

FILED
MAY 31 1978

30

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THE FINLEY HOSPITAL, A Corporation, and)
UNITED STATES FIDELITY AND GUARANTY)
COMPANY, A Corporation,)

Appellants,)

Filed May 31, 1978

vs.)

WILLIAM E. ZWACK,)
ROBERT C. LANDESS, Industrial Commissioner,)
a/k/a ROBERT C. LANDESS, Iowa Industrial)
Commissioner, and)
ROBERT C. LANDESS, Industrial Commissioner)
for the State of Iowa, and)
IOWA INDUSTRIAL COMMISSIONER, a/k/a)
INDUSTRIAL COMMISSIONER and INDUSTRIAL)
COMMISSIONER FOR THE STATE OF IOWA,)

523
2-61100

Appellees.)

Appeal from Dubuque District Court - Karl Kenline, Judge.

The employer hospital and its workmen's compensation carrier appeal the arbitrator's award of benefits to employee hospital x-ray technologist for injuries he suffered from a salmonella infection. The award was upheld by the industrial commissioner's review decision and by the trial court. - Affirmed.

Stephen Juergens & Allan J. Carew, of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for Appellants.

Daniel P. Ernst, of Klauer, Stapleton, Ernst, Gilloon & McCauley, Dubuque, for Appellee William E. Zwack.

Robert C. Landess, Des Moines, pro se.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiffs - the employer, Finley Hospital, and its workmen's compensation carrier, United States Fidelity and Guaranty Company - appeal the trial court's ruling affirming the industrial commissioner's review decision upholding an arbitrator's award to defendant-employee William E. Zwack. The arbitrator ruled Zwack sustained an injury arising out of and in the course of his employment as the hospital's chief x-ray technologist when he contracted a salmonella infection ultimately resulting in a disabling illness. We affirm.

The error of law urged is that the two Dubuque treating physicians should not have been permitted to express an opinion as to the source of Zwack's salmonella infection because there were no objective facts to form the basis for such opinions. The employer insists that since the doctors did not know whether or not there was a salmonella carrier in the hospital, much less whether or not such a carrier, if present, came into contact with Zwack, it was error to invite the doctors to speculate. It is uncontroverted that there were no diagnosed cases of salmonella at Finley at any time pertinent to this case. Necessarily then the doctors had to deal in inferences to be drawn from the objective facts laid out in the hypothetical questions and supported by the Zwack's earlier testimony regarding conditions in the household, Zwack's home and social activities, and the pattern with which the infection struck other family members. The doctors testified they considered that Zwack's employment brought him in daily contact with sick people; that as an incidence of his duties at the hospital Zwack was exposed routinely to an inordinate amount of human waste from the patients being treated; and that the salmonella infection could exist in such fecal matter completely undetected, masked by antibiotics. We find no error in the question of source posed to the doctors. The opinions expressed by them rested on inferences acknowledged by them and "...were of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject..." Fed. R. Evid. 703. The witnesses examined were expert and as such were allowed to give an opinion based upon inferences arising from shown facts. *Moyers v. Sears-Roebuck & Co.*, 242 Iowa 1038, 1046, 48 N.W.2d 881, 885 (Iowa 1951).

We are not persuaded that the doctors' responses should have been excluded because their testimony if believed would be decisive of the ultimate fact. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942). As Grismore indicates the true test of admissibility "... is not the total dependence of the jury upon such testimony but their inability to judge for themselves as well as is the (expert) witness." 232 Iowa at 353, 5 N.W.2d at 656 quoting from United States Smelting Co. v. Parry, 166 F. 407, 410 (8th Cir. 1909). The source of Zwack's salmonella infection was an issue necessitating expert medical testimony before the arbitrator could decide the likelihood that Zwack's infection was hospital-acquired. On this issue Zwack was entitled to frame the hypothetical question according to his theory of the case as his construction of the evidence showed the facts to be or as the jury would have a right to find them. Dickinson v. Maillard, 175 N.W.2d 588, 594 (Iowa 1970).

The claim of insufficient evidence is severely eroded by the admission of the doctors' opinions. The doctors were subjected to thorough cross-examination; the hospital introduced testimony of several expert witnesses some of whom were Zwack's Iowa City treating physicians and surgeons. Their testimony ranged from unequivocal statements that Zwack did not contract salmonella at the hospital to "not likely" that he was exposed at Finley. Grismore and Moyers indicate in a case which requires the aid of expert testimony the ultimate fact finding remains the responsibility of the jury, or as here the industrial commissioner. Upon review:

Our question is not whether there is sufficient evidence to warrant a decision the commissioner did not make but rather whether there is sufficient evidence to warrant the decision he did make. Swain v. Monona County, 163 N.W.2d 918, 920 (Iowa 1969) quoting from Musselman v. Central Telephone Company, 261 Iowa 352, 356, 154 N.W.2d 128, 130 (1967).

The weight, the credibility and the ultimate believability of the experts were matters for the arbitrator's decision. He concluded the facts in Zwack's favor. We find no reversible error in his conclusion.

The argument that even if salmonella was contracted at work, the disabling illness was unrelated and therefore not compensable is without merit. Dr. Brehm testified that the gross derangement of the architecture of Zwack's bowel by the salmonella infection and his consequent immunological incapacity to respond either

directly caused Zwack's ultimately disabling bowel disease or it precipitated the onset of ulcerative colitis. The hospital's expert, Dr. Zike, testified it was possible that the salmonella caused the ulcerative colitis but it was not likely. The pathologist Dr. Vernon testifying for the hospital replied in response to the deputy commissioner's questioning that Zwack's was a real problem case for a pathologist to form an opinion regarding whether Zwack ultimately suffered from ulcerative colitis or a salmonella process in the bowel almost identical to ulcerative colitis.

Musselman, in upholding the commissioner against a charge his ruling was not supported by the evidence, observed:

The commissioner was not compelled to accept the opinion of any testifying medical expert. The fair inferences to be drawn from all the medical testimony, the histories related by claimant to the various doctors and other evidence surrounding the alleged injury may well support (his) finding. . . . 261 Iowa at 360, 154 N.W.2d 131.

We think a fair inference from the medical testimony is that Zwack's severe salmonella infection contracted at work was the cause of his ultimate ileostomy surgery and disability. Having found sufficient evidence to warrant the decision the commissioner did make, we must affirm.

AFFIRMED.