

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DOYLE LANDERS,	)	
	)	
Employee/Respondent,	)	
	)	Appeal No. 72028
vs.	)	
	)	
CHRYSLER CORPORATION,	)	
	)	
Employer/Appellant.	)	

APPEAL FROM THE MISSOURI LABOR AND
INDUSTRIAL RELATIONS COMMISSION

BRIEF -- AMICI CURIAE

OF COUNSEL:
AMERICAN PSYCHOLOGICAL
ASSOCIATION
James L. McHugh, Jr.
Nathalie F.P. Guilfoyle
750 First St., NE
Washington, D.C. 20005
(202) 336-6089

JENNER & BLOCK
D. Scott Barash
Thomas D. Amrine
601 13th Street, N.W.
Suite 1200
Washington, DC 20005
(202) 639-6000

PAULE, CAMAZINE
& BLUMENTHAL, P.C.
Daniel P. Card II, MBE #24272
165 N. Meramec Avenue, 6th Floor
St. Louis, MO 63105
(314) 727-2266

Attorneys for Amici American Psychological
Association, Missouri Psychological
Association, and National Academy of
Neuropsychology

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	4
POINTS RELIED UPON	5
ARGUMENT	11
I. NEUROPSYCHOLOGISTS BY TRAINING AND EXPERIENCE ARE QUALIFIED TO PROVIDE EXPERT TESTIMONY CONCERNING CAUSATION OF PSYCHOLOGICAL CONDITIONS	11
A. Psychological Training and Practice are Rigorous, Scientific, and Relevant to the Issues at Bar	11
B. The Methodology of Neuropsychologists Enables Them to Assess Causation	12
II. § 490.065.1 RSMo (1996) COMMANDS LIBERAL ADMISSION OF EXPERT OPINION TESTIMONY	15
III. COURTS HAVE WIDELY RECOGNIZED THAT PSYCHOLOGISTS ARE EXPERTS IN DIAGNOSING THE EXISTENCE AND CAUSES OF BRAIN DYSFUNCTIONS	17
CONCLUSION	22

INTEREST OF AMICI CURIAE

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 151,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major functions are promoting psychological research, promulgating the results of that research, and assuring proper understanding of that research. APA has submitted amicus briefs in important cases that raise issues to which psychological research, opinion, and testimony pertain. The United States Supreme Court has relied on APA's amicus briefs in cases of national importance. See, e.g., Maryland v. Craig, 497 U.S. 836, 855 (1990); Hudgson v. Minnesota, 497 U.S. 417, 437 n.24, 454 n.38 (1990).

The Missouri Psychological Association ("MoPA"), a Missouri not-for-profit corporation and an affiliate of APA, represents the interests of licensed psychologists in the State of Missouri. It has approximately 700 members. It aims to promote the science and practice of psychology in the public interest.

The National Academy of Neuropsychology ("NAN") is the largest organization in the United States devoted to the practice of clinical neuropsychology. It consists of more than 2,000 members.

APA, MoPA, and NAN have requested leave to participate as amici curiae in this case in order to assist the Court of Appeals in understanding the important role of one branch of psychology -- known as neuropsychology -- in the diagnosis of brain dysfunctions. Amici believe the current state of this science dictates the following

conclusions: (1) because of the complex interrelationship between medicine and psychology in evaluating the etiology of brain dysfunctions, physicians may have far less understanding of neuropsychological testing or the method of differential diagnosis than do neuropsychologists; (2) neuropsychologists -- by virtue of their educational training in research methodology and the biological bases of mental illnesses -- have an understanding of neurological disorders of brain function; (3) neuropsychologists' expertise in neuropsychological evaluation and differential diagnosis enables them to provide significant assistance to a factfinder in determining the cause of brain dysfunction and excluding other causes.

STATEMENT OF FACTS

On September 13, 1989, while working on an assembly line at appellant Chrysler Corporation's plant in Fenton, Missouri, respondent Doyle Landers was struck on the head by an approximately forty-pound steel hook. In the ensuing workers' compensation proceeding, a neuropsychologist, Dr. Richard Wetzel, testified that Mr. Landers suffered from organic brain injury, the symptoms of which included impairment of memory and attention span. Dr. Wetzel also testified that Mr. Landers' organic brain injury had been caused by the impact of the steel hook. See Award of Administrative Law Judge Matthew D. Vacca, at 2. As a neuropsychologist, Dr. Wetzel was specifically trained to diagnose and assess the cause of physical brain injuries.

