CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
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Re: Hughes County Civ. No. 17- 000088: *Dustin K. Engelien v. West Central Metal and Western National Mutual Insurance Company.*

Dustin Engelien, Appellant, sought to have an expert witness testify in support of his workers' compensation claim before the Department of Labor. Appellee, Employer/Insurer, filed motions to exclude Engelien's expert witness and for summary judgment. The Administrative Law Judge granted both. This Court Reverses and Remands.

BACKGROUND

Dustin Engelien is a 41 year-old employee of West Central Hollow Metal in Rapid City, South Dakota. In his capacity as an employee of West Central, Engelien builds steel doors and steel door frames. Engelien has a history of alcohol abuse and alcohol-related withdrawal seizures.

Dr. Teresa Hastings is a licensed clinical psychologist with a Ph.D in clinical psychology from Louisiana State University. (Hastings Dep. at 11:7-10). From 1996-1997, Dr. Hastings

completed internship rotations in forensic psychology, child neuropsychology, and adolescent and adult mental health. *Id.* at 13:7-10. From 1997 to 2010, she worked in private practice as a child neuropsychologist, primarily limiting her practice to working with children with learning disorders like ADHD and dyslexia. *Id.* at 17:1-14. From 2010 to 2015, Dr. Hastings worked as a rehab psychologist at Rapid City Regional Hospital, where she did neuropsychological testing and impatient therapy for individuals with injuries. *Id.* at 17:10 - 21:16. From 2015 to present, Dr. Hastings has worked in private practice, where she sees nearly 250 neuropsychological patients a year. *Id.* at 22:24-23:3. Over the course of her career, Dr. Hastings estimates that she has investigated approximately 100 fall cases. *Id.* 54:20.

On January 27, 2014, Engelien was sanding a door on a flat table at West Central, while a co-worker was working nearby. At approximately an hour after the morning break, the co-worker left the area to retrieve a pop and use the restroom, leaving Engelien alone. When the co-worker returned, he found Engelien lying unconscious on the concrete floor, by the door. There were no witnesses to the fall and Engelien has no memory of what occurred or what caused him to blackout. Eugene Hansen, Engelien's supervisor, reported that when he came upon the scene, he observed Engelien lying on his side with his feet possibly underneath the table. When Engelien was rolled-over, Hansen observed a couple puddles of blood where Engelien's face would have been positioned on the floor. Hansen also noted that the power-sander that Engelien would have been using was still partially in his hand.

Following the accident, Engelien was taken to the emergency room and admitted to the hospital, where he remained until March 6, 2014. The doctor's clinical impressions were (1) alcohol withdrawal seizure; (2) traumatic subarachnoid hemorrhage; and (3) basilar skull fracture. He was placed on alcohol withdrawal seizure protocol, and on February 1, 2014, he underwent a right frontal craniotomy for evacuation of a subfrontal hematoma.

On February 26, 2014, Engelien's treating physician referred him to Dr. Hastings for a neuropsychological evaluation. Dr. Hastings performed neuropsychological testing on Engelien on three occasions to determine his level of cognitive impairment. On her last evaluation of Engelien on October 6, 2014, she issued a letter confirming that Engelien had scored within the normal range on all areas of neuropsychological functioning, and that he could return to work part-time.

On March 26, 2014, Engelien filed a Petition for Hearing, alleging that that his injuries were the result of a work-related accident on January 27, 2014. In response to Engelien's Petition, West Central, and insurer, Western National Mutual Insurance Company, denied that his condition arouse out of and in the course of his employment, and affirmatively alleged that his condition and resulting injuries were the result of a personal health condition.

On October 20, 2015, Dr. Hastings was asked by Engelien's counsel to render an opinion "within a reasonable degree of medical probability" as to whether Engelien hit his head on a steel door during his fall. (Hastings Dep. Ex. 2). On April 6, 2016, Dr. Hastings issued a two-page written report in which she opined that in her professional opinion, Engelien's right frontal parenchymal hematoma was most likely a coup injury (an injury occurring on the side of the brain where the impact is received), rather than a contrecoup injury (an injury occurring on side of the brain opposite to where the impact is received). (Hastings Dep. Ex. 1). Dr. Hastings wrote that Engelien "most likely hit his forehead on the steel door he was working on, breaking his fall and then hit the back of his head on the concrete floor." *Id.*

The Department of Labor was scheduled to hear the testimonies of Dr. Hastings and Employer/Insurer's expert witness on May 2, 2017. The threshold issue to be decided at the hearing was whether Engelien hit his head on the steel door. However, on March 6, 2017, Employer/Insurer made motions asking the Administrative Law Judge (ALJ) to (1) exclude Dr. Hastings' testimony and (2) find for summary judgment. The ALJ granted both motions. Engelien appeals.

