

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD McCAULEY,)	
PATRICIA MCCAULEY,)	
)	
Plaintiffs,)	
vs.)	NO. 1:05-cv-00424-TAB-RLY
)	
NUCOR CORP.,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD McCAULEY and)
PATRICIA McCAULEY,)
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Plaintiffs,)
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vs.)
) 1:05-cv-0424-TAB-RLY
NUCOR CORP.,)
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Defendant.)

ENTRY ON DEFENDANT’S MOTION TO EXCLUDE EXPERT WITNESSES

I. Introduction.

In June 2003, Plaintiff Donald McCauley became a quadriplegic after falling from a trailer at Defendant’s facility. He subsequently brought a negligence action against Defendant.¹ Defendant now moves to exclude four of Plaintiffs’ expert witnesses—Daniel T. Teitelbaum, John J. Treuting, Neil B. Jurinski, and Stanley D. Pulz. Defendant challenges these experts’ qualifications and methodology under Fed. Evid. R. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Plaintiffs contend that these four experts are qualified in their fields and have offered reliable expert opinions consistent with federal standards for the admissibility of expert testimony. The parties appeared for oral argument on June 13, 2007. The matter having been fully heard and briefed is now ripe for disposition. For the reasons below, the Court grants in part and denies in part Defendant’s motion [Docket No.

¹ The circumstances and facts of this personal injury case have been well detailed in previous entries, and the Court finds no practical utility in revisiting those facts in depth here. Instead, where appropriate the Court will detail only those facts that are critical to the disposition of Defendant’s motion to exclude Plaintiff’s experts.

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II. Discussion.

Federal Rule of Evidence 702 and the tenets articulated in *Daubert* provide the barometer of admissibility for scientific expert testimony.² A district court has broad, yet not unlimited, discretion in exercising its gatekeeping function under *Daubert*. *Jenkins v. Bartlett*, 487 F.3d 482, 489 (7th Cir. 2007) (citing *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999)). A district court must determine whether a proposed expert: (1) is qualified; (2) used reasoning or methodology that is scientifically reliable; and (3) offers testimony that assists a trier of fact to understand the evidence or determine a fact in issue. *Ervin v. Johnson & Johnson*, ___ F.3d ___, 2007 WL 1966796 at *3 (7th Cir. July 9, 2007).

Specifically, Rule 702 provides:

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.

Per *Daubert*, “the district court has a duty to ensure that expert testimony offered under Federal Rule of Evidence 702 is both relevant and reliable.” *Jenkins*, 487 F.3d at 488-89 (internal citation omitted). “Whether proposed expert testimony is sufficiently reliable under Rule 702 is dependent on the facts and circumstances of the particular case.” *Id.* at 489.

Accordingly, where the facts of a case could not possibly support an expert’s conclusions or opinions, a court may properly exclude such testimony. *Target Mkt. Publ’g. Inc. v. ADVO, Inc.*,

² See, e.g., *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (despite Rule 702’s post *Daubert* amendment, “the standard of review that was established for *Daubert* challenges is still appropriate”).

136 F.3d 1139, 1144 (7th Cir. 1998). “The trial court’s gatekeeper role, however, is not meant to supplant the adversary system or the role of the jury: ‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” *U.S. v. W.R. Grace*, 455 F. Supp. 2d 1148, 1153 (D.Mont. 2006) (quoting *Daubert*).

Moreover, reliability should not be confused with an expert’s ultimate correctness. *See Smith v. Ford Motor Company*, 215 F.3d 713, 719 (7th Cir. 2000) (“It is not the trial court’s role to decide whether an expert’s opinion is correct . . .”). Instead, reliability is measured more appropriately by focusing on the expert’s principles and methodology. *Daubert*, 509 U.S. at 595. *Daubert* illustrates several nonexclusive factors to determine the reliability of an expert’s methodology: whether the conclusion is testable; whether the conclusion is subject to peer review; the potential or known error rate; and the general acceptance of the theory. *Id.* at 593-94. Yet, these factors are “meant to be helpful, not definitive.” *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999).