Relying on Dr. Wetzel's testimony, the administrative law judge determined that Mr. Landers' impairments, including memory loss, headaches, concentration problems, depression, and speech problems, were medically and causally related to his work-related injury on September 13, 1989. Chrysler appealed to the Labor and Industrial Relations

Commission, arguing that Dr. Wetzel was not competent to testify on the issue of medical causation because he is a neuropsychologist, not a medical doctor. The Commission, however, held that Dr. Wetzel was competent to testify as to medical causation and affirmed the administrative law judge's award. See Final Award Allowing Compensation, at 2, 3. Chrysler then appealed to this Court.

The central issue on appeal is whether the Commission erred in affirming the administrative law judge's determination that a neuropsychologist may offer admissible expert testimony on the causation of organic brain injury.

SUMMARY OF ARGUMENT

By acknowledging that neuropsychologists are competent to testify as to the physical cause of brain injury, the Commission recognized a vital source of information on causation. The Commission's decision accords with the liberal standard for admission of expert testimony set forth in § 490.065.1 RSMo (1996), as well as with the conclusions of the vast majority of courts to consider this or analogous questions. Amici respectfully urge the Court to affirm the Commission's decision because it would be highly unfortunate if a categorical exclusion of useful expert testimony -- unjustified both legally and factually -- were to become the rule in Missouri.

POINTS RELIED UPON

I. NEUROPSYCHOLOGISTS BY TRAINING AND EXPERIENCE ARE QUALIFIED TO PROVIDE EXPERT TESTIMONY CONCERNING CAUSATION OF PSYCHOLOGICAL CONDITIONS

A. Psychological Training and Practice are Rigorous, Scientific, and Relevant to the Issues at Bar

National Research Council, Summary Report 1987: Doctorate Recipients from United States Universities (Washington, D.C.; National Academy Press, Preliminary release (1989))

D. Hartman, Neuropsychological Toxicology: Identification and Assessment of Human Neurotoxic Syndromes 2 (1988)

E. Bigler, Diagnostic Clinical Neuropsychology (1984)

C. Golden & P. Vincente, Foundations of Clinical Neuropsychology (1983)

Handbook of Clinical Neuropsychology (S. Filskov & T. Boll eds. 1981)

Handbook of Neuropsychological Assessment (A. Puente & R. McCaffrey eds. 1992)

A. Luria, Higher Cortical Functions in Man (2d ed. 1980)

Heilman & Valenstein, Clinical Neuropsychology (2d ed. 1985)

Medical Neuropsychology: The Impact of Disease on Behavior (R. Tarter, D. Van Thiel & K. Edwards eds. 1988)

Reitan & Davison, Clinical Neuropsychology: Current Status and Applications (1974)

B. The Methodology of Neuropsychologists Enables Them to Assess Causation

Valiulis v. Scheffels, 547 N.E.2d 1289 (Ill. App. 1989)

S. Franz, Handbook of Mental Examination Methods 12 (1919)

Smith, Principles Underlying Human Brain Functions in Neuropsychological Sequelae of Different Neuropathological Processes, in Handbook of Clinical Neuropsychology 184 (S. Filskov & T. Boll. eds. 1981)

Filskov and Leli, Assessment of the Individual in Neuropsychological Practice, in Handbook of Clinical Neuropsychology 545 (S. Filskov & T. Boll eds. 1981)

Eskenzi and Maizlish, Effects of Occupational Exposure to Chemicals on Neurobehavioral Functioning in Neuropsychology 255

Filskov, Grimm and Lewis, Brain-Behavior Relationships, in Handbook of Clinical Neuropsychology (S. Filskov & T. Boll eds. 1981)

II. § 490.065.1 RSMo (1996) COMMANDS LIBERAL ADMISSION OF EXPERT OPINION TESTIMONY

In re C.L.M., 625 S.W.2d 613 (Mo. 1981)

Inman v. Bi-State Development Agency, 849 S.W.2d 681 (Mo. App. E.D. 1993)

St. Luke's Hospital v. May, 588 S.W.2d 217 (Mo. App. W.D. 1979)

Washburn v. Grundy Electric Cooperative, 804 S.W.2d 424 (Mo. App. W.D. 1991)

Hord v. Morgan, 769 S.W.2d 443 (Mo. App. W.D. 1989)

Cebuala v. Benoit, 652 S.W.2d 304 (Mo. App. W.D. 1983)

Sigrist v. Clark, 935 S.W.2d 350 (Mo. App. S.D. 1996)

McGrath v. Satellite Sprinkler System, 877 S.W. 2d 704 (Mo. App. E.D. 1994)

Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200 (Mo. App. W.D. 1991)

Section 490.065 RSMo. (1996)