QUESTIONS PRESENTED

I. WAS THE EXCLUSION OF THE TESTIMONY OF DR. TERESA HASTINGS AN ABUSE OF DISCRETION?

II. WAS THE SUMMARY JUDGMENT GIVEN IN ERROR?

STANDARD OF REVIEW

The standard of review in an administrative appeal is governed by SDCL 1-26-36. All actions regarding an agency's conclusions of law are fully reviewable de novo, while questions of fact are reviewed by this Court under the clearly erroneous standard. *Belhassen v. John Morrell & Co.*, 2000 SD 82, 613 N.W.2d 531; *Katz v. South Dakota State Bd. of Medical &*

Osteopathic Examiners., 432 N.W.2d 274 (S.D.1988). This Court gives deference and great weight to the agency or hearing officer on fact questions. *Goebel v. Warner Transp.*, 2000 SD 79, ¶ 10, 612 N.W.2d 18, 21; *Kurtz v. SCI*, 1998 SD 37, ¶ 9, 576 N.W.2d 878, 882; *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228. When factual determinations are made on the basis of documentary evidence, however, the matter is to be reviewed de novo, unhampered by the clearly erroneous rule. *Watertown Coop. Elevator Assn. v. State Dept. of Rev.*, 2001 SD 56, ¶ 10, 627 N.W.2d 167, 171; *Kurtz*, 1998 SD 37, ¶ 10, 576 N.W.2d at 882. To overturn factual determinations made by an administrative agency, there must be a definitive and firm conviction that a mistake was made. *Goebel*, 2000 SD 79, ¶ 10, 612 N.W.2d at 21; *Kurtz*, 1998 SD 37, ¶ 9, 576 N.W.2d at 882; *Sopko*, 1998 SD 8, ¶ 6, 575 N.W.2d at 228.

This Court reviews a department's decision to deny an expert's testimony under the abuse of discretion standard. *State v. Guthrie*, 2001 SD 61, ¶ 30, 627 N.W.2d 401, 414–15 (internal citations omitted); *see also State v. Edelman*, 1999 SD 52, ¶ 4, 593 N.W.2d 419, 421 (citing *State v. Bachman*, 446 N.W.2d 271, 275 (S.D.1989)). The South Dakota Supreme Court has made clear that the law does not require expert testimony to be above all criticism before it is admissible. *See Guthrie*, 2001 SD 61, 627 NW2d at 416. In addition, this Court interprets the rules of evidence liberally and in harmony with the general approach to relax the traditional barriers to the admissibility of expert testimony. *Id.* (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 588, 113 S.Ct. 2794, 125 L.Ed.2d 480 (1993)). In reviewing a grant of summary judgment, this Court conducts an independent review of the record. *Id.* (citing *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 499 (S.D.1990); *Koeniguer v. Eckrich*, 422 N.W.2d 600, 601 (S.D.1988)). This Court must determine whether:

> the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. This Court's task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there

> exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Weiss v. Van Norman, 1997 SD 40, ¶ 9, 562 N.W.2d 113, 115 (quoting *Lamp v. First Nat'l Bank of Garretson,* 496 N.W.2d 581, 583 (S.D.1993) (citation omitted)).

ANALYSIS & DECISION

I. The Exclusion of Dr. Hastings' Testimony was an abuse of discretion.

In a workers' compensation case, the claimant has the burden of proving all facts essential to sustain an award of compensation. *King v. Johnson Bros. Constr. Co.*, 83 SD 69, 73, 155 NW2d 183, 185 (1967). The claimant must prove these essential facts by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992). Under SDCL § 62-1-1(7), the claimant must establish that the injury arose out of and in the course of his employment. It must also be established by medical evidence that the claimant's employment or employment-related activities were a major contributing cause of his condition. *See Wise v. Brooks Constr. Serv.*, 2006 SD 80, ¶17, 721 NW2d 461, 466 ("Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained. The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability.") (citations omitted).

