fall within the meaning of this paragraph.

V-a. "Domestic", "domestic employee", or "domestic worker" means a person performing domestic services in a private residence of the employer, where the employer is an individual, family, local college club, or local chapter of a college fraternity or sorority and not an agency or other entity engaged in the business of providing domestic workers to the public and the person is not defined as an independent contractor under RSA 281-A:2, VI(b).

V-b. (a) "Domestic labor" or "domestic services" means the performance of such duties as housekeeping, childcare, gardening, handy person work, and serving as a companion or caregiver for children or others who are not physically or mentally infirm.

(b) "Domestic labor" or "domestic services" shall also include the services rendered by paid roommates or live-in companions who provide fellowship, care, and protection for persons who because of advanced age, or physical or mental infirmity cannot care for their own needs, regardless of whether the paid roommate or companion is employed by an agency or entity other than the person using such services, but subject to the following limitations:

(1) The services may encompass housekeeping duties provided such services do not exceed 20 percent of the total hours worked; and

(2) The services do not include those relating to the care and protection of the aged and infirm that require and are performed by specially trained personnel such as registered or licensed practical nurses or similarly trained personnel.

VI. (a) "Employee", with respect to private employment, means any person in the service of an employer subject to the provisions of this chapter under any express or implied, oral or written contract of hire except a railroad employee engaged in interstate commerce whose rights are governed by the Federal Employers' Liability Act. If they elect to be personally covered by this chapter, "employee" includes persons who regularly operate businesses or practice their trades, professions, or occupations, whether individually, or in partnership, or association with other persons, whether or not they hire others as employees.

(b)(1) Subject to the preceding subparagraph, any person, other than a direct seller or qualified real estate broker or agent or real estate appraiser, or person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, who performs services for pay for an employer, is presumed to be an employee. This presumption may be rebutted by proof that an individual meets all of the following criteria:

(A) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(B) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(C) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(D) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(E) The person holds himself or herself out to be in business for himself or herself.

(F) The person has continuing or recurring business liabilities or obligations.

(G) The success or failure of the person's business depends on the relationship of business receipts to expenditures.

(H) The person receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.

(I) The person is responsible in the first instance for the main expenses related to the service or work performed. However, this shall not prohibit the employer or person offering work from providing the supplies or materials necessary to perform the work.

(J) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(K) The person supplies the principal tools and instrumentalities used in the work, except that the employer may furnish tools or instrumentalities that are unique to the employer's special requirements or are located on the employer's premises.

(L) The person is not required to work exclusively for the employer.

(2) For the purposes of this subparagraph, "qualified real estate broker or agent" means a person who is a licensed real estate broker or licensed real estate salesman duly licensed pursuant to RSA 331-A and whose remuneration as such is directly related to sales or other output including performance of services, rather than to the number of hours worked.

(3) For the purposes of this subparagraph, "direct seller" means a person:

(A) Engaged in selling or soliciting the sale of consumer products, services or intangibles to any

buyer on a buy-sell basis, deposit-commission basis or any similar basis for resale by the buyer or any other person in the home or other than in a permanent retail establishment; or engaged in selling or soliciting the sale of consumer products, services, or intangibles in the home or otherwise than in a permanent retail establishment; and

(B) Who receives substantially all remuneration as such in a direct relationship to sales or other output including the performance of services, rather than the number of hours worked and whose services are performed pursuant to a written contract with the person for whom the services are performed, which provides that the individual will not be treated as an employee for federal tax purposes. For purposes of this subparagraph a mortgage originator as defined by RSA 397-A:1, XVII who meets the conditions of this subparagraph shall be deemed a direct seller.

(4) For the purposes of this subparagraph, "real estate appraiser" means a person who is a real estate appraiser and whose remuneration as such is by way of a fee and is directly related to services or other work product rather than to the number of hours worked.

(c) A written agreement signed by the employer and the person providing services, on or about the date such person was engaged, which describes the services to be performed and affirms that such services are to be performed in accordance with each of the criteria in subparagraphs (b)(1)(A)-(L) is prima facie evidence that the criteria have been met. Nothing in this subparagraph shall require such an agreement to establish that the criteria have been met.

