

The Aluminum Association

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June 10, 1993

TO: HEALTH ADVISORY PANEL

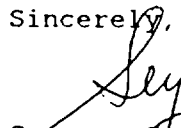
RE: WORKERS' COMPENSATION CLAIMS

Ladies and Gentlemen:

The Industrial Disease Standards Panel in Ontario sent us their report to the Workers' Compensation Board on Respiratory Complications among Workers Receiving Compensation for Non-malignant Respiratory Disease. A copy is enclosed.

Also enclosed is a copy of an article that appeared in the New Jersey Law Journal regarding a claim of aluminum toxicity from occupational exposure to aluminum. The claimant, an employee of Continental Can Company was found to have elevated levels of aluminum in his blood, according to the testimony.

Sincerely,


Seymour G. Epstein
Technical Director

SGE/kyg

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Appellate Division: State v. Barone, A-2433-91T2, opinion by Sullivan, J.A.D. decided January 15, 1991, approved for publication February 2, 1991. Before Judges Ansell, Doree and Stillman. On appeal from the Law Division, Somerset County. [Sat below Judge Coleman.] 1005 N.J. 14-2 0136.

Defendant was indicted for an attempted burglary of an automobile, and aggravated assault upon a law enforcement officer. A jury was empaneled and the parties were directed to be ready to proceed the following morning. The next morning the assistant prosecutor assigned to the case advised the court that her office was having difficulty locating the victim of the alleged attempted burglary. The prosecutor told the court that police officers had been sent to the victim's home but that she was not there, and that a prosecutor's representative had called her place of employment but that she was not there either. The prosecutor also stated that there were no reports of automobile accidents or hospital admissions which might establish the witness's absence. The prosecutor then requested the court to continue the trial for one day so that the whereabouts of this victim could be determined. The court denied the prosecutor's application. At 10:35 a.m. the court discharged the jury and declared a mistrial. Defendant proffered his right to make an appropriate motion regarding the declaration of a mistrial. (If a trial court convicts that difficulty in locating a witness may require the declaration of a mistrial or other remedial measure, the court should require a complete record of the relevant facts to be placed on the record before it acts. The trial court failed to properly discharge this responsibility here.) Defendant's motion to dismiss the indictment on the ground that a retrial was barred by double jeopardy was denied.

It is firmly established that jeopardy attaches when a jury is selected and sworn. Therefore, if the court declares a mistrial without the defendant's consent after a jury is sworn, a retrial is barred by double jeopardy unless there was a "manifest necessity" for the mistrial or the "ends of public justice" would be defeated by an acquittal. *United States v. Davis*, 424 U.S. 600, 606-07 (1976). "The underlying hypothesis" of this rule is that "the trial once started should proceed to its conclusion." *Id.* at 406. A trial court's failure to consider less drastic alternatives than the declaration of a mistrial is one circumstance which has led reviewing courts to conclude that there was an absence of "manifest necessity" for a mistrial.

Although the sudden serious illness or unexpected disappearance of a crucial witness could create a "manifest necessity" for the declaration of a mistrial which would allow the State to retry a defendant, temporary absence of a witness is an insufficient basis.

Thus, in *State v. Sims*, 197 N.J. Super. 146 (App. Div. 1984), the victim of the alleged offense, who apparently was disinclined to cooperate with the State for personal reasons, failed to respond to a subpoena. Defense counsel acceded to the court's request to move for a mistrial,

which the court then granted. The empanelling of a new jury and retrial of defendant under these circumstances was barred by double jeopardy.

If there be any essence in the doctrine of jeopardy, it must be that the State may not retreat from the field when its case runs sour and then be permitted to rally forth on a future day before a new jury when its case is refreshed and reinforced. *Id.* at 150-51.

