

# Fifth Annual Workers' Compensation Seminar

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Learned Treatises and Other Medical Proofs

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## Learned Treatises and Other Medical Proofs in the Division of Workers Compensation

### **I. Evidentiary Standards in the Division**

- A. Burden of Proof and the Rules of Evidence – pursuant to *N.J.S.A.* 34:15-56, the Judge of Compensation is not bound by the Rules of Evidence.
- B. *N.J.S.A.* 34:15-30 allows for compensable occupational disease provided the employee to not willfully self-expose or willfully fail to utilize available safety devices.
- C. *N.J.S.A.* 34:15-31(a) defines a compensable occupational disease as “arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment.”
- D. *N.J.S.A.* 34:15-36 further defines
  - 1. Permanent partial disability – “...demonstrable objective medical evidence, which restricts the function of the body or of its members or organs...whether there has been a lessening to a material degree of an employee’s working ability.”
  - 2. Permanent total disability- “...total permanent impairment...where no fundamental or marked improvement in such condition can be reasonably expected.”
- E. *N.J.S.A.* 34:15-34 is the Statute of Limitations –
  - 1. There is no time limitation for the filing a claim for compensation for occupational disease,
  - 2. Provided that the claim is filed within 2 years after the date on which the Petitioner first knows if the nature of the disability and its relation to the employment (See, *Earl v. Johnson and Johnson*, 158 NJ 155 (1999) and *Pulejo v. Middlesex County Consumer Affairs*, 2015 WL 1540056, \*10 , N.J. Adm. , (NO. 2010-10115 )
- F. Case law has helped us to interpret these definitions.
  - 1. *Fiore v. Consolidated Freightways*, 140 NJ 452 (1995)
    - i. Issue presented was standard of proof in occupational heart disease.
    - ii. Court held that both section 7.2 and 31 must be satisfied.

- iii. Must show that the disease is due in a material degree to causes or conditions that characterize the employee's occupation and that substantially contribute to the development of the disease.
2. *Lindquist v. City of Jersey City Fire Dept*, 175 NJ 244 (2003)
- i. The decision regarding compensability must be based upon competent evidence.
  - ii. There must be substantial credible evidence to support the judgment when considering the entire record.
  - iii. Medical causation means showing that the injury is a consequence of work exposure.
  - iv. Proving legal causation means showing the injury is work-connected.
  - v. It is sufficient for the petitioner to show the workplace exposure was a contributing cause.
3. *Laffey v. Jersey City*, 289 NJ Super 292, (App. Div. 1996), cert. denied
- i. Petitioner's burden is to show by a preponderance of the evidence that the link is probable.
  - ii. The petitioner need not prove that the nexus between the disease and the place of employment is certain.
  - iii. Compensation cannot be justified when a medical witness merely asserts a "reasonably probable contributory work connection" with no medical support.
  - iv. "Here, petitioner has done no more than offer subjective characterization about his work environment. He has failed to provide quantitative evidence concerning the level of pollution he was exposed to, the component elements of the pollution, or the duration of exposure in any measurable manner. There was no evidence of any articles, treatises or medical studies that link exposure to fumes from vehicles, furnaces, landfills, or fires to petitioner's ailments. Petitioner's expert's testimony of a causal relationship was based solely on the subjective characterizations of the petitioner and not on any existing medical, epidemiological, or scientific studies

establishing causation. “[T]he mere assertion of reasonably probable contributory work connection by a medical witness cannot justify an award. The facts of the situation under examination in their totality must demonstrate causality by the greater weight of the credible evidence.” (citing, *Dwyer v. Ford Motor Co.*, 36 NJ 487 (1962))

4. *Bird v Somerset Hills*, 309 NJ Super 517 (App. Div. 1988), cert. denied
  - i. Petitioner has the burden to prove all the elements of his case, then the burden shifts to his employer to establish contrary facts that alleviate or mitigate the employer’s liability (citing *Gulick v. H.M. Enoch, Inc.*, 280 N.J. Super. 96, 109, 654 A.2d 987 (App.Div.1995))