(d) If the commissioner finds that an employer has misrepresented the relationship between the employer and the person providing services, the commissioner may assess a civil penalty of up to \$2,500; in addition, such employer may be assessed a civil penalty of \$100 per employee for each day of noncompliance. The fines [ may be assessed from the first day of the infraction but not to exceed one year. Notwithstanding any provision of law to the contrary, any person with control or responsibility over decisions to disburse funds and salaries and who knowingly violates the provisions of this subparagraph shall be held personally liable for payments of fines. All funds collected under this subparagraph shall be continually appropriated and deposited into a nonlapsing workers' compensation fraud fund dedicated to the investigation and compliance activities required by this section and related sections pertaining to labor and insurance law. The commissioner of labor shall appoint as many individuals as necessary to carry out the department's responsibilities under this section.

VII. (a) "Employee", with respect to public employment, means:

(1) Any person in the service of an employer, as defined in RSA 281-A:2, IX, including members of the general court, under any express or implied voluntary contract of hire and every elected or appointed official or officer of the state or any political subdivision or agency thereof while performing official duties.

(2) Any person who is a call firefighter or special police officer, volunteer or auxiliary member of a fire or police department, ambulance or rescue service, or the state police, whether paid or not paid. For the purposes of this chapter, such a person shall be deemed to be an employee of the political subdivision of the state in which the department is organized.

(3) Any person who is a regularly enrolled volunteer member or trainee of the emergency management corps of this state as established under the state emergency management act. For the purposes of this chapter, such a person shall be deemed to be an employee of the state.

(4) Any person who fights a forest or other type of fire and who is either voluntarily under the direction of those authorized to give direction in the fighting of fires or who is under statutory compulsion to fight fires pursuant to RSA 227-L:11 and 227-L:13, or RSA 154:7, 8, and 9. For the purposes of this chapter, such a person shall be deemed to be an employee of the state with respect to fires fought under the provisions of RSA 227-L and deemed to be an employee of the municipality in which the fire is fought with respect to fires fought under the provisions of RSA 154.

(5) Any person who assists in a search for or an attempted rescue or rescue of another pursuant to RSA 206:26, XII, after January 1, 1982, and who is voluntarily under the direction of those authorized to give direction in searching for or attempting to rescue or rescuing another. A person who assists in the search for or attempted rescue or rescue of another shall, solely for the purposes of this chapter and not

otherwise, be deemed to be an employee of the state with respect to such activity. Any payments required to be made as a result of this paragraph shall be a charge against the general fund.

(6) In the absence of any mutual aid agreement or other similar written agreement that specifically addresses the issue of workers' compensation benefits, any person who acts as an agent to the department of health and human services or the department of safety by providing assistance in response to a specific public health or public safety incident. Such person shall be deemed an employee of the state for the purposes of this chapter. In order to be eligible for workers' compensation benefits under this chapter the person shall have been specifically designated in writing as an agent by the commissioner of the department of health and human services or the commissioner of the department of safety, or their respective designees, in accordance with the provisions of RSA 508:17-a. This subparagraph applies only to such designated agents who are not receiving compensation from either the department of health and human services or the department of safety, other than possible reimbursement for expenses actually incurred for such services, such as travel expenses, but who may be receiving compensation from his or her regular employer or from any other source.

(7) Any member of the New Hampshire national guard while on state active duty.

(8) Any person who is officially designated by the governing body of a political subdivision as a volunteer in a New Hampshire citizen corps local council program that is organized, recruited, trained, supervised, and has been activated by an authorized political subdivision employee or official acting in his or her capacity as the emergency management director of the political subdivision.

(b) "Employee," with respect to public employment shall not include any inmate of a county or state correctional facility who is, under RSA 651, required or allowed to work or perform services for which no significant remuneration is provided, any volunteer not covered under RSA 281-A:2, VII(a)(2) through (8), who performs services for which no significant remuneration is provided, or any participant performing community service work under a court order or the provisions of a court diversion program, or any person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities. "Employee," with respect to public employment, shall include any person participating in a local welfare work program established under RSA 165:31; however, the local governing body may vote to make the provisions of this chapter not applicable to local welfare work program participants through guidelines adopted under RSA 165:1, II.

(c) The provisions of RSA 281-A:2, VI(b)(1) through (4) and (c) shall also apply to this paragraph.