Held: There was a similar absence in this case of the kind of "manifest necessity" which could justify the declaration of a mistrial without the defendant's consent. The court took this drastic action solely because an important prosecution witness failed to appear within the first hour and a half of the court day. The court was given no reason to believe that this witness was seriously ill or that her absence was more than temporary. Therefore, the court should have anticipated that the witness could be produced if the State's motion for a brief continuance were granted. Alternatively, the court could have insisted that the State proceed with the remainder of its case. The State's proof of the charge of aggravated assault upon a law enforcement officer was not in any way dependent on the testimony of the missing witness.

Finally, the trial court's finding that defendant acquiesced in the declaration of a mistrial is rejected. To the contrary, when the court declared a mistrial sua sponte, defendant expressly reserved his right to move for a dismissal of the charges.

Reversed and remanded for entry of a judgment of acquittal.

— *Quoted by Steven P. Sims*

(This slip opinion is 6 pages long.)

For appellant — McDonald, Rogers & Rizzolo (Michael J. Rogers on the brief). For respondent — Nicholas L. Bissell, Jr., Somerset County Prosecutor (Nicholas A. Ghidella, III, Assistant Prosecutor, on the brief).

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page 48.

State Digests

WORKERS' COM- PENSATION

Although the Compensation Judge's finding that petitioner did not suffer from aluminum toxicity is supported by substantial credible evidence in the record, the compensability of his claimed psychiatric disability is not dependent on a prior showing of some physical disability but on demonstrable objective medical evidence that repetitive stimuli (here, aluminum dust and fumes), viewed realistically, were peculiar to his workplace and that his claimed traumatic stress disorder is due in material degree to this stimuli; petitioner's subjective reaction is not to be completely disregarded, and whether a psychiatric disorder arising from his perception that he suffered from a disease due to elevated levels of aluminum in his blood is sufficient to meet his burden of proof is to be determined by the compensation judge on remand, considering the totality of factors including the nature of his work, the duration and extent of his actual exposure to aluminum, the reasonableness of his psychological response to his condition, and whether any unrelated cause or event may have triggered his disorder.

Appellate Division: Wernowski v. Continental Can Company, A-6103-90T3; opinion by Hervey, J.A.D.; decided January 8, 1993; approved for publication January 29, 1993. Before Judges Gaskin, Hervey and Stern. On appeal from the Division of Workers' Compensation.

Petitioner Kenneth Wernowski worked for respondent Continental Can from January 1971 to July 1986. He described the conditions at the plant as "very smoky, cloudy" and observed dust particles on his clothing and skin on a daily basis. On occasion he detected silver dust particles in his mucus. In the early 1980s, he developed nausea, migraine headaches, and dizziness. He began to suffer weight loss and a numbness on the left side of his body. In October 1985 he sought medical help.

Dr. Milton Bronstein, an internist, conducted a series of blood tests that disclosed elevated aluminum levels, which he attributed to petitioner's occupation. He advised petitioner that he should not be working with aluminum. Consequently, petitioner left his employment with Continental Can. Dr. Bronstein concluded that he was totally disabled because of aluminum toxicity and associated anxiety.

Dr. Samuel Pollock, petitioner's psychiatrist, testified that he suffered from "neurological residuals" and brain damage, attributable to his exposure to noxious aluminum fumes and dust. He fixed disability at 25 percent partial total, neuropsychiatric. Dr. Roland Goodman, an internist, was of the view that the aluminum toxicity and petitioner's "severe neuropsychiatric condition" rendered him totally and permanently disabled.

Respondent's expert, Dr. Howard Kippen, an internist, found no evidence of aluminum toxicity and concluded that petitioner's depression and stress disorder were not associated with his employment. Respondent's

psychiatrist agreed, noting that although petitioner was "preoccupied" with the diagnosis of aluminum poisoning he was neurologically normal.

In dismissing the claim, the judge of compensation attributed great value to Dr. Kippen's testimony that although petitioner may have had elevated aluminum levels in his blood there was no evidence of aluminum poisoning. Implicit in his findings is that, in the absence of competent proof that petitioner suffered from aluminum toxicity, his psychiatric disability was not compensable.