III. COURTS HAVE WIDELY RECOGNIZED THAT PSYCHOLOGISTS ARE EXPERTS IN DIAGNOSING THE EXISTENCE AND CAUSES OF BRAIN DYSFUNCTIONS

Kinsey v. Kolber, 431 N.E.2d 1316 (Ill.App. 1982)

Weider v. Senebouthyrath, 583 N.Y.S.2d 94 (N.Y. App.Div. 1992)

James v. State, 489 So. 2d 737 (Fla.), cert. denied, 477 U.S. 909 (1986)

Simmons v. Mullen, 331 A.2d 892 (Pa. Super. 1974)

Hutchison v. American Family Mut. Life Ins. Co., 514 N.W. 2d 882 (Iowa 1994)

Hooper v. Industrial Commission of Arizona, 617 P.2d 538 (Ariz. 1980)

Sadow v. Weyerhaeuser Co., 449 P.2d 426 (Or. 1969)

Madrid v. University of California, 737 P.2d 74 (N.M. 1987)

Fabianke v. Weaver, 527 So. 2d 1253 (Ala. 1988)

Price v. Mitchell Constr. Co., 482 So. 2d 869 (La. Ct. App.), cert. denied, 484 So. 2d 671 (1986)

Cunningham v. Montgomery, 921 P.2d 1355 (Or. App. 1996)

Shilling v. Mobile Analytical Services, Inc., 602 N.E.2d 1154 (Ohio 1992)

Seneca Falls Greenhouse & Nursery v. Layton, 389 S.E.2d 184 (Va. App. 1990)

Nichols v. Colonial Beacon Oil Co., 132 N.Y.S.2d 72 (App. Div. 1954)

People v. Sixto, 17 Cal. App. 4th 374 (Cal. App. 4th 1993)

State v. Bey, 610 A.2d 814 (N.J. 1992)

Drake v. Larue Constr. Co., 451 S.E.2d 792 (Ga. App. 1994), cert. denied, 1995 Ga. LEXIS 427

Hutchison v. American Family Mut. Life Ins. Co., 514 N.W.2d 882 (Iowa 1994)

Brannon v. Sharp, 554 So.2d 951 (Ala. 1990)

Valiulis v. Scheffels, 547 N.E.2d 1289 (Ill. App. 1989)

Shaw v. Martin, 399 N.W.2d 450 (Mich. App. 1986)

Sanchez v. Derby, 433 N.W.2d 523 (Neb. 1989)

Buckler v. Sinclair Ref. Co., 216 N.E.2d 14 (Ill. App. 1966)

Winder v. Martinez, 545 P.2d 88 (N.M. App. 1975), cert. denied, 546 P.2d 71 (1976)

Hughes v. Royal-Globe Ins. Co., 496 So. 2d 1241 (La. App.), cert. denied, 497 So. 2d 1388 (La. 1986)

In re Stephanie, 456 A.2d 268 (R.I. 1983)

Billbrey v. Industrial Comm'n, 556 P.2d 27 (Ariz. App. 1976)

Freemon v. VF Corp., 675 S.W.2d 710 (Tenn. 1984)

Chatfield v. SAIF Corp., 688 P.2d 434 (Or. App. 1984)

Haas v. Seekell, 538 So. 2d 1333 (Fla. App. 1989)

GIW Southern Valve Co. v. Smith, 471 So. 2d 81 (Fla. App. 1985)

Executive Car & Truck Leasing v. DeSerio, 468 So. 2d 1027 (Fla. App. 1985)

Kriewitz v. Savoy Heating & Air Conditioning Co., 396 So. 2d 49 (Ala. 1981)

Handy v. Speth, 435 S.E.2d 623 (Ga. App. 1993)

Chandler Exterminators, Inc. v. Morris, 416 S.E.2d 277 (Ga. 1992)

Drake v. Larue Constr. Co., 451 S.E.2d 792 (Ga. App. 1994), cert. denied, 1995 Ga. Lexis 427 (Ga. 1995)

Fla. Stat. Ann § 490.003(4) (West 1990)

Psychologists as Expert Witnesses: Issues of Admissibility, *The Clinical Neuropsychologist* 295 (1992)

Filskov and Leli, Assessment of the Individual in Neuropsychological Practice, in *Handbook of Clinical Neuropsychology* 545 (S. Filskov & T. Boll eds. 1981)

ARGUMENT

I. NEUROPSYCHOLOGISTS BY TRAINING AND EXPERIENCE ARE QUALIFIED TO PROVIDE EXPERT TESTIMONY CONCERNING CAUSATION OF PSYCHOLOGICAL CONDITIONS

A. Psychological Training and Practice are Rigorous, Scientific, and Relevant to the Issues at Bar

Appellant Chrysler seeks reversal of the Commission primarily on the ground that a neuropsychologist cannot offer competent expert testimony on causation of organic brain injury, simply because a neuropsychologist is not a medical doctor. By seeking categorically to exclude neuropsychologists from testifying on causation of brain injury, however, the rule proposed by Chrysler would exclude a group of experts who are often the most qualified to testify on causation.