VIII. "Employer," with respect to private employment, means:

(a) A person, partnership, association, corporation, or legal representative of a person, partnership, association or corporation who employs one or more persons whether in one or more trades, businesses, professions or occupations and whether in one or more locations. In determining the number of persons employed, there shall be included persons whose contract of employment was entered into outside the state if such persons are actually employed on work in this state. For the purpose of determining the number of persons employed, executive officers elected or appointed and empowered in accordance with the charter and bylaws of a corporation and limited liability company members and managers designated in accordance with a limited liability company agreement shall not be considered to be employees, except that any executive officers or limited liability company members and managers in excess of 3 shall be counted as employees and except that there shall be no such exclusion in determining employer status for the purposes of RSA 281-A:23-b (alternative work opportunities), RSA 281-A:25-a (reinstatement) and RSA 281-A:64 (safety).

(b) Any other employer who may elect to accept the provisions of this chapter in accordance with RSA 281-A:3.

(c) Except where the context specifically indicates otherwise, the term employer as used in paragraph VIII shall be deemed to include the employer's insurance carrier or any association or group providing self-insurance to a number of employers.

IX. "Employer", with respect to public employment, means the state, any agency of the state, any county, city, town, school district, sewer district, drainage district, water district, public or quasi-public corporation, or any other political subdivision of any of these that has one or more employees subject to

this chapter. Except where the context specifically indicates otherwise, the term employer as used in this paragraph shall be deemed to include the employer's insurance carrier or any association or group providing self-insurance to a number of employers.

X. "Farm" means the operation of farm premises, and includes the planting, cultivating, producing, growing and harvesting of farming commodities thereon; the raising of livestock and poultry thereon; and any work performed as an incident to or in conjunction with such farm operations. It does not include the operations and activities of employers identified as florists, flower shops, and greenhouses.

X-a. "Gainful employment" means employment which reasonably conforms with the employee's age, education, training, temperament and mental and physical capacity to adapt to other forms of labor than that to which the employee was accustomed.

X-b. "Homogeneous" means of a similar kind or nature, or possessing similar qualities and attributes. A group or association of homogeneous employers shall mean employers who have similar trades, businesses, occupations, professions or functions.

XI. "Injury" or "personal injury" as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out of and in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. "Injury" or "personal injury" shall not include diseases or death resulting from stress without physical manifestation. "Injury" or "personal injury" shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer. No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another. Conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury. Notwithstanding any law to the contrary, "injury" or "personal injury" shall not mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless the employee reasonably expected, based on the employer's instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment.

XII. "Insurance carrier" shall include any corporation licensed to sell insurance in this state from which an employer has obtained a workers' compensation insurance policy in accordance with the provisions of this chapter.

XII-a. "Intoxication" means intoxication by alcohol or controlled drug as defined in RSA 318-B:1. This definition shall not include an employee's use of a controlled drug for which a prescription has been issued authorizing such drug to be dispensed to him, when the employee's use of the controlled drug is in accordance with the instructions for use of the controlled drug.

XII-b. "Health care provider" as used in this chapter includes doctors, chiropractors, rehabilitation providers, health services as defined in RSA 151-C:2, XVIII, health care facilities as defined in RSA 151-C:2, XV-a, and health maintenance organizations as defined in RSA 151-C:2, XVI.

XIII. "Occupational disease" means an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment. It shall not include other diseases or death therefrom unless they are the direct result of an accidental injury arising out of or in the course of employment, nor shall it include either a disease which existed at commencement of the employment or a disease to which the last injurious exposure to its hazards occurred prior to August 31, 1947.

XIV. "Permanent physical or mental impairment", as used in RSA 281-A:54, means any permanent condition that is congenital or due to injury or disease and that is of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining employment if the employee should become unemployed.

XIV-a. "Rehabilitation provider" as used in this chapter includes any person certified as a vocational rehabilitation provider under RSA 281-A:68 or RSA 281-A:69 and who operates for the purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other

services which are provided under competent professional supervision.

XV. "Wages" means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel or a similar advantage received from the employer and gratuities received in the course of employment from others than the employer; but "wages" shall not include any sum paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of the employment.