Held: The judge's determination that petitioner did not suffer from aluminum toxicity as a result of his employment is supported by substantial credible evidence in the record. However, that finding is not dispositive of petitioner's stress disorder claim.

The question is whether petitioner's psychiatric disability is a "compensable occupational disease" as defined by N.J.S.A. 34:15-31:

... all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions ... characteristic of or peculiar to a particular employment.

It is now settled that compensable personal injuries include psychiatric injuries and hence may be an independent compensable workers' compensation claim. *Sunderlin v. E.I. DuPont Co.*, 102 N.J. 402 (1986).

Nevertheless, claims of psychiatric disability must be based on demonstrable objective medical evidence rather than on purely subjective factors. The objective/subjective distinction is not resolved by determining whether the petitioner suffers physical manifestations of psychiatric disability; the distinction is between independent professional analysis and the bare statement of the patient.

The compensability of a psychiatric injury is also not dependent upon whether the petitioner has suffered a work-related "physical" accident or trauma. Moreover:

That the stimulus is gradual, in the form of sustained stress ... or harassment does not ... make nervous injury any the less compensable than if it were caused by sudden shock. *Id.* Larson, *The Law of Workers' Compensation*, § 42.23(b).

Williams v. Western Elec. Co., 178 N.J. Super. 571, 585 (App. Div. 1981), held that mental illness caused by repetitive mental stress may be compensable if there is objective evidence "when viewed realistically" that the alleged work exposure "was to a material degree a contributing factor." *Id.* at 580. No compensability was found in *Williams* because the evidence consisted primarily of petitioner's subjective, neurotic reaction to the demands of his job.

Gorden v. State Judiciary, 256 N.J. Super. 438 (App. Div. 1991), aff'd o.b., 128 N.J. 34 (1992), reaffirmed the *Williams* "objective material degree" standard, but added that the objectively stressful working conditions must be "peculiar" to the particular workplace, and there must be objective evidence supporting a medical opinion of the resulting psychiatric disability.

The question here is not, as the judge viewed it, whether petitioner suffered from aluminum poisoning.

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The judge must apply the "objective, may/rail" test by focusing on petitioner's perception that he suffered from the disease. A remand for new findings is therefore necessary.

The issue is whether there is objective evidence, realistically viewed, which sustains petitioner's burden of proving that his mental disorder was "due in a material degree" to the repetitive workplace exposure at Continental Can. His substantial weight loss, migraine headaches, dizziness, and nervousness are undisputed, as is the history of elevated aluminum levels found in his blood and Dr. Bernstein's advising him that he suffered from aluminum poisoning.

Both psychiatrists acknowledged that petitioner had become depressed, concerned for his well being and preoccupied with how he could rid his body of what he deemed to be a poisonous substance. Thus, there is a psychiatric disorder arising from the employee's perception of a "physical" stimulus.

On the other hand, there is evidence that after petitioner left his employment the aluminum level in his blood normalized. Nevertheless, his stress disorder, according to Continental Can, argues that his belief was caused by anything in the work environment but by his subjective interpretations of the medical advice received.

However, his subjective reaction is not to be completely disregarded. Whether he sustains his burden of proof is a fact issue, which must be resolved after considering the totality of factors, including the nature of his work, the duration and extent of his actual exposure to aluminum, the reasonableness of his psychological response to his condition, and whether any unrelated cause or event may have triggered his disorder.

Affirmed in part, reversed in part, and remanded for further proceedings.

— Disposed by Judith S. Blitzer

(This case appears in 10 pages long.)

For petitioner — George F. Hendricks (Robin L. Puderbach on the brief). For respondent — Julie C. Blitzer (Hill Wallack).