Psychologists must adhere to rigorous training standards and are required to complete demanding training programs. The doctoral program requires demonstrated competence in theories of normal and abnormal behavior, clinical diagnostic skills, the full range of approaches to treatment, ethics and professional standards, research design and methodology, and extensive clinical rotations followed by at least one year of a full-time, closely supervised internship experience in a hospital, medical center, or clinic.^{1/} Doctoral candidates receive considerable training in the biological aspects of mental disorders; courses on psychopathology, for example, review in detail organic bases for mental disorders.

Neuropsychology is a specialty within psychology that integrates the educational,

^{1/} This training takes an average of 7.1 years to complete. National Research Council, Summary Report 1987: Doctorate Recipients from United States Universities (Washington, D.C.; National Academy Press, Preliminary release (1989)). This is in addition to the undergraduate degree, which typically involves a psychology major.

scientific, and professional contributions of the discipline of psychology with relevant developments in the neurosciences.^{2/} Neuropsychology brings a unique perspective to assessing the etiology of mental disorders. In addition to the rigorous training required of all psychologists, neuropsychologists have specialized training in the science of brain-behavior relationships, including functional neuroanatomy, clinical diseases, clinical and behavioral neurology, psychophysiological principles underlying pathology, sociocultural influences on behavior, principles of assessment and interviewing, principles of test construction, administration, and validation, and specialized neurodiagnostic technologies.^{3/}

B. The Methodology of Neuropsychologists Enables Them to Assess Causation

Seventy years ago, Sheperd Franz recognized the intersecting aims of neurology, psychology, psychiatry, and psychopathology. He predicted “it will be seen that these four sciences which are independent to a great extent are, nevertheless, overlapping and it is

^{2/} “Developed as a clinical science within the past 60 years, neuropsychology is the study of the relationship between brain structure and function. It attempts to understand patterns and variations of cognition, emotion and behavior in the context of cortical and subcortical neuroanatomical organization. Clinical applications of neuropsychology more specifically integrate the effects of brain dysfunction or damage on these same psychological and behavioral processes.” D. Hartman, Neuropsychological Toxicology: Identification and Assessment of Human Neurotoxic Syndromes 2 (1988) (hereafter “D. Hartman”).

^{3/} See generally E. Bigler, Diagnostic Clinical Neuropsychology (1984); C. Golden & P. Vincente, Foundations of Clinical Neuropsychology (1983); Handbook of Clinical Neuropsychology (S. Filskov & T. Boll eds. 1981); Handbook of Neuropsychological Assessment (A. Puente & R. McCaffrey eds. 1992); A. Luria, Higher Cortical Functions in Man (2d ed. 1980); Heilman & Valenstein, Clinical Neuropsychology (2d ed. 1985); Medical Neuropsychology: The Impact of Disease on Behavior (R. Tarter, D. Van Thiel & K. Edwards eds. 1988); Reitan & Davison, Clinical Neuropsychology: Current Status and Applications (1974).

impossible to separate by sharp lines one of these disciplines from the other three.”^{4/} As predicted, the health disciplines have evolved toward collaboration in diagnosis and treatment.^{5/} The sub-discipline of neuropsychology has been at the forefront of diagnostic collaboration, and the development of clinical neuropsychology has “contributed to the accuracy of neuropsychological diagnosis” of a wide range of neurological disorders, including closed head injury.^{6/}

In determining the existence of illness, etiology, course of treatment, and predicted recovery, the clinical diagnostic process employed by neuropsychologists is no different from that employed by physicians or psychiatrists. Just as heart disease causes visible failure on cardiovascular tests when used in an overall evaluation by cardiologists, so brain disease causes visible patterns of impairment on tests of memory, attention, psychomotor skills, and other cognitive abilities when used in an overall evaluation by neuropsychologists. In fact, neuropsychological tests have been observed to be “among the most sensitive methods available for detecting the presence of cerebral pathology.”^{7/}

^{4/} S. Franz, Handbook of Mental Examination Methods 12 (1919).

^{5/}

For example, the Missouri General Assembly amended in 1989 the Mo. Psychology Practice Act, Chapter 337 RSMo. and in particular § 337.015, subsections (3) and (4) so as to substantially broaden, expand, and clarify what constitutes the practice of psychology. The statute provides that psychologists are independent health care practitioners qualified to “diagnose and treat” mental and emotional disorders, to test, evaluate, and assess neuropsychological functioning, and to diagnose and treat the “psychological aspects of physical illness.”