**Source.** 1988, 194:2. 1989, 204:2. 1990, 254:2-7. 1991, 376:2. 1992, 43:3. 1994, 3:25, 26, I, 267:1, 272:1, 351:1. 1995, 49:1, 2, 205:2, 299:20, 301:1, 2. 1996, 213:1, 231:4. 1997, 163:1, 324:2. 1999, 214:1. 2001, 47:1. 2005, 191:1. 2007, 231:2, 362:6-9. 2008, 95:1, 2, eff. Jan. 1, 2009. 2010, 145:1, eff. June 14, 2010.

# **APPENDIX F**

FINAL BILL REPORT

HB 1396

C 161 L 88

BY Representatives Wang, Patrick and Cole; by request of Department of Labor and Industries

Revising industrial insurance disability benefits.

House Committee on Commerce & Labor

Senate Committee on Economic Development & Labor

SYNOPSIS AS ENACTED

BACKGROUND:

MONTHLY BENEFITS. The amount of basic workers' compensation disability and death benefits paid monthly to injured workers or beneficiaries is based on a percentage of the worker's wage at injury. The percentage varies depending on the marital status of the worker and the number of children. However, the maximum amount is limited to 75 percent of the state average monthly wage. Tips, overtime pay and gratuities are not included in the calculation of a worker's wage. The Board of Industrial Insurance Appeals has determined that the Department of Labor and Industries must base wages on the worker's current wage at the time of injury, not on the average of the worker's recent wage history.

OCCUPATIONAL DISEASE. Compensation for an occupational disease claim is based on the payment schedule that was in effect at the time the worker contracted the disease or was last exposed to injurious substances. For many occupational diseases, the disease does not manifest itself for many years after the date that the worker was last exposed to the injurious substance.

In a 1987 Washington state supreme court decision, industrial insurance coverage for occupational diseases was extended to certain disabilities caused by repetitive trauma and aggravation of pre-existing nonoccupational diseases. It is not clear whether the court's decision extends coverage to mental stress cases.

PERMANENT DISABILITY. If a worker is awarded a permanent partial disability award based on a back injury that does not have marked objective clinical findings, the award is automatically reduced by 25 percent.

JOB MODIFICATION. Job modification benefits are allowed for modification of the worker's old job, but not a new job. New jobs or new job modifications are not listed in the return-to-work priorities for vocational rehabilitation plans.

REOPENING CLAIMS. If aggravation, diminution or termination of a worker's disability occurs within seven years of the previous claim closure order, the worker's claim may be reopened to adjust benefits.

SELF-INSURERS' CLAIM CLOSURE. In 1986, self-insurers were given authority to close industrial insurance claims that involve medical benefits or temporary disability benefits. The program is scheduled for termination on June 30, 1988.

#### SUMMARY:

MONTHLY BENEFITS. Beginning July 1, 1988, the maximum monthly disability or death benefit payable to an injured worker or beneficiary is 100 percent of the state average monthly wage. The definition of "wages" for determining the monthly wages on which to compute an injured worker's industrial insurance benefits is amended to include tips, to the extent that tips are reported to the employer for federal income tax purposes. For employment that is exclusively seasonal or essentially part-time or intermittent, a 12 month averaging formula is established to determine the monthly wage.

OCCUPATIONAL DISEASE. The rate of compensation for occupational disease claims filed on or after July 1, 1988, is established as of the date that the disease requires medical treatment or becomes disabling, whichever occurs first, without regard to the date on which the disease was contracted or the date the claim was filed. The Department of Labor and Industries is directed to adopt a rule that mental conditions and disabilities caused by stress are not included within the definition of occupational disease.

PERMANENT DISABILITY. The reduction in the permanent partial disability award for back injuries that do not have marked objective clinical findings is deleted beginning July 1, 1988.

JOB MODIFICATION. The department is authorized to provide job modification benefits to workers entering employment with a new employer. Job modification with a new employer or a new job is

made a return- to-work priority under a vocational rehabilitation plan.

REOPENING CLAIMS. The time period for reopening an industrial insurance claim is changed to one seven year period that runs from the date the first closing order becomes final. However, the director may provide proper and necessary medical care at any time. After July 1, 1988, an order denying an application to reopen must be issued within 90 days of the filing of the application or it is deemed granted. The department may extend the 90 day time period an additional 60 days for good cause.