The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition "because the field is one in which laypersons ordinarily are unqualified to express an opinion." *Id.* (quoting *Rawls v. Coleman-Frizzell, Inc.,* 2002 SD 130, ¶ 21, 653 N.W.2d 247, 252 (quoting *Day v. John Morrell & Co.,* 490 N.W.2d 720, 724 (S.D.1992))).

Under South Dakota law, the admissibility of expert testimony is governed by SDCL 19-19-702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

Furthermore, before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie,* 2001 SD 61, ¶ 32, 627 N.W.2d at 415. "Relevance embraces '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.' " *Id.* at 415 (quoting SDCL 19–12–1). Where the evidence is shaky but admissible, it should be attacked by "vigorous cross examination, presentation of contrary evidence, and careful attention to the burden of proof," not exclusion. *Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798, 125 L. Ed. 2d 469.

Here, Engelien argues that his right frontal brain injury is the result of him falling forward during his seizure and striking his head against the steel door he was sanding (coup injury). (In opposition, Employer/Insurer argues that Engelien fell backwards, and that his frontal brain injury is the result of his brain jostling forward (contrecoup injury) after the back of his head struck the concrete floor.) To address this dispute, Engelien offered the expert testimony of Dr. Hastings. The question this Court must answer is whether the ALJ abused her discretion by excluding Dr. Hastings' testimony as an expert witness.

At the Department level, Employer/Insurer argued that while Dr. Hastings may be competent to testify on the results of neuropsychological testing concerning the presence of cognitive impairment, she is not equally qualified to offer opinions on topics that are medical in nature. Employer/Insurer's brief gave considerable attention to Dr. Hastings' admission in her deposition that she is not a medical doctor and cannot make a medical diagnosis of an intracranial hematoma to a reasonable degree of medical probability. Employer/Insurer posited that this concession was fatal to Appellant's positon, arguing that under South Dakota law causation in a worker's compensation proceeding must be established to a reasonable degree of medical probability.

Echoing Employer/Insurer 's brief, the ALJ wrote that while "Dr. Hastings is qualified to evaluate Engelien's current condition regarding traumatic brain injury, the facts available to [Dr. Hastings] do not allow her to conclude the causation of Engelien's condition." (Letter and Decision Order at 3). To this effect, the ALJ wrote:

> Dr. Hastings opinions are *speculative*. As there were no witnesses to Engelien's fall and he has no memory of the incident, the only evidence to support a conclusion that he was facing the door at the time of the fall was the fact that he was found with the sander in his hand. The fact that Dr. Hastings believes a fall on the door could have caused the current injury is not enough to establish that the fall did cause the current injury. She is not an expert in biomechanical engineering or accident reconstruction. Her extensive experience with brain injury does not give her authority to draw a medical conclusion regarding causation or opine as to the facts the incident in question.

Id. (emphasis added).

In opposition, Engelien argues that Dr. Hastings opinions are not speculative and that she has specialized knowledge, experience, and training that qualify her to make the professional opinion that Engelien's frontal brain damage was the result of him striking his head against the steel door he was sanding. Engelien's brief directs this Court to Dr. Hastings' deposition wherein she testified that while she is not a medical doctor and cannot make a medical diagnosis of an intracranial hematoma, the overlap between neuropsychology and medicine qualifies her to opine as to the likely cause of Engelien's head injury. (Appellant's Brief at 4; Hastings Dep. 36:18-20). Engelien also points to Dr. Hastings' testimony that she has a formal education in neuropsychology, five years of "basically" post-doctoral training in neuropsychological training at Rapid City Regional Hospital, has investigated approximately 100 fall cases in her career, and works with 250 neuropsychological patients a year. (Appellant's Brief at 4, 9; Hastings Dep. 23:2-3; 44:18-20; 54:20).

The question of whether a psychologist or neuropsychologist may provide expert testimony on the cause of an organic brain injury is one which has divided jurisdictions in our legal system. The idea that neuropsychologists are per se unqualified to testify as experts in

these cases is the minority opinion. *Bennett v. Richmond*, 960 N.E.2d 782, 784–85 (Ind. 2012) (discussing jurisdictional split and majority rule); *Hutchison v. Am. Family Mut. Ins. Co.,* 514 N.W.2d 882, 886–87 (Iowa 1994) ("The majority of the states that have passed on the issue have permitted such testimony."); *Huntoon v. TCI Cablevision of Colo., Inc.,* 969 P.2d 681, 690–91 (Colo.1998) (discussing that the majority of jurisdictions have found that, with the proper foundation, neuropsychologists can opine on the cause of an organic brain injury).