G. Medical Causation Evidence –

1. *Fiore v. Consolidated Freightways*, 140 NJ 452 (1995)-
  - i. Presents a difficult question of dual causation
  - ii. Must fulfill 3 requirements:
    1. Disease is due in a material degree to causes arising out of the workplace
    2. Must prove by suitable medical evidence that the employment exposure cause or contribute to the disease
    3. Employment exposure substantially contributed to the development of the disease. (so significant that disease would not have developed to the extent that it caused the disability resulting in incapacity)
  - iii. Personal risk factors cannot outweigh exposure at work
2. *Rubanick v. Witco Chemical Corp.* was adopted by the Supreme Court as the evidential standard for expert testimony in workers’ compensation matters (*Lindquist*, 175 NJ at 261). The factors:
  - i. Evidence must be proffered by an expert sufficiently qualified by education, knowledge, training, and experience in the scientific field.
  - ii. The expert must possess a demonstrated professional capability to assess the scientific significance of the underlying data and information, to apply the scientific methodology, and to explain the

bases for the opinion reached (Rubanick at 449).

- iii. “As reflected in our own rule, *Evid.R. 56(2)*, it is not essential that there be general agreement with the opinions drawn from the methodology used. There must merely be some expert consensus that the methodology and the underlying data are generally followed by experts in the field” (Rubanick at 450).
  - iv. “In engaging in such an analysis, the court substituted its own assessment of the studies for that of an acknowledged expert. As the Appellate Division, citing *Ryan v. KDI Sylvan Pools, ...* recently recognized, ‘[t]he interpretation of the data ... is the function of the qualified expert.... [C]ourts should be loath to determine whether the particular expert has properly relied upon data which experts in the field generally rely on.’” *Rubanick* at 451
  - v. “The critical determination is whether comparable experts accept the soundness of the methodology, including the reasonableness of relying on this type of underlying data and information. Great difficulties can arise when judges, assuming the role of scientist, attempt to assess the validity of a complex scientific methodology” (Rubanick at 451).
3. *Wiggins v. The Port Authority of New York and New Jersey, 276 NJ Super 636 (1994)*
- i. At issue was the causal link between petitioner’s emotional stress, occupational exposure to chemicals and temperature variations and the exacerbation of his multiple sclerosis.
  - ii. Petitioner did not present any evidence as to the extent of his exposure to chemicals other than a general description
  - iii. Conflicting medical testimony could not identify a cause of MS and there was no medical literature to support the Petitioner’s position therefore, the proofs were insufficient to establish a causal link.

4. *Magaw v. Middletown Board of Ed*, 323 NJ Super (App Div 1999)
  - i. “While courts obviously do not wish to decide cases based on discredited science or medicine, the judicial system does not have the leisure to defer decision until proper and definitive scientific or medical studies are available” (citing *Rubanick*).
  - ii. “The Workers’ Compensation Judge’s determination that Magaw established a nexus between his disease and place of employment is based on sufficient evidence present in the record. The test is not certainty, the evidence supporting the nexus appears ‘well founded in reason and logic ....’ and is not mere guess or conjecture. (Contrasting the evidence against the deficiencies in *Laffey* and *Wiggins*).
  - iii. The absence of any objective medical or scientific evidence establishing a causal link between petitioner’s place of employment and a claimed occupational disease will usually be fatal to the petitioner’s workers’ compensation case (citing *Wiggins*).
5. *Lindquist v. City of Jersey City Fire Department*, 175 NJ 244 (2003)
  - i. Issue was whether 23 years as a firefighter caused or contributed to Petitioner emphysema within the meaning of section 31 despite his 22 year history of smoking  $\frac{3}{4}$  packs per day, quitting within 1-3 years of retirement.
  - ii. Petitioner’s expert concluded he suffered from COPD attributed to his expose to smoke, hazardous waste, combustion and cigarette smoke without attributing a percentage to each. He could point to no studies to support his opinion.
  - iii. Respondent’s expert felt that he suffered from emphysema caused by cigarette smoking. He stated that studies did not support finding that firefighters are at greater risk for developing emphysema.
  - iv. Court held *Fiore* not applicable except in cardiovascular injury.
  - v. N.J.S.A. 34:15-43.2 does carry a statutory presumption of causal relationship for disease of the respiratory system.
  - vi. Courts must not penalize workers suffering from diseases for which

science has not yet clearly established causation when more than a possibility of causal connection exists.