SELF-INSURERS' CLAIM CLOSURE. The program allowing self-insurers to close certain industrial insurance claims is extended until June 30, 1990.

VOTES ON FINAL PASSAGE:

House 58 36  
Senate 42 7 (Senate amended)  
House 97 0 (House concurred)

EFFECTIVE: July 1, 1988 (Sections 1-3 and 6)  
June 30, 1989 (Section 4)

HB 1396 6/15/99 [ ]

# APPENDIX G

...authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease.

Authorizing this preventive treatment after the exposure does not mean the department is required to allow the claim. Claims filed for exposure to an occupational disease, with no injury, will be rejected, but the immunological treatment and treatment for any negative reaction to the immunological treatment should be authorized. Examples include exposures to the HIV virus, hepatitis, and similar infectious diseases. (See WAC 296-20-03005, "Preventive Treatment for Infectious Diseases" in Chapter 4, and Attachment 4-10E.)

A worker may not know whether he or she has contracted the disease until months after the exposure. Or a worker's claim may be rejected for lack of findings when the exposure occurs. If the disease is contracted, the worker should file a new occupational disease claim.

The department is also unable to allow claims to provide treatment to prevent the contraction of a disease prior to probable exposure. Preventive treatment before exposure does not meet the definition of injury or occupational disease and is the employer's or worker's responsibility, not the department's.

### **Exposure to Heat and Cold**

A claim for exposure to heat or cold may be allowable when the exposure is greater than that of the general public. Some examples are sunstroke, sunburn, heat prostration, frostbite, and hypothermia. These claims are adjudicated as injury, rather than occupational disease, claims. The exposure is generally a one-time, specific incident or occurs over the course of one day. An example would be a roofer who is spreading hot tar on a 90-degree day and is diagnosed with sunstroke.

### **Chemically Related Illnesses**

When multiple chemical sensitivity (MCS) or another chemically related illness (CRI) is diagnosed, the claim may need to be forwarded to Unit 3 for adjudication and management. This applies to both new claims and when these exposures/conditions are contended on existing claims. Some possible CRI claims include:

- Chemical claims, including chemical burns.
- Lead exposure and lead poisoning with an ICD-9 diagnosis code of 984 through 984.9, E861.5 or E866.0. *Used here, E means external cause code.*
- Respiratory claims that do not involve other body systems or injuries.

- Other occupational diseases occurring as a result of acute or chronic exposure to a chemical or physical agent.

(For the complete list of claims assigned to Unit 3, see the "Assignment of Claims and Claims Complexity Guideline" in the G drive.) If any of these illnesses are diagnosed on the ROA, the claim manager should send an email to CRIAsbestos, the unit mailbox. The email should include the claim number, worker's name, and condition contended. If the Unit 3 supervisor decides that this is an appropriate referral, he or she will transfer the claim assignment on LINIIS.

## Occupational Diseases in Fire Fighters

In 1987, the legislature recognized that fire fighters have a higher rate of respiratory disease than the general public. RCW 51.32.185 established the prima facie presumption is that a fire fighter's respiratory disease is an occupational disease. Heart problems, some cancers, and some infectious diseases have been added to the conditions presumed related to fire fighters' work exposure.

**Claim validity determinations** *for respiratory diseases, heart problems, and cancer are made by specialty unit adjudication staff only.*

If fire fighters' claims for respiratory diseases, heart problems, or cancer are assigned to regular units before the claim allowance decision have been made, CMs should notify their supervisors so the claims can be forwarded for validity adjudication.

Claim validity for fire fighters' contentions of:

- Respiratory diseases, including mycobacterium tuberculosis, are assigned to the chemically related illness unit, Unit 3.
- Heart disease and cancer claims are assigned to workposition R412 in the pension section.
- *ONLY hepatitis, meningococcal meningitis, and HIV/AIDS claims are assigned to CMs in regular claims units.*

**Presumption of coverage.** A fire fighter's claim is likely to be allowable as an occupational disease when it's filed for a:

- Respiratory disease,
- Infectious disease or cancer listed in the law, or
- Heart problem within 72 hours of exposure to toxic substances or within 24 hours of strenuous physical exertion due to fire fighting activities.