Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201490179

ARMSTRONG COAL CO INC PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS**
ADMINISTRATIVE LAW JUDGE

NATHAN ATTEBURY
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Armstrong Coal Company, Inc. ("Armstrong") appeals from the April 9, 2015 Opinion, Award and Order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined Nathan Attebury ("Attebury") suffered toxic encephalopathy caused by occupational

exposure to toluene. On appeal, Armstrong argues this finding is unsupported by substantial evidence. We affirm.

Attebury began working for Armstrong in June, 2012 as a face boss. One of his duties was to mark the face of the mine to direct the miners. He would use spray paint containing toluene for this purpose. In a typical ten hour shift, he would use two to four cans of spray paint.

Attebury began experiencing headaches, dizziness and blackouts around January 2013. Later, additional symptoms developed, including shortness of breath, hands shaking, nausea, memory loss and confusion. He noticed the headaches would improve when he was not in the mine. Attebury expressed a concern to his supervisor that the paint was making him sick. He requested the company switch to an oxide paint, and he began wearing a mask when painting. After a series of temporary periods off work due to his symptoms, Attebury permanently quit working in the mines in July, 2014.

In 2009 and 2010, prior to his employment with Armstrong, Attebury sought treatment with Dr. Jayna Jones for chest pain, shortness of breath, dizziness, blurred vision and high blood pressure. He was diagnosed with nerve root and plexus disorder, elevated blood pressure, and unspecified anxiety state. He was later examined for

attention deficit disorder. On September 12, 2012, Attebury returned to Dr. Jones with complaints of pressure behind his eyes, blurred vision, headaches, panic attacks, chest pain and anxiety.

Attebury was again examined by Dr. Jones on January 17, 2014 for dizziness, fatigue, shortness of air, shakiness, and light headedness. Chest x-rays were normal, though spirometry testing found moderately decreased ventilation function. Attebury reported his symptoms were better when he was not working, though he continued to experience memory loss and loss of consciousness.

Dr. Jones referred Attebury to Dr. Michael Mayron, a neurologist. Dr. Mayron ordered an MRI of the brain and an EEG, both of which were normal. Attebury displayed serious deficiencies on a mini mental status exam, which Dr. Mayron compared to patients with severe Alzheimer's disease. Dr. Mayron diagnosed toxic encephalopathy.

Dr. Mayron researched the type of paint Attebury used in the mines, and discovered it contained toluene. Relying on a scholarly article published in the Annals of Neurology, which was admitted into evidence at Dr. Mayron's deposition, he concluded Attebury's symptoms were caused by his occupational exposure to toluene.

Attebury was also examined by Dr. Dennis O'Keefe, a neurologist. Dr. O'Keefe also administered a mini mental status exam and Attebury scored higher than he had on Dr. Mayron's administration of the exam, though he continued to exhibit deficits in immediate recall, attention and calculation. His motor and neurologic examination was otherwise normal. Dr. O'Keefe rejected the diagnosis of toxic encephalopathy, and instead diagnosed severe agitated depression. Also, Dr. O'Keefe rejected Dr. Mayron's conclusion Attebury's symptoms were caused by his exposure to toluene. He noted Attebury does not exhibit any nervous system injury, as would be expected, and his symptoms would have resolved once his exposure ceased.

Because the issue on appeal concerns only causation, we need not further discuss the medical proof submitted as to the extent of Attebury's disability. The ALJ ultimately found Dr. Mayron's opinion most persuasive as to the issue of causation. He explained:

> On the issue of causation both Dr. Mayron and Dr. O'Keefe have provided an opinion. Both have independently researched the effects of the Krylon paint used by the Plaintiff. Both have concluded that the paint can cause neurological effects. From that point their opinions diverge.
>
> Dr. O'Keefe believes the paint can cause two different types neurological

condition. The first, primarily effecting the limbs, the Plaintiff does not have. The second, according to Dr. O'Keefe, is not permanent and its effects should resolve entirely when exposure to the paint stops. Dr. O'Keefe affirmatively states the Plaintiff does not have toxic encephalopathy, regardless of causation. Dr. O'Keefe affirmatively states the Plaintiff has no work-related condition.

Dr. Mayron states that one of the potential side effects of the Krylon pain is toxic encephalopathy. This is the diagnosis he makes for the Plaintiff. He states the toxic encephalopathy is work-related. Dr. Mayron testified in his deposition that he extensively reviewed the Krylon paint, particularly the toluene. It can cause the toxic encephalopathy and it can cause all of the Plaintiff's neurologic symptoms. The damage is permanent.

In short while I respect both physicians who provided an opinion regarding causation I am more inclined to find the opinion of Dr. Mayron persuasive. He is a treating physician with no known or demonstrated bias. His is a very specific field and area of expertise to which he devotes his practice, i.e. neurological conditions. He has demonstrated the scholarly texts he relies upon. There is no other known source of causation for the Plaintiff's symptoms, as I agree that the ADHD, anxiety or depression is not causing them.