## **II. Expert Testimony: Admissibility and Reliability**

A. *N.J.R.E. 702*: 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.

a. *Landrigan v. Celotex Corp.*, 127 NJ 404, 413 (1992): [Rule 702] imposes three requirements for admission of expert opinions:

- i. the intended testimony must concern a subject matter that is beyond the ken of the average juror;
- ii. the field testified to must be at a state of the act such that an expert's testimony could be sufficiently reliable;
- iii. the witness must have sufficient expertise to offer the intended testimony.

b. “The admissibility of such testimony depends on the expert’s ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Thus, the key to admission of the opinion is the validity of the expert’s reasoning and methodology.” (*Landrigan* at 414, quoting *Rubanick*).

c. “In resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community. The court’s function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs” *Landrigan* at 414).

d. “...[w]hen an expert relies on such data as epidemiological studies, the trial court should review the studies, as well as other information proffered by the parties, to determine if they are of a kind on which such experts ordinarily rely. The court should then determine whether the expert’s opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.” (*Landrigan* at 417).

- e. “Defined landmarks guide a trial court in making this determination. Support may be demonstrated by reference to professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology.” (*Landrigan* at 417).
- B. *Frye v. United States*, 293 F. 1013 (1923) – the “General Acceptance Standard” is the standard still followed in New Jersey
1. “...while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye* at 1014.
  2. Note that even if the scientific principals or opinion has not achieved “general acceptance” in the professional field, a court may nonetheless admit the evidence if the methodology and the data are of the type generally relied upon by experts in the field. (*Rubanick v. Witco Chemical Corp*, 125 NJ 421 (1991))
- C. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standards (superseded *Frye* in federal court) are useful to evaluate expert testimony for admissibility and relevance under Rule 702 and *Rubanick*, since *Daubert* holds that “general acceptance” is not a necessary precondition under Federal Rule 702. However the trial judge must find that:
1. The expert testimony or evidence is based upon a reliable foundation;
  2. The expert testimony or evidence assists the fact finder in understanding the evidence or determining a fact at issue;
  3. The expert testimony or evidence is sufficiently tied to the facts of the case so as to aid the fact finder in resolving a factual dispute;
- D. *N.J.R.E* 703 Basis of opinion testimony by experts: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
1. *Windmere, Inc. v. International Insurance Co.*, 105 NJ 373 (1987)



- a. Civil case involving denial of fire insurance claim where the issue was whether voiceprints were admissible with a view toward admissibility and reliability of scientific tools in general
- b. Must have sufficient scientific basis to produce uniform and reasonably reliable results.
- c. Three ways a proponent of expert testimony or scientific results can prove the required reliability in terms of general acceptance in the professional community:
  - i. Testimony of Knowledgeable Experts
  - ii. Authoritative scientific literature
  - iii. Persuasive judicial opinions which acknowledged such general acceptance of expert testimony

2. *Morlino v. Medical Center of Ocean County, 152 NJ 563 (1998)*

- a. Medical malpractice case - pregnant woman prescribed medication. Shortly thereafter, fetus died. The issue was whether or not pharmaceutical package insert in the PDR were admissible as the physician's standard of care.
- b. There are 3 approaches concerning the use of the insert and the parallel PDR warning to establish a medical standard of care:
  - i. Product packaging is admissible to show what the physician knew or should have known about the drug,
  - ii. Allow product inserts to show the standard of care, provided expert testimony is also presented to explain the standard of care,
  - iii. Product insert is evidence of negligence by the physician who fails to adhere to its rules.
- c. The only accepted approach is the insert with expert testimony. A medical treatise may not be used as a substitute for expert testimony.