► CIVIL PROCEDURE — DISCOVERY — EXPERT WITNESSES — SUMMARY JUDGMENT

The holding in *Celino* (on which the trial court relied) disapproved, consistent with Rule 1:1-4, attaching an unworn factual assertion by a lay witness to a brief, but Rule 4:17-4(c) governs expert or treating-physicians' reports in answer to interrogatories and it does not require them to be submitted in the form of affidavit or testimony; plaintiff's expert's letter report on plaintiff's permanently discolored adult teeth provided a circumstantial link between defendant doctor and his allegedly having prescribed tetracycline-based medication to plaintiff as a child, and (as in *Shofits*) it was error for the judge to refuse to consider information that would preserve plaintiff's cause of action, submitted after discovery, had been completed but while defendant's motion for summary judgment was pending, as part of the record for the purpose of deciding the motion, and the grant of summary judgment is reversed.

State Digests

Appellate Division: Baldyga v. Oldman et al., A-874 91-72, opinion by Wallace, J.S.C. (temporarily assigned), decided January 6, 1993; approved for publication January 29, 1993. Before Judges Michels, Baine and Wallace. On appeal from the Law Division, Hunterdon County (Sat below Judge Bernhard).

In this medical malpractice case, plaintiff Thomas Baldyga appeals from orders granting summary judgment in favor of defendant Ellen Oldman, M.D., and denying his motion for reconsideration. Plaintiff's complaint had alleged that defendant negligently administered the drug tetracycline to him during childhood, resulting in permanent staining and discoloration of his adult teeth.

In response to defendant's summary judgment motion, plaintiff attempted to present his expert's letter report after the time had expired for the completion of discovery. The trial judge refused to consider the late submission.

Plaintiff was born on August 20, 1960. For the first three years of his life, he was under the care of Dr. Paul Coccia, who is now deceased. He was under the care of defendant from August 1963 until approximately 1976 or 1978.

Pursuant to an earlier order of the trial judge plaintiff was deemed to have admitted that he did not know what, if any, antibiotic medication was administered to him by either Coccia or defendant, and did not know whether either doctor had administered tetracycline- or non-tetracycline-based medication to him.

The report of Ira Feldman, D.M.D., on which plaintiff wished to rely in opposition to defendant's summary judgment motion stated that: "With reasonable dental certainty... Thomas received the drug tetracycline between the ages of 3 and 6." Plaintiff argued that, since he was under defendant's care during that time, Feldman's report defeated defendant's motion for summary judgment.

The trial judge stated that under Rule 4:46-2 and Rule 1:6-4, Feldman's report was required to be in either affidavit or testimony form, and suggested that the appropriate venue for it was on appeal to the Appellate Division.

Held, Facts intended to be relied upon in response to a motion, which are not of record and are not judicially noticeable, are required to be submitted in the form of affidavit or testimony, R. 4:46-2; R. 1:6-4.

In this case, the trial court relied on *Celino v. Gen. Accident Ins. Co.*, 211 N.J. Super. 538, 544 (App. Div. 1986), which reversed summary judgment in favor of a defendant who had attached an insurance notice of cancellation to the brief without properly authenticating it by affidavit or certification.

The issue in *Celino* was an unworn factual assertion made by a lay witness, and thus the court's holding was consistent with the language and intent of Rule 1:6-4. In this case, Dr. Feldman's report did not contain lay-

witness factual statements, but was instead expert opinion evidence submitted as an addendum to the record.

Discovery materials including answers to interrogatories, are not within Rule 1:6-4, as is made clear by the comment following the rule, whose purpose is to ensure that fact-witness testimony is based on personal knowledge.

Rule 4:17-4 governs the form, service and time of answers to a party's interrogatory requests, (c) specifically deals with experts, or treating physician's reports, and provides that an exact copy of an expert's report must be annexed to the interrogatory.

There is no requirement under Rule 4:17-4(c) that an expert physician's report must be submitted in the form of affidavit or testimony.

Had Feldman's report been timely submitted to defendant in the ordinary course of the litigation as a response to the standard request for the names of expert witnesses and the substance of their opinion, it would have properly been before the court as part of the record for purposes of deciding the motion.