^{6/} Smith, Principles Underlying Human Brain Functions in Neuropsychological Sequelae of Different Neuropathological Processes, in Handbook of Clinical Neuropsychology 184 (S. Filskov & T. Boll. eds. 1981).

^{7/} Medical Neuropsychology, The Impact of Disease on Behavior, *supra*, at 2.

Neuropsychologists evaluate these tests in light of a patient's particular case history. They compare the results of neuropsychological tests with those on medical tests, with their observation of a patient, with that patient's report of symptoms, and with the test results of people known to have brain damage of the same etiology. They then evaluate this patient profile against their understanding of which medical problems are consistent with that profile. They further narrow down their assessment of the problem by gathering information on a patient's personal history. Thus, a differential diagnosis and assessment of causation made by a neuropsychologist, like those made by other medical professionals, is based on the clinician's judgment, interpretation of test results, and evaluation and assessment of the patient and the patient's case history (all in light of the relevant scientific literature).^{8/}

The diagnostic sensitivity and objectivity of neuropsychology is highly valued in the health professions. Neurologists, psychiatrists, and practitioners of occupational medicine all frequently refer patients to neuropsychologists to diagnose neurological conditions including organic brain disease.^{9/} For that reason, a rule that barred courts from utilizing this one category of professional expertise would be indefensible. As the Illinois Appellate Court explained, "it would be somewhat anomalous to conclude that [a neuropsychologist] would not be qualified to testify about [a neurological disease] when the neurologists and psychologists who sought

^{8/} See, e.g., Filskov and Leli, Assessment of the Individual in Neuropsychological Practice, in Handbook of Clinical Neuropsychology 545 (S. Filskov & T. Boll eds. 1981).

^{9/} See Eskenzi and Maizlish, Effects of Occupational Exposure to Chemicals on Neurobehavioral Functioning in Neuropsychology 255; Filskov, Grimm and Lewis, Brain-Behavior Relationships, in Handbook of Clinical Neuropsychology 39 (S. Filskov & T. Boll eds. 1981).

out his expertise and assistance in diagnosing the disease would most likely be qualified to do so.”^{10/}

II. § 490.065.1 RSMo (1996) COMMANDS LIBERAL ADMISSION OF EXPERT OPINION TESTIMONY

By seeking categorically to exclude testimony of neuropsychologists, Chrysler fails to recognize the breadth of § 490.065.1 RSMo (1996), the rule governing admissibility of expert testimony in Missouri. The plain language of § 490.065.1 RSMo (1996) makes clear that the primary consideration in determining an expert witness’s competence is the witness’s “knowledge, skill, experience, training or education,” not the particular degree or title that the witness holds. § 490.065.1 RSMo (1996).

And, as noted by the Commission in its Memorandum and Order of Confirmation, there is neither a statute nor case which requires a specific license in order to establish qualifications, as a matter of law. Instead, the question of whether one has the requisite qualifications is one which is determined by the trial judge (or in this case the administrative law judge) on a case by case basis. See In re C.L.M., 625 S.W.2d 613, 615 (Mo. 1981).

This Court, as well as the other districts, has acknowledged the broad scope of expert testimony admissible under § 490.065.1 RSMo (1996). See, e.g., Inman v. Bi-State Development Agency, 849 S.W.2d 681, 683 (Mo. App. E.D. 1993); see also St. Luke’s Hospital v. May, 588 S.W.2d 217, 222 (Mo. App. W.D. 1979) (“Our system provides for liberal construction of who may be considered an expert witness.”). In particular, the statute provides that expert testimony is properly admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” § 490.065.1 RSMo (1996). For that reason, the

^{10/} Valiulis v. Scheffels, 547 N.E.2d 1289, 1296-97 (Ill. App. 1989).

Western District has emphasized that “[t]here is no requirement that an expert witness have expertise based solely upon his education. An individual with substantial practical and specialized experience in a given area may also qualify as an expert.” Washburn v. Grundy Electric Cooperative, 804 S.W.2d 424, 426 (Mo. App. W.D. 1991). Accordingly, it is not necessary for an expert witness to have a specific degree, such as an M.D. In addition, a factfinder’s determination that an expert’s qualifications are sufficient to enable him to assist the jury is discretionary and will not be disturbed without a clear showing of an abuse of discretion. Id.; Hord v. Morgan, 769 S.W.2d 443, 448 (Mo. App. W.D. 1989).

Moreover, Chrysler misstates the holdings in Cebuala v. Benoit, 652 S.W.2d 304, 308 (Mo. App. W.D. 1983), and Sigrist v. Clark, 935 S.W.2d 350, 357 (Mo. App. S.D. 1996), in support of its argument that Missouri courts have categorically disqualified chiropractors, nurses and others as a class from providing expert testimony. Scrutiny of those cases reveals that the particular individual was not qualified to render an expert opinion. Chrysler also incorrectly cites McGrath v. Satellite Sprinkler System, 877 S.W. 2d 704, 708 (Mo. App. E.D. 1994), for the proposition that a claimant must produce only “medical evidence” to show causation of injury. The court actually held that medical causation “must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” Id. at 708, citing Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo. App. W.D. 1991).

The categorical rule proposed by Chrysler would sweep aside the question of whether a neuropsychologist’s testimony would assist the trier of fact in understanding the medical causation of a brain injury, which is the key question under Missouri law. Chrysler’s position would give short shrift to the experience-based qualifications of experts, substituting

instead a mechanical inquiry into which degrees the expert has earned. In short, Chrysler's proposition -- that admission of neuropsychological testimony on causation of physical injuries is always an abuse of discretion, simply because neuropsychologists lack the title "medical doctor" -- would deprive the trier of fact of important evidence in contravention of the liberal principles of § 490.065.1 RSMo (1996).

III. COURTS HAVE WIDELY RECOGNIZED THAT PSYCHOLOGISTS ARE EXPERTS IN DIAGNOSING THE EXISTENCE AND CAUSES OF BRAIN DYSFUNCTIONS

It is well established that psychologists are qualified to testify as to whether an individual is suffering from a mental disorder that has a physical cause -- including brain damage.^{11/} And if neuropsychologists are qualified to diagnose organic brain injury, it follows that neuropsychologists are qualified to testify to the cause of such injuries. This is because the neuropsychological method of assessing causation is part and parcel of the method of diagnosis. Making a diagnosis of organic brain injury, for example, involves establishing that the injury has a physical rather than purely mental cause.^{12/} Thus, as the vast majority of courts have

^{11/} See, e.g., Kinsey v. Kolber, 431 N.E.2d 1316, 1329 (Ill.App. 1982); Weider v. Senebouthyrath, 583 N.Y.S.2d 94, 94 (N.Y. App.Div. 1992); James v. State, 489 So. 2d 737, 739 (Fla.), cert. denied, 477 U.S. 909 (1986); Simmons v. Mullen, 331 A.2d 892, 898 (Pa. Super. 1974). See generally Robert L. Richardson & Russell L. Adams, Neuropsychologists as Expert Witnesses: Issues of Admissibility, The Clinical Neuropsychologist 295, 297 (1992) ("Apparently each and every jurisdiction which has ruled on the current brain functioning issue since 1980 has allowed clinical psychologists and neuropsychologists to testify as expert witnesses on the current condition of the brain.").

^{12/} As early as the beginning of this century, clinical psychologists called upon to determine that psychotherapy was a worthwhile treatment for hospitalized psychiatric patients first had to rule out physical causes of their symptoms. See Filskov and Leli, Assessment of the Individual in Neuropsychological Practice, in Handbook of Clinical Neuropsychology 545 (S. Filskov & T. Boll eds. 1981).

recognized,^{13/} because psychologists “are entitled to diagnose, treat and correct mental conditions within their field it follows that they are also competent to testify regarding the causes of such conditions.” Hooper v. Industrial Commission of Arizona, 617 P.2d 538, 539 (Ariz. 1980).^{14/}

Courts therefore have allowed neuropsychologists to testify that an individual’s brain damage resulted from premature birth and respiratory distress,^{15/} that it did not result from

^{13/} See Richardson & Adams, supra, at 298; Hutchison v. American Family Mut. Life Ins. Co., 514 N.W. 2d 882, 886 (Iowa 1994) (“The majority of the states that have passed on the issue have permitted such testimony.”).

^{14/} Like the Arizona Supreme Court, the Oregon Supreme Court, after surveying the relevant psychological literature, correctly concluded that psychologists are competent to determine “antecedent circumstances” to mental disorders or disabilities, and to achieve the goals of diagnosis: “completely describing the etiological factors causative of disorder,” including the “differentiat[ion] between organic and functional disorders.” Sadow v. Weyerhaeuser Co., 449 P.2d 426, 428-29 (Or. 1969). The New Mexico Supreme Court also put it well:

It consequently appears to us a curious proposition that the legislature has enough confidence in the competence of non-physician health care providers to grant them licenses to practice their professions, and to authorize treatment by them to injured compensation claimants, but to have intended that those same health care providers be prohibited from testifying concerning the cause of injury which lies squarely within the areas of their competency.

