

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DIANA STEVENSON and)
AARON STEVENSON,)
)
Plaintiffs,)
)
v.)
)
HAROLD MACQUINN, INC.,)
)
Defendant)

Civil No. 03-109-B-S

**ORDER ON DEFENDANT'S
MOTION TO EXCLUDE EXPERT TESTIMONY**

Plaintiff Diana Stevenson, a resident of Florida, fell down a concrete structure on her family's property in Bar Harbor that was installed by the defendant, Harold MacQuinn, Inc., a local contractor. The plaintiffs contend that the defendant was negligent in failing to take measures to cover or cordon off the installation. The plaintiffs intend to introduce expert testimony at trial to support a finding that Diana suffers from a degree of permanent emotional injury as a consequence of allegedly permanent physical impairment. The defendant seeks an order precluding any expert testimony concerning an emotional injury permanent impairment rating because of an allegedly misleading expert designation and because of certain issues pertaining to the expert's application of AMA guidelines relating to the evaluation of permanent emotional impairment. The presiding judge referred this motion to me. The motion does not impact any summary judgment proceeding before this court. In fact, the matter is already on the April 20, 2004, tentative trial list. I now **GRANT** the motion to a limited extent.

Background

The plaintiffs designated Manley Kilgore, M.D., as their medical expert on the issue of permanent impairment. The plaintiffs initially designated Dr. Manley in cursory fashion, informing the defendants that, based on an office visit, a review of Diana Stevenson's medical records, and his education, training and experience, Dr. Manley was of the opinion "that Ms. Stevenson's permanent impairment rating (whole body) is between 29% and 43%" and that "she is unlikely to be able to return to her former employment." (Mot. to Exclude, Docket No. 13, Attachment 1.) This disclosure led to a telephone conference following which I ordered, inter alia, that the plaintiffs provide certain additional information within a week's time. (Nov. 14 Report of Tel. Conf. & Order, Docket No. 10.) The information that the defendant sought included the "instrument(s) and methods used by Dr. Kilgore in making his permanent impairment assessment" and the permanent impairment "percentages Dr. Kilgore assigned to body parts." (Id.) Subsequently, the plaintiffs timely provided the defendant with a supplemental disclosure, indicating that "Dr. Kilgore used the AMA Permanent Impairment Assessment Guidelines, 5th Edition," and that "Dr. Kilgore concluded that Diana Stevenson's impairment is based upon 15% rating to her back and neck and 14-28% psychiatric rating." (Docket No. 13, Attachment 2.) Three days later, during Dr. Kilgore's deposition, the defendant questioned Dr. Kilgore regarding the same. Dr. Kilgore testified that the "psychiatric rating" referred to by the plaintiffs in their designation was really a rating of "emotional or behavioral impairments," the distinction being that the later are neurological in nature, not purely "psychiatric." (Id., Attachment 5, at 39-40.) Dr. Kilgore revealed that, with respect to psychiatric or psychological status, Diana had not yet reached a plateau in the healing process, or what is called "maximum medical improvement," and that psychiatric counseling and treatment was "a big area in her treatment that has been neglected." (Id. at 29.) Dr. Kilgore also testified

that a permanent impairment assessment presumes that the patient has reached a state of maximum medical improvement. (*Id.* at 28.) Finally, Dr. Kilgore revealed that his “emotional or behavioral impairment” rating was based on § 13.3f of the AMA Guidelines, which purportedly pertains to neurological impairments, rather than from a related guideline pertaining to psychiatric evaluation of “mental or behavioral” impairments. (*Id.* at 39-40; Docket No. 13, Attachment 3, § 13.3f and Table 13-8.)

Discussion

The defendant’s lead argument is that Dr. Kilgore should not be permitted to testify concerning neurological “emotional or behavioral impairments” because he acknowledged at his deposition that Diana has not been treated for emotional or behavioral problems and, therefore, has not reached maximum medical improvement. The defendant’s secondary argument is that Dr. Kilgore’s opinion regarding emotional or behavioral impairments should be excluded because the plaintiffs’ disclosure mischaracterized the opinions as a “psychiatric” one.

1. *The defendant’s Daubert argument goes to weight, not admissibility.*

Pursuant to Rule 702 of the Federal Rules of Evidence:

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 qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993), the Supreme Court assigned to federal judges the gatekeeping role of screening from introduction in evidence expert testimony that, although relevant, is nevertheless based on unreliable scientific methodologies. *Id.* at 597. In General Elec. Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court explained that a judge exercising this duty must evaluate whether the challenged expert testimony is based on reliable

scientific principles and methodologies in order to ensure that expert opinions are not “connected to existing data only by the ipse dixit of the expert.” Id. at 146. In the subsequent case of Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), the Supreme Court reminded that the gatekeeping function is “a flexible one” that “depends upon the particular circumstances of the particular case at issue.” Id. at 150; see also Daubert, 509 U.S. at 591, 594. In this vein, the First Circuit Court of Appeals has stated that “[b]ecause the exact inquiry undertaken by the district court will vary from case to case, the district court need not follow any particular procedure in making its determination.” United States v. Diaz, 300 F.3d 66, 73 (1st Cir. 2002).

It is the proponent of the challenged evidence who carries the burden of proof. That burden is not to prove that his or her expert’s opinion or conclusion is correct, but that “the expert’s conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.” Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998). In meeting this burden, the proponent must not assume that an evidentiary hearing will be held; the trial court has the discretion to decide the motion on briefs and with reference to expert reports, depositions and affidavits on record. Diaz, 300 F.3d at 83-84. Thus, it is incumbent on the proponent to ensure that the record contains evidence explaining the methodology the expert employed to reach the challenged conclusion and why this methodology is a reasonably reliable one to employ. Reali v. Mazda Motor of America, Inc., 106 F. Supp. 2d 75, 79 (D. Me. 2000).

To carry their burden the plaintiffs argue that Dr. Kilgore’s opinion regarding Diana’s permanent emotional or behavioral impairment rating is appropriate, notwithstanding the absence of maximum medical improvement, because Dr. Kilgore offered an impairment rating that ranges between 14 and 28 percent, rather than a static rating based on maximum medical improvement, thus taking into account the opportunity for future improvement in this area.

(Docket No. 16 at 6-7.)

I agree with the plaintiffs that Dr. Kilgore’s testimony concerning emotional or behavioral impairment should not be precluded simply because Diana has not reached maximum medical improvement in this area. It is apparent that Dr. Kilgore’s prognosis for Diana takes into consideration that there are certain psychiatric treatment modalities that could improve her long term emotional health but have thus far been ignored by her. Although this fact certainly provides the defendant with some good material for cross examination, I do not understand why it should preclude all testimony concerning permanent emotional or behavioral impairment as a natural consequence of living with permanent pain and facing perpetual periodic visits to treatment providers.¹ To this limited degree, Dr. Kilgore’s opinion about emotional or behavioral impairment does not present speculation as to future psychiatric health, but an assessment as to how the physical limitations placed on Diana’s body will likely impact her emotional or behavioral health, depending on whether she obtains and finds success with psychiatric treatment in the future.

On the other hand, the plaintiffs have not presented anything to support Dr. Kilgore’s assertion that the appropriate emotional or behavioral impairment rating belongs somewhere between 14 and 28 percent, which, for purposes of this motion, makes Dr. Kilgore’s opinion on that score an inadmissible ipse dixit. As the defendant points out in its reply memorandum, “There is no authority in the record—including any testimony by Dr. Kilgore—that a physician can predict what permanent impairment might be if and when a patient reaches maximal medical improvement.” (Reply Mem., Docket No. 17, at 2.) In the context of a Rule 702 motion such as this, Daubert and its progeny require that the proponent of expert testimony provide the Court with reasonable assurances that the expert’s opinion was arrived at in a “scientifically sound and

¹ Dr. Kilgore characterizes Diana’s primary impairment as “the spinal injuries and the pain that they generate.” (Docket No. 13, Attachment 5, at 37, lines 11-12.) He also distinguishes emotional or behavioral (neurological) impairments from psychiatric impairments as being “reactive” to pain, rather than being characterized by affects such as depression or mood changes. (Id. at 39-40.)

methodologically reliable fashion.” Ruiz-Troche, 161 F.3d at 85. Because the plaintiffs have failed to offer any rationale for a 14-28 percent rating, as opposed to, for instance, a 1-14 percent rating, Dr. Kilgore should be precluded from offering any numerical quantification of the degree of Diana’s emotional or behavioral impairment at trial.

2. *There is no prejudice to warrant a Rule 26 sanction.*

The defendant’s second argument is that Dr. Kilgore should be precluded from testifying about “emotional or behavioral impairments” because the plaintiffs’ designation referred to “psychiatric impairment,” which led the defendant into the misconception that Dr. Kilgore’s impairment rating was premised on different AMA guidelines. (Docket No. 13 at 6-7.) I can appreciate the defendant’s frustration with the plaintiffs’ designation, particularly the plaintiffs’ failure to indicate the specific AMA Guidelines that Dr. Kilgore utilized as a neurologist, as opposed to a psychiatrist, but this appears to reflect plaintiff counsel’s own failure to fully appreciate the nuances of Dr. Kilgore’s opinion and the medical establishment’s drawing of non-intuitive lines between so called “emotional or behavioral impairments” (which are neurological) and “mental or behavioral impairments” (which are psychiatric). However, the defendant offers no explanation how confusion over neurological and psychiatric distinctions prejudiced the ability of its counsel to conduct the deposition or otherwise defend the claim. So far as I can tell, it appears that defense counsel’s examination was fully competent and, in any event, I discern no prejudice to the defendant in light of my limited exclusionary ruling.

Conclusion

My assessment is that Dr. Kilgore can provide testimony about the prospect of permanent emotional or behavioral impairment as a consequence of permanent physical or neurological impairment, something that the AMA Guidelines appear to support. Dr. Kilgore appears to be fully conversant in these guidelines and fully qualified to assist the jury in understanding these

consequences of physical injury. Dr. Kilgore also appears fully qualified to testify that Diana suffers from some degree of emotional or behavioral impairment (Diana might well testify to this herself) and that, in his medical opinion, she should seek out treatment from psychological or psychiatric professionals. Indeed, it does not even appear that the defendants are challenging Dr. Kilgore's testimony to this extent. However, Dr. Kilgore should not be permitted to quantify the level of any emotional or behavioral impairment as being between 15 and 28 percent, so as to arrive at a whole body impairment rating of between 29 and 43 percent. As to this particular opinion, the plaintiffs have failed to provide adequate assurances that Dr. Kilgore employed a reliable scientific methodology. Accordingly, I **GRANT** the defendants' motion to exclude (Docket No. 13) to this limited extent.

CERTIFICATE

- A. The Clerk shall submit forthwith copies of this Order to counsel in this case.
- B. Counsel shall submit any objections to this Order to the clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated February 26, 2004

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00109-GZS
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STEVENSON et al v. HAROLD MACQUINN INC
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:
Demand: \$
Lead Docket: None
Related Cases: None

Date Filed: 06/20/03
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Case in other court: None
Cause: 28:1332 Diversity-Personal Injury

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