The jurisdictions restricting psychologist/neuropsychologist testimony premise their arguments on the fact that unlike medical doctors, psychologists are not educated in the physiological aspects of the human body. *Landers v. Chrysler Corp.,* 963 S.W.2d 275, 280–81 (Mo.Ct.App.1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 223, 226 (Mo.2003) (en banc); See *Martin v. Benson,* 125 N.C.App. 330, 481 S.E.2d 292 (1997) (neuropsychologist was not competent to testify on medical causation because the opinion invaded field reserved for the practice of medicine); *Edmonds v. Illinois Central Gulf R.R. Co.,* 910 F.2d 1284 (5th Cir.1990) (clinical psychologist not qualified to testify on potential link between employee's job related stress and worsening of heart condition).

However, the majority of the states have found such testimony permissible, "basing their reasoning on relevant statutes or case law, evidence rules, common sense, or some combination [of those factors]." *Bennett* , 960 N.E.2d at 745. In *Hutchison v. American Family Mutual Insurance Co.*, the Iowa Supreme Court held that a statute which limited expert testimony in medical malpractice actions did not similarly preclude a clinical psychologist with substantial experience in neuropsychology from testifying as to the medical cause of an insured's head injury. 514 N.W.2d 882, 886 (Iowa 1994). The court noted that the criteria for qualifications in the manner of knowledge, skill, experience, training, and education were too broad to allow distinctions on whether a proposed expert belonged to a particular profession or held a specific degree. *Id.* at 888-889. Finally, the court observed that with the aid of vigorous cross-examination, the fact finder is capable of detecting the plausible explanation of events. *Id.* at 888.

In *Valiulis v. Scheffels,* the Illinois Court of Appeals found that a trial court did not abuse its discretion by allowing a psychologist/neuropsychologist to testify as to the causal connection between the head trauma in the case and the onset of multiple sclerosis (MS) symptoms. 191 Ill.App.3d 775, 138 Ill.Dec. 668, 547 N.E.2d 1289, 1296–97 (Ill.App.1989). The court noted the

doctor's qualifications and experience were determining factors in allowing him to testify, citing that he had seen approximately 150 patients with MS, and had been called upon on many occasions by neurologists and psychologists to assist in the diagnosis of patients who turned out to have MS. *Id.*

Finally, in *Huntoon v. TCI Cablevision of Colo., Inc.*, the Supreme Court of Colorado reversed a court of appeals ruling that excluded a neuropsychologist's testimony because no authority in the state allowed that class of doctors to testify as to the physical cause of organic brain injury. 969 P.2d 681. In overturning the appellate court's ruling, the Supreme Court noted the doctor's extensive educational background, including master's and doctoral degrees in psychology, and additional study in neuropsychology, including understudy with experienced neuropsychologists. *Id.* at 685. The court observed that there was no compelling reason for the law to single out and categorically exclude a class of professions from giving opinions on matters well within their area of expertise. *Id.* at 690.

It is notable to mention that the ALJ here did not rule that psychologists are per se unqualified to opine on issues of medical causation, but rather that Dr. Hastings herself was not qualified to render a medical opinion on the cause of the head injury at issue. Nevertheless, the conclusions and determinations the ALJ reached in her opinion are squarely aligned with the species of thought advocated by the minority view—a view this Court rejects. Today, this Court joins the majority of states which have rejected placing artificial barriers on the admission of expert testimony by otherwise qualified psychologists.

To conclude, as the ALJ did, that Dr. Hastings' should be precluded from testifying because she was unable to qualify her opinions as "medical opinions" was an abuse of discretion. The record supports that Dr. Hastings' training and experience in neuropsychology qualify her to provide expert testimony on the cause of Engelien's injuries. Indeed, in addition to the qualifications included in Engelien's briefs, this Court also notes that Dr. Hastings (1) performed neuropsychological testing on Engelien on three separate occasions in her capacity as a rehab psychologist at Rapid City Regional Hospital before being hired to give her expert testimony here (Hastings Dep.27:17 - 28:12); (2) has extensive experience narrowing down neuropsychological symptoms and behaviors into classifications and disorders (*Id. at* 37: 5-25); (3) previously worked for physicians to diagnose contrecoup injuries as potential causes for a

hematoma (*Id. at* 48: 16-22); and (4) has experience working with individuals with alcohol withdrawal symptoms like those Engelien experienced here. (*Id.* at 59: 22-25).