The trial judge also stated that he should not consider the report because it contained hearsay, apparently referring to plaintiff's statement to Dr. Feldman that he had been given tetracycline. Since plaintiff had admitted he had no first-hand knowledge of this, it may reasonably be assumed that he was relating an earlier diagnosis by Steven G. Finsen, D.D.S., that his teeth exhibited tetracycline staining.

However, Dr. Feldman's report was also based on his own observation and examination of plaintiff, which revealed that plaintiff's teeth exhibited "characteristic banding" associated with tetracycline. An expert may legitimately use hearsay evidence to confirm an opinion reached by independent means.

The trial judge principally refused to consider Dr. Feldman's report because it was submitted after the close of discovery and while the motion for summary judgment was pending.

Shofits v. Am. Cyanamid Co., 238 N.J. Super. 8, 16-18 (App. Div. 1989), a case very similar to this one, held that it was a mistaken exercise of discretion to refuse to consider supplemental affidavits from fact witnesses submitted by plaintiff in opposition to a summary judgment motion after discovery was completed and while the motion for summary judgment was pending. The affidavits represented both newly discovered evidence and evidence that had been inadvertently omitted when plaintiff filed their brief in opposition to the motion.

Viewing the record with all factual inferences in favor of plaintiff as the nonmoving party, the information supplied in Dr. Feldman's report would have preserved plaintiff's cause of action. It presented evidence that plaintiff received tetracycline sometime between ages three and six. Thus, the report provides a circumstantial link between defendant and the alleged injury. As stated in *Shofits*:

"Strict adherence to the schedules established by the court for discovery and presentation of opposi-

ing papers would take too great a toll on the parties. Under these circumstances, the trial judge should have granted a reasonable postponement to receive the full report of Dr. Feldman and any reply certification by defendant. Failing to do so was error.

The trial judge did not rule on plaintiff's request to shift the burden of proof to defendant to show that he did not prescribe tetracycline to plaintiff during his childhood. Therefore, no decision on this issue is reached here. At trial, the judge should determine the proper charge to the jury, which may or may not include an instruction shifting the traditional burden of proof.

Reversed and remanded.

— Disposed by P. B. Chermak

(This case appears in 11 pages long.)

For appellant — Philip Toranzo (Garruto, Gales & Connor; Richard Gales on the brief). For respondent — Peter J. McDonald (Ronca, McDonald & Hanley; Robert J. Kovacs on the brief).

► CORPORATIONS — FRAUD

Where defendants transferred the accounts of the corporation after its judgment was obtained against it, and defendants decided to cease doing business as a corporation but did not file a certificate of dissolution, defendants are personally liable for the full amount of the transferred assets based on either a fraudulent conveyance or piercing the corporate veil; their maximum responsibility is measured by the value of the transferred assets, which may include post-transfer income received from the accounts.

Appellate Division: AYR Composition, Inc. v. Rosenberg et al., A-1747-8171, per curiam opinion, decided January 8, 1993; approved for publication January 29, 1993. Before Judges Dreier and Shillman. On appeal from the Law Division, Union County (Sat below Judge Monza).

In 1989, plaintiff AYR Composition, Inc. filed a complaint against Rosenberg/Marguccio, Inc. (R/M) for collection of sums due and owing to AYR. Plaintiff recovered final judgment by default on January 24, 1990 in the amount of \$60,160.70 plus costs of \$129.90. Post-judgment execution left a balance due of over \$70,000 on the judgment, including post-judgment interest.

On July 23, 1990, plaintiff instituted the current action against Rosenberg, Marguccio and Cherson, Carroll & Holzer, a corporation, alleging violation of the Uniform Fraudulent Transfer Act, N.J.S.A. 23:2-20 et seq. Plaintiff also claimed the right to pierce the corporate veil and obtain judgments against defendants Rosenberg and Marguccio for the amount of the judgment obtained against R/M.

Cherson was dismissed with prejudice. The judge granted AYR's motion for summary judgment against Rosenberg and Marguccio, but limited plaintiff's damages to the amount of

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