Madrid v. University of California, 737 P.2d 74, 76 (N.M. 1987).

^{15/} Fabianke v. Weaver, 527 So. 2d 1253, 1257 (Ala. 1988) (upholding decision of trial court to allow neuropsychologist to testify that premature birth and resulting respiratory distress had caused plaintiff’s complications and could cause a future learning disability).

electrical shock,^{16/} that it resulted from exposure to toxins or other substances,^{17/} and, as in this case, that it resulted from an automobile accident or other physical blow.^{18/} The rule proposed

^{16/} Cf. Price v. Mitchell Constr. Co., 482 So. 2d 869, 872 (La. Ct. App.), cert. denied, 484 So. 2d 671 (1986) (relying in part on psychologist's testimony to uphold trial court's decision that plaintiff's brain damage existed well before the electrical shock he received in an industrial accident and did not result from that accident).

^{17/} See Cunningham v. Montgomery, 921 P.2d 1355, 1358-59 (Or. App. 1996) (reversing refusal to admit neuropsychologist's testimony that dentist's administration of nitrous oxide caused plaintiff's hypoxia); Shilling v. Mobile Analytical Services, Inc., 602 N.E.2d 1154 (Ohio 1992) (reversing the trial court's decision to exclude the testimony of a neurotoxicologist/psychologist that plaintiffs suffered brain damage from drinking water contaminated with gasoline); Seneca Falls Greenhouse & Nursery v. Layton, 389 S.E.2d 184 (Va. App. 1990) (relying on neuropsychologist's testimony that plaintiff was suffering from panic attacks related to being sprayed with insecticide; in reaching this conclusion, the neuropsychologist seemed to have considered other causes such as exposure to the pesticide and chronic exposure to organophosphates); Nichols v. Colonial Beacon Oil Co., 132 N.Y.S.2d 72, 76 (App. Div. 1954) (relying on testimony of a neuropsychologist that decedent had postoperative delirium probably as a result of taking drug, medicine, or alcohol). In other cases, such testimony has been admitted without issuance of a reported decision discussing admissibility issues. See People v. Sixto, 17 Cal. App. 4th 374, 388-89 (Cal. App. 4th 1993) (discussing testimony by neuropsychologists that criminal defendant was brain damaged and had an acute psychotic episode triggered by alcohol or drugs); State v. Bey, 610 A.2d 814 (N.J. 1992) (discussing testimony by neuropsychologist that criminal defendant had suffered brain damage as a result of preutero exposure to alcohol, consumption of drugs and alcohol, and early head injuries).

^{18/} Drake v. Larue Constr. Co., 451 S.E.2d 792, 794 (Ga. App. 1994), cert. denied, 1995 Ga. LEXIS 427 (under amendment to Georgia statute, neuropsychologist should have been allowed to testify that blow to head caused psychological problems); Hutchison v. American Family Mut. Life Ins. Co., 514 N.W.2d 882 (Iowa 1994) (psychologist's testimony that plaintiff's auto accident did not result in brain injury was admissible even though psychologist was not board certified in neuropsychology); Brannon v. Sharp, 554 So. 2d 951 (Ala. 1990) (upholding trial court's decision to allow psychologist to testify that headaches and chronic pain were caused by auto accident); Valiulis v. Scheffels, 547 N.E.2d 1289, 1296 (Ill. App. 1989) (upholding trial court's decision to allow neuropsychologist to testify that collision had caused plaintiff's multiple sclerosis); Shaw v. Martin, 399 N.W.2d 450, 454 (Mich. App. 1986) (stating that a conflict between plaintiff's neuropsychologist and defendant's doctors as to whether auto accident had caused him to have memory loss and other cortical dysfunction made it a jury question); Sanchez v. Derby, 433 N.W.2d 523 (Neb. 1989) (holding that trial court abused its discretion in limiting testimony of a neuropsychologist regarding brain damage suffered by plaintiff in an automobile accident);

(continued...)

by Chrysler in this case thus conflicts with the decisions of the vast majority of other courts to consider this or analogous questions.^{19/}

Chrysler mistakenly relies on Missouri's statute defining the practice of psychology. That statute actually supports the decisions of the administrative law judge and the Commission. RSMo § 337.015 defines the practice of psychology to include "diagnosis and treatment of mental and emotional disorder or disability", "the testing, evaluation, or assessment

^{18/} (...continued)