Even if an expert’s testimony is deemed reliable, it is essential that the Court be satisfied that a proposed expert’s testimony will assist a trier of fact “to understand the evidence or to determine a fact in issue.” Fed. R. Civ. P. 702. It is axiomatic that a proposed expert’s testimony is inadmissible if it does not help the jury understand the evidence or determine a fact in issue. *See, e.g., Taylor v. Ill. Cent. R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (district court may properly bar qualified expert’s testimony where the issue to be decided in the case was not beyond understanding of a lay juror).

Several significant corollary lessons flow from *Daubert*. For instance, “[e]xpert

testimony as to legal conclusions that will determine the outcome of the case is inadmissible.” *Good Shepherd Manor Foundation, Inc. v. City of Mومence*, 323 F.3d 557, 564 (7th Cir. 2003). Moreover, experts may base an opinion to some extent on facts or data gleaned from another expert’s expertise without the other expert’s testimony. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002); *see also* Rule 703. As *Daubert* counsels, “Rule 403 permits the exclusion of relevant evidence ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury’” *Daubert*, 590 U.S. at 595 (quoting Rule 403).

Defendant seeks to exclude four of Plaintiff’s witnesses from testifying either entirely or in part at trial on the bases that they are not qualified to offer certain opinions and that their opinions are not reliable. [Docket No. 208.] With the above principles in mind, the Court now turns to its gate-keeping obligation for each challenged expert.

A. Daniel T. Teitelbaum.

Plaintiffs offer Dr. Daniel Teitelbaum as an expert in medical toxicology and occupational medicine. While Teitelbaum opines on medical causation, his opinions also touch on matters of chemistry, chemical engineering, and the steel-making process itself. Defendant contends that Teitelbaum’s opinions are “clouded by [his] lack of ‘knowledge, skill, experience, training or education’ in the areas as required by F.R.E. 702.” [Docket No. 208.] Defendant’s qualification-based challenge to Teitelbaum’s testimony is not supported with meaningful analysis nor does Defendant provide the Court with any more information than it did on summary judgment. [*See* Docket No. 191, pp. 5-6.] Thus, for the reasons detailed in the Court’s entry on summary judgment, the Court finds that Teitelbaum is qualified with regard to the

opinions contained in his report.

Defendant also challenges the reliability of Teitelbaum's opinions and conclusions. Defendant initially asserted that Teitelbaum's opinions are based on speculation and/or selective application of facts. [Docket No. 208, pp. 8-16.] After Teitelbaum's testimony at the June hearing, Defendant argues that Teitelbaum's opinions are based on incorrect facts and assumptions concerning the location of McCauley's body upon falling.³ [Docket No. 233 at pp. 1-7.]

Plaintiffs note that Nucor admits the presence of hydrogen sulfide -- the chemical agent Plaintiffs assert caused Donald McCauley to fall from his truck rendering him a quadriplegic. [Docket No. 223.1 at p. 5.] Plaintiffs further contend that Teitelbaum's conclusion that a level of hydrogen sulfide existed sufficient to cause a sudden knockdown is supported by the facts of this case. Even if such a conclusion is not factually sustainable, Plaintiffs point out that a complete knockdown is not Teitelbaum's sole explanation. [Docket No. 238 at pp. 3-5.] According to Plaintiffs, Teitelbaum's "opinion is that it was either a knockdown or severe impairment caused by a very brief exposure to hydrogen sulfide gas that caused McCauley to fall." [Docket No. 238 at p. 5.] Plaintiffs argue that Teitelbaum's opinions are not only well-grounded in fact, but that his methodology is "well described in the literature." [Docket No. 223.2 at p. 9.] Plaintiffs

³ Defendant also cites to a number of cases in which Teitelbaum was disqualified. However, these cases deal with medical causation of long term exposure to chemicals and chronic ailments such as cancer -- some in which the only support for his opinion is studies on the effects of animals. Moreover, there are other instances more analogous to our case's circumstances in which Teitelbaum satisfied the standards of admissibility. *See, e.g., Goebel v. Denver and Rio Grande Western Railroad Co.*, 346 F.3d 987 (10th Cir. 2003) (the court determined that Teitelbaum was qualified to opine that exposure to high elevation and diesel fumes caused high altitude cerebral edema and his opinions concerning general and specific causation were reliable). Accordingly, the Court does not find the Defendant's listed cases particularly helpful.

claim that Defendant's contentions go to the weight, and not the admissibility, of Teitelbaum's testimony. [Docket No. 238 at p. 1.] For the most part, the Court concurs with Plaintiffs.