SDCL 19-19-702 does not require an expert to hold a specific degree or membership in a professional organization to testify on a particular subject. The fact that Dr. Hastings is not a medical doctor does not bar her from giving expert opinion, but rather ***goes to the weight*** of her testimony. See *State v. Spiry,* 1996 SD 14, ¶ 16, 543 N.W.2d 260, 264; *see also Lauria v. Nat'l R.R. Passenger Corp.,* 145 F.3d 593, 598 (3d Cir.1998) (holding that trial court abused its discretion by excluding testimony simply because the trial court did not deem proposed expert to be the best qualified or because proposed expert did not have the specialization that the trial court considered most appropriate). Moreover, "[***a]ny other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial.***" *Burley v. Kytec Innovative Sports Equip., Inc.,* 2007 S.D. 82, ¶ 24, 737 N.W.2d 397, 406. (emphasis added).

Another reason cited by the ALJ for excluding Dr. Hastings' expert testimony is that she "is not an expert in biomechanical engineering or accident reconstruction." (Letter and Decision Order at 3) Here, again, this Court finds that the ALJ set the bar too high. While these additional qualifications would add lines to Dr. Hastings' resume, this Court does not find that their absence takes anything away from her ability to render an expert opinion on the cause of Engelien's head injury. During Dr. Hastings deposition, she explained that the neuropsychological testing she administered on Engelien revealed an absence of visual impairment, which would have manifested had Engelien simply hit the back of his head. (Hasings Dep. 46: 17-21). The ALJ should have concluded that this opinion, coupled Dr. Hastings' aforementioned education, training, and experience qualified her to render an expert opinion on this matter.

The offered testimony of Dr. Hastings not only meets the criteria of Rule 702 and is clearly relevant, but as noted above, exclusion is not appropriate where the evidence is "shaky but admissible." *Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798, 125 L. Ed. 2d 469. The trial process is well equipped to deal with contrasting opinions through "vigorous cross examination, presentation of contrary evidence, and careful attention to the burden of proof." *Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798, 125 L. Ed. 2d 469.

II. The Administrative Law Judge clearly erred in finding that summary judgment was appropriate.

This Court next considers whether the ALJ properly granted summary judgment. In order to prevail on a motion for summary judgment, the nonmoving party 'must present specific facts showing that a genuine, material issue for trial exists.'" *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 14, 719 N.W.2d 780, 785 (citing *Stoebner v. South Dakota Farm Bureau Mut. Ins. Co.*, 1999 S.D. 106, ¶ 6, 598 N.W.2d 557, 558). In addition, this Court has notes that "[s]ummary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Richards v. Lenz,* 539 NW2d 80, 83 (SD 1995) (citing *Jewson v. Mayo Clinic,* 691 F.2d 405 (8th Cir. 1982).

The ALJ's determination that Dr. Hastings should be precluded from providing expert testimony had the effect of disposing the entire case via summary judgment. In light of this Court's ruling that the ALJ abused her discretion on the expert testimony issue, this Court finds that her summary judgment conclusion was clearly erroneous.

CONCLUSION

A judge should "screen unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.,* 738 F.3d 960, 969–70 (9th Cir. 2013). Simply put, a "court is not tasked with deciding whether the expert is right or wrong, just whether [the] testimony has substance such that it would be helpful to a [factfinder]." *Id.* at 969–70. The conclusion that Dr. Hastings' opinion is not persuasive is one which the ALJ may reach, but not before her testimony is properly heard. Dr. Hastings' education, training, and experience qualify her to provide an opinion on the cause of Engelien's right frontal brain injury.

Here, the ALJ simply weighed the strength of Dr. Hastings' testimony from a deposition transcript, found her professional background wanting, and disposed of the entire case without following the teachings of *Daubert* on the correct method of testing shaky evidence. Summary Judgment, of course, requires the ALJ to view the facts in a light most favorable to the non-movant—a difficult task when those facts have been improperly excluded prior to trial.

It should be noted that this opinion only reaches admissibility and the related question of summary judgment; it does not in any way suggest what ***weight*** the ALJ should give the

testimony of Dr. Hastings at the trial level. Weight, of course, is a matter to be decided by the ALJ after the adversary process has taken place.

The decision below is hereby REVERSED and REMANDED.

Sincerely,

Mark Barnett

The Honorable Mark Barnett
Circuit Court Judge