Buckler v. Sinclair Ref. Co., 216 N.E.2d 14, 19-20 (Ill. App. 1966) (upholding trial court's decision to allow psychologist to testify that plaintiff suffered brain damage arising from an auto accident); Winder v. Martinez, 545 P.2d 88 (N.M. App. 1975), cert. denied, 546 P.2d 71 (1976) (psychologist held qualified to testify as expert that car accident caused change in intellectual function); Hughes v. Royal-Globe Ins. Co., 496 So. 2d 1241, 1247 (La. App.), cert. denied, 497 So. 2d 1388 (La. 1986) (affirming trial judge's conclusion, partly based on testimony of a psychologist, that worker was entitled to worker compensation because accident aggravated his psychological problems -- possibly including Alzheimer's disease); In re Stephanie, 456 A.2d 268 (R.I. 1983) (neuropsychologist testified that fall caused behavioral problems organic in origin).

^{19/} Only a small number of courts in other states have held to the contrary. See, e.g., Bilbrey v. Industrial Comm'n, 556 P.2d 27 (Ariz. App. 1976). Chrysler cites several purportedly contrary decisions for its conclusion that other jurisdictions have refused to allow neuropsychologists to testify concerning causation of brain injury. However, almost all of these decisions fail to support Chrysler's position. Freemon v. VF Corp., 675 S.W.2d 710 (Tenn. 1984), concerns a psychologist's testimony as to the causation of a back injury, not a brain injury, and is therefore off point. The court in Chatfield v. SAIF Corp., 688 P.2d 434, 437 (Or. App. 1984), based its decision, not on a categorical ruling that psychologists are never competent to testify as to brain injury, but rather on the fact that the plaintiff had made "no showing that [the specific psychologist] is competent to testify as to physical brain damage." Haas v. Seekell, 538 So. 2d 1333, 1336-37 (Fla. App. 1989), and GIW Southern Valve Co. v. Smith, 471 So. 2d 81, 82 (Fla. App. 1985), rely explicitly on Executive Car & Truck Leasing v. DeSerio, 468 So. 2d 1027 (Fla. App. 1985), which has been superseded by statute, see Fla. Stat. Ann § 490.003(4) (West 1990). The decision in Kriewitz v. Savoy Heating & Air Conditioning Co., 396 So. 2d 49 (Ala. 1981), was reached in accordance with a statute that differs materially from Missouri's statutory definition of the practice of psychology. Handy v. Speth, 435 S.E.2d 623 (Ga. App. 1993), simply follows Chandler Exterminators, Inc. v. Morris, 416 S.E.2d 277 (Ga. 1992), which also was superseded by statute, see Drake v. Larue Constr. Co., 451 S.E.2d 792, 794 (Ga. App. 1994), cert. denied, 1995 Ga. Lexis 427 (Ga. 1995).

of neuropsychological functioning”, and “the psychological aspects of physical illness, accident, injury or disability.” RSMo § 337.015. As explained above, the diagnosis of organic brain injury (i.e., a “mental . . . disorder or disability”) necessarily encompasses an assessment of the cause of such injury. Chrysler insists that “a psychologist may only render expert testimony as to those matters which fall within the ‘practice of psychology’ as that term is defined by Missouri statute,” Br. at 62, but, when the psychologist’s diagnostic activity is properly understood as including an assessment of causation, Chrysler’s argument actually supports admission of the neuropsychological evidence.^{20/}

^{20/} Moreover, Chrysler’s argument further ignores the non-discrimination public policy enunciated in Section 337.041 RSMo. Psychologists can not be discriminated against in favor of physicians so long as the psychologist is acting within the scope of his license. And as noted, one cannot diagnosis, assess, or evaluate unless one is also qualified to determine “causation.”

CONCLUSION

For the reasons set forth above, amici respectfully urge the Court to affirm the award of the Labor and Industrial Relations Commission.

Respectfully submitted,

JENNER & BLOCK

Attorneys at Law

By:

D. Scott Barash

D. Scott Barash, D.C. Bar #421699

Thomas D. Amrine

601 13th Street, NW, Suite 1200

Washington, D.C. 20005

Telephone No. (202) 639-6056

Facsimile No. (202) 639-6066

OF COUNSEL:

PAULE, CAMAZINE & BLUMENTHAL, P.C.

Attorneys at Law

AMERICAN PSYCHOLOGICAL
ASSOCIATION

James L. McHugh, Jr.

Nathalie F.P. Guilfoyle

750 First St., NE

Washington, D.C. 20005

(202) 336-6089

By:

Daniel P. Card II

Daniel P. Card II, MBE 24272

165 N. Meramec, 6th Floor

St. Louis, MO 63105

Telephone No. (314) 727-2266

Facsimile No. (314) 727-2101

Dated: August 18, 1997