Teitelbaum's ultimate conclusion is that "hydrogen sulfide exposure, produced as a consequence of the actions of Nucor and its employees, was a precipitating cause of Mr. McCauley's injury." [Teitelbaum Report at pp. 7, 26-27, 29.] He specifically opines that the gas that escaped the hatch as McCauley loosened it was at a sufficient level to render him "either unconscious or so impaired that he fell from the truck." [Teitelbaum Report at pp. 20, 26; *see also* Teitelbaum Dep. at 100.] Teitelbaum testified that his methodology consisted of reviewing all available statements, records, case studies, and literature concerning generation of hydrogen sulfide gas including that regarding the Kipp generator, and that he applied a differential diagnosis to reach his conclusions. [June 13 Hearing Tr. at pp. 28-29; Teitelbaum Dep. at p. 141.] As part of his differential diagnosis, Teitelbaum excluded other possible factors behind McCauley's fall from the truck including: volatile hydrocarbons; the possibility of "blacking out" from standing from a crouched position; McCauley's health; and/or drug and alcohol use. [Teitelbaum Dep. at pp. 55, 141, and 215-17.]

"A differential diagnosis satisfies a *Daubert* analysis if the expert uses reliable methods. Under *Daubert*, expert opinions employing differential diagnosis must be based on scientifically valid decisions as to which potential causes should be 'ruled in' and 'ruled out.'" *Ervin v. Johnson & Johnson*, __F.3d__, 2007 WL 1966796 at *3 (7th Cir. July 9, 2007); *see also Ervin v. Johnson & Johnson*, 2006 WL 1529582 at *5 (S.D. Ind. 2006) (collecting cases holding same). Defendant does not appear to challenge the reliability of Teitelbaum's differential diagnosis. Instead, Defendant mounts a fact-based attack on the reliability of Teitelbaum's opinions. This

attack falters.

Teitelbaum may have based his opinion on one incorrect fact -- that McCauley was found toward the center of the truck beneath the dome -- and one false assumption -- that McCauley's truck had been cleaned prior to loading. Yet, these inaccuracies do not necessarily render his opinions unreliable under the factual circumstances of this case. With respect to McCauley's location, the record is less than definitive about where Nucor employee William McClure located McCauley. At the June 13, 2007 hearing, McClure indicated by marking a diagram that McCauley was found towards the center of the trailer's tandem wheel axle. Teitelbaum's shock and admitted lack of familiarity with this evidence at the June 13 hearing did not go unnoticed by the Court. On the other hand, Defendant's counsel posed questions to Teitelbaum asserting that McCauley was located some twenty feet from the dome without ever really presenting definitive evidence of the trailer's dimensions. Moreover, McClure's recollection of where he located McCauley has varied over time. When he was deposed in April 2006, McClure specifically stated that he found McCauley "between the rear wheels of the tractor" and not the trailer as he indicated at the hearing. [McClure Dep. at p. 61.]

Teitelbaum testified that an individual exposed to high levels of hydrogen sulfide gas could crawl "some distance" before succumbing. [June 13 Hearing Tr. at pp. 46-49.] Although initially stunned by Defendant's account of where McCauley was found, Teitelbaum remained steadfast in his opinion that hydrogen sulfide gas impaired McCauley and probably caused him to fall. The record sustains a conclusion that McCauley moved some distance along the top of the trailer before falling. It does not, however, support Defendant's assertion that McCauley traveled twenty feet. Regardless, even by Defendant's counsel's account of the relative

distances, McCauley may have been found in a location consistent with a theory of incapacitation less than knockdown.⁴ Defendant's best guesstimate of what distance McCauley traveled after his alleged exposure to hydrogen sulfide gas does not provide the Court sufficient grounds to strike Teitelbaum as an expert witness.

Teitelbaum also operated under the false assumption that the truck had been cleaned prior to McCauley's loading at Nucor.⁵ Teitelbaum's false assumption does not necessarily make his opinions unreliable. Even if sulfites existed in the truck from sources extraneous to Nucor, Nucor's addition of highly acidic wastewater could have caused the hydrogen sulfide gas that Nucor admits existed in McCauley's trailer on two different readings following the accident. The highly acidic wastewater was allegedly caused by Nucor's incorrect pH readings and related actions. Thus, Teitelbaum's assumption concerning the origin of the sulfites is immaterial.