### III. Expert Testimony: Admissibility and Reliability

A. *N.J.R.E* 803(c)18: *Learned treatises*. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.

1. Although a text may qualify as a learned treatise, it may still be excluded pursuant to Rule 403 if its probative value is outweighed by the danger of prejudice (*Kimmel v. Dayrit*, 301 NJ Super 534 (1997)).

2. Even where judicial notice is taken that a text is a learned treatise, it is not admissible unless it is relied upon by an expert or used to cross-examine an expert (*Tyndall v. Zaboski*, 306 NJ Super 423 (1997)).

B. *Jacober v. St. Peter's Medical Center*, 128 NJ 475 (1992)

1. In this medical malpractice claim, the defense experts refused to acknowledge the textbooks as authoritative on cross-exam and trial court ruled inadmissible.

2. On appeal, the issue is extent to which statements from learned treatises may be used in cross-examination of defense and expert witnesses.

2. Modified pre-existing common-law and brought into line with Federal R. E 803, advances the goals of the adversarial system by enhancing the ability of juries to evaluate expert testimony.

3. Text qualifies as learned-treatise by expert testimony or by judicial notice rather than solely by the cross-examined expert. In addition, contents of learned treatises may be introduced on direct and cross examination.

C. *Bird v. Somerset Hills*, 309 NJ Super 517 (App. Div. 1988), cert. denied

1. It was not reversible error for the compensation judge to permit the treating

doctor to testify as to causation since there was no surprise to the respondent, and the treating doctor in a compensation case is in a better position to address causation than one who merely examines the patient to render an expert opinion (citing *Bober v. Independent Plating Corp.*, 28 N.J. 160 (1958)).

D. Net Opinion: *Townsend v. Pierre* \_\_\_NJ \_\_\_\_, 2015:

1. When a trial court determines the admissibility of expert testimony, *N.J.R.E.* 702 and *N.J.R.E.* 703 frame its analysis. *N.J.R.E.* 702 imposes three core requirements for the admission of expert testimony: “(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert’s testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony” (Citing *Reanga v. Jardal*, 185 N.J. 345 (2005)).
2. “The net opinion rule is a ‘corollary of [*N.J.R.E.* 703] ... which forbids the admission into evidence of an expert’s conclusions that are not supported by factual evidence or other data.’ The rule requires that an expert ‘give the why and wherefore’ that supports the opinion, ‘rather than a mere conclusion’” (citing *Borough of Saddle River v. 66 E. Allendale, LLC*, 216 N.J. 115, 144, 77 A.3d 1161 (2013)).
3. The net opinion rule, however, mandates that experts “be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable” (citing *Landrigan, supra*, 127 N.J. at 417, 605 A.2d 1079).
4. A party’s burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert’s speculation that contradicts that record.

**Citations:**

NJSA 34: 15-30

NJSA 34: 15-31

NJSA 34: 15-36

NJRE 702

NJRE 703

NJRE 803(c)(18)

*Jacobson v. St. Peter's Medical Center*, 128 NJ 475 (1992)

*Bird v. Somerset Hills*, 309 NJ Super 517 (App. Div. 1988), cert. denied

*Fiore v. Consolidated Freightways*, 140 NJ 452 (1995)

*Laffey v. Jersey City*, 289 NJ Super 292, (App. Div. 1996), cert. denied

*Wiggins v. Port Authority*, 276 NJ Super, 636 (App Div. 1994)

*Magaw v. Middletown Board of Ed*, 323 NJ Super (App Div 1999)

*Lindquist v. Jersey City Fire Dept.*, 175 NJ 244 (2003)

*Earl v. Johnson and Johnson*, 158 NJ 155 (1999)

*Rubanick v. Witco Chemical Corp.*, 125 NJ 421 (1999)

*Frye v. United States*, 293 F 1013 (1923)

*Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993)

*Windmere, Inc. v. International Insurance*, 105 NJ 373 (1987)

*Landrigan v. Celotex Corp.* 127 NJ 404 (1992)

*Morlino v. Medical Center*, 152 NJ 563 (1998)

*Townsend v. Pierre* \_\_\_ NJ \_\_\_ (2015)