I am not persuaded by the Defendant's argument that Dr. Mayron had insufficient knowledge regarding the amount of toluene exposure. The Plaintiff testified to me and related to

> Dr. Mayron his exposure levels. That it was not measured in parts per milliliter or some other scientifically exact amount is not decisive.
>
> I find, based on the foregoing, that the Plaintiff does have toxic encephalopathy and it is work-related.

Armstrong did not file a petition for reconsideration. Therefore, the ALJ's findings of fact are conclusive and binding. KRS 342.285(1). On appeal, Armstrong argues Dr. Mayron's opinion cannot constitute substantial evidence upon which to base the award.

According to Armstrong, Dr. Mayron's opinion is deficient for several reasons. Dr. Mayron was unaware of Attebury's exact level of exposure to toluene. His opinion was based on Attebury's anecdotal testimony concerning the amount of paint he would use and frequency of the use. In fact, Armstrong points out, Attebury's exposure levels fall within acceptable levels according to published OSHA standards submitted by Dr. Mayron. Armstrong also challenges the scholarly study submitted by and relied upon by Dr. Mayron. It claims the article examines only abusive exposure to toluene, not occupational exposure. Additionally, the article links toluene exposure to central nervous system damage, but not toxic encephalopathy.

Essentially, Armstrong is arguing that Dr. Mayron's opinion does not meet the standards of scientific reliability set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Kentucky Rules of Evidence govern workers' compensation claims and, therefore, the principles enunciated in Daubert apply to the admission of expert testimony pursuant to KRE 702. 803 KAR 25:010 §14(1). Thus, the ALJ is required to make a reliability determination, though he need not specifically recite the Daubert factors. City of Owensboro v. Adams, 136 S.W.3d 446, 451 (Ky. 2004).

In Adams, the Kentucky Supreme Court considered a case factually similar to the one before us, and determined a physician's expert opinion concerning occupational exposure to toxic gas was sufficiently reliable to meet the admissibility standards of Daubert. The Court noted the indicia of reliability identified in Daubert: a theory's general acceptance in the scientific community, whether the theory has been tested, whether it has been subjected to peer review, and the potential rate of error. Daubert, 509 U.S. at 592-94. However, the Court emphasized the Daubert analysis is a "flexible" one designed to separate opinions reached by valid scientific methods from unsupported speculation:

> The subject of an expert's testimony must be scientific ... knowledge. The adjective "scientific" implies a ground in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation... Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science .... Indeed, scientists do not assert that they know what is immutably "true"—they are committed to searching for new, temporary, theories to explain, as best they can, phenomena ... Science is not an encyclopedic body of knowledge about the universe. Instead it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement ... But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.,* "good grounds," based on what is known.

Daubert, 509 U.S. at 589-90.

In this case, Dr. Mayron is a Board Certified neurologist who has been practicing for over thirty-five years. He personally treated Attebury regularly. Through diagnostic testing and trial periods of various pharmaceuticals, he eliminated other potential causes of Attebury's symptoms. He conducted research of the ingredients in the paint used by Attebury and the scholarly article he relied upon was submitted into evidence. Dr.

Mayron's expertise as a neurologist, coupled with his description of the diagnostic testing and research conducted, establish his opinion satisfies the requirements of KRE 702 for admissibility. Therefore, it constitutes the requisite substantial evidence upon which to base the ALJ's award. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Again, because no petition for reconsideration was filed, Armstrong may not now complain the ALJ's analysis as to the reliability of Dr. Mayron's opinion was insufficient. Furthermore, Armstrong's complaints go to the weight to be afforded Dr. Mayron's opinion, not the admissibility. As stated in Adams, the fact no other cases of toxic encephalopathy caused by occupational exposure were presented does not render Dr. Mayron's diagnosis per se inadmissible. 136 S.W.3d at 452 ("The issue is not whether anyone else has ever espoused Dr. van Loveren's opinion that trigeminal neuralgia can be caused by exposure to toxic gas, but whether his opinion was reached by valid scientific method or process…"). The ALJ also properly exercised his discretion in considering the levels of Attebury's exposure, and concluding Dr. Mayron had evidence upon which to conclude Attebury was exposed to sufficient levels of toluene to cause his symptoms. Again, this alleged deficiency in Dr. Mayron's scientific process goes to the

weight afforded the evidence, not the admissibility. Additionally, it must be pointed out that Dr. Mayron was cross-examined on these points, and Dr. O'Keefe identified these supposed deficiencies in his report.

For the foregoing reasons, the April 9, 2015 Opinion, Award and Order rendered by Hon. Chris Davis, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

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