At the hearing, Defendant proffered the testimony of its own expert, Gary Evans, in an attempt to demonstrate that Teitelbaum's opinions were inapposite to this case's circumstances. Evans' testimony fell short of its intended mark. Teitelbaum explained the absence of objective symptoms from hydrogen sulfide gas exposure: McCauley's exposure was a momentary blast of pressurized gas, and the moment he fell he was no longer exposed to toxic fumes [Teitelbaum Dep. at p. 139]; aspirated vomit obscured a diagnosis of pulmonary edema [June 13 Hearing Tr. at p. 41]; other symptoms were not noted by EMS due to the nature of their tasks dealing with the severity of trauma experienced by Donald McCauley and/or the fact that McCauley broke his

⁴ Moreover, without knowing the exact relative distances, Defendant's contention that Teitelbaum's expert opinions are unreliable because they are based on inaccurate facts is speculation itself.

⁵ Plaintiffs' experts operated under this same false assumption.

neck and fractured his skull. [June 13 Hearing Tr. at pp. 39, 50.] Paradoxically, Defendant's own expert stated that the OSHA chart of symptoms was "not meant to be accurate" [June 13 Hearing Tr. at p. 28.]

Defendant further complains that Teitelbaum did not conduct any empirical tests on the wastewater to determine the exact level of exposure. This contention is not dispositive in the absence of any explanation for how tests would have made Teitelbaum's testimony more reliable or even what specific tests could have been conducted. Defendant has not identified any conductible tests that would have shown the exact amount of gas that allegedly hit McCauley. To this extent, Defendant's assertions of unreliability due to lack of testing are unsupported conclusions.

Defendant's varied challenges to Teitelbaum's opinions may significantly diminish any weight given to Teitelbaum's testimony, but they do not sufficiently demonstrate how Teitelbaum's differential diagnosis was unreliable or how his opinions are not relevant under *Daubert* and Rule 702. The facts concerning where McCauley landed, whether sulfites in the truck originated from a source other than Nucor, and objective symptoms reportedly experienced by McCauley may not ultimately be found to support Teitelbaum's opinions. However, "may not possibly support" and "could not possibly support" are not the same. Defendant has not persuaded the Court that this is a case where the undisputed facts *could not possibly* support an expert's conclusions or opinions. Defendants will have ample opportunity to challenge any shaky aspects of Teitelbaum's opinions and conclusions through cross examination. As a result, the Court denies Defendant's motion to exclude Teitelbaum's testimony.

B. John J. Treuting.

As with Teitelbaum, Defendant contends that John J. Treuting is not qualified to render opinions as to medical causation. [Docket No. 208 at pp. 16.] To the extent Defendant concedes that Treuting is qualified, Defendant asserts that because he failed to rule out other causes and lacked sufficient data, his opinions in “his field of toxicology do not meet the requisite reliability and relevance standards” [Docket No. 208 at pp. 16-18.] Defendant further contends that Treuting’s opinion is based on Teitelbaum’s “unsupported opinion.” [Docket No. 233 at p. 9.] As the Court has found Teitelbaum’s opinions reliable, Defendant’s latest contention is without merit. As for Defendant’s other contentions, Plaintiffs counter that Treuting’s opinions are not based in medical conclusions so no medical degree is required for his opinions. [Docket No. 223.2 at p. 14.] Instead, Plaintiffs respond that Treuting is qualified to opine on the addition of excessive acid to the wastewater due to the malfunctioning pH meter, the generation of sufficiently high levels of hydrogen sulfide gas in McCauley’s trailer, and its result on McCauley. [Docket No. 223.2 at p. 13.] Plaintiffs argue that Treuting’s testimony is reliable because his methodology is sound and “much of his analysis relies on known chemistry formulas that demonstrate that the combination of certain elements creates hydrogen sulfide.” [Docket No. 223.2 at p. 15.]

The Court agrees that Treuting is qualified to offer his opinion that “[t]he malfunctioning pH meter, which introduced excessive sulfuric acid into the Nucor wastewater, caused the production of hydrogen sulfide gas and hydrogen gas. The release of the hydrogen sulfide when Mr. McCauley began opening the dome was the causative agent that resulted in his fall and subsequent injury.” [Docket 208, Ex. 12 at p. 8.] Treuting has thirty years experience in the field

of human toxicology, including international lecturing in the field of toxicology. He holds a Ph.D. in clinical and forensic toxicology as well as degrees in chemistry. He is also a chemistry lecturer at California State University, North Ridge, among other entities. Treuting does not offer an opinion that fits neatly in a medical causation box. He instead opines on the creation of hydrogen sulfide gas and its effect on McCauley. He is well qualified to do so.

With respect to the reliability of his opinions, the Court finds, as it did with Teitelbaum, that Treuting's principles and methodology are reliable. Defendant again advances a fact-based challenge to Treuting's opinions and conclusions. In doing so, Defendant does not successfully show how Treuting's principles or methodology are unreliable. In fact, Defendant offered nothing to challenge Plaintiffs' position that the chemical equations he used are generally accepted in the scientific community. For the same reasons as detailed above, Defendant has not persuaded the Court that this is a case where the undisputed facts *could not possibly* support this expert's conclusions or opinions. Defendant's arguments against Treuting go to the weight, not admissibility, of his conclusions and opinions. Accordingly, the Court denies Defendant's motion to exclude Treuting's testimony.

C. Neil B. Jurinski.

Plaintiffs offer Neil B. Jurinski as an industrial hygienist who is qualified to evaluate "the health and safety effects of chemicals" in the workplace. Jurinski is a board-certified industrial hygienist with a Ph.D. in physical chemistry. [Docket No. 223.2 at p. 17.] He is a university instructor in industrial hygiene chemistry and has experience in hazard management. In his report he specifically opines on safety holes and hazards in Defendant's operation including lack of adequate pH control and failure to properly install, calibrate or maintain the pH meter.

Defendant's challenge against Jurinski echo all of those waged against the other two experts. Defendant contends that Jurinski is not qualified to offer opinions regarding medical causation. Defendant argues that Jurinski's opinions are not reliable because his opinions are not backed by sufficient data. For the reasons cited previously, the Court finds Jurinski's opinions backed by the proper qualifications and sufficiently reliable. Under these circumstances, the Court denies Defendant's motion to exclude the testimony of Neil Jurinski.

D. Stanley D. Pulz.

Plaintiffs offer the testimony of Stanley D. Pulz, a certified safety professional, as "an expert witness in relation with the dangers of hydrogen sulfide in the workplace as well as the safety precautions that can and should be taken where hydrogen sulfide may be formed." [Docket No. 223.2 at p. 20.] Defendant's challenges to Pulz echo previous challenges with a more effective resonance. Defendant points out that Pulz "indicated that his areas of expertise did not include when in the sequence of events hydrogen sulfide was created, where it was created, what the concentration was, or what the effect of any concentration would be on an individual." [Docket No. 208 at p. 25.] Further, Defendant contends that Pulz has limited knowledge of production of hydrogen sulfide. The Court concurs that Pulz's testimony is inadmissible but for reasons largely not addressed by Defendant.

Specifically, Pulz's opinions are couched in terms of ultimate legal conclusions concerning control and failure to exercise reasonable and prudent care. For instance, Pulz opines: "[Defendant] controlled the site of the incident . . .", Defendant "should have corrected . . . the fall hazard . . ." and "the primary cause of the subject accident was [Defendant's] failure to exercise reasonable and prudent care" [Pulz Report at pp. 1-2.] These are legal questions,

the resolution of which determine liability in this case. As such, they are improper and Pulz may not offer them at trial. *See Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (“[E]xpert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.”).

Moreover, Pulz’s opinions concern matters the Court disposed of on summary judgment. For example, Pulz’s report contains opinions and conclusions regarding the lack of fall protection and the design of Defendant’s loading bay. Yet, the Court has already ruled that Defendant had no duty to McCauley to provide or ensure that he used fall protection. Thus, matters concerning fall protection or design of the loading bay are not relevant. Lastly, Pulz’s testimony is cumulative and offers nothing new that would assist the trier of fact because the remainder of his opinions are already well covered by the other three experts. He adds nothing novel or particularly insightful, and Rules 403 and Rule 702 bar this testimony. As a result, the Court grants Defendant’s motion to exclude the testimony of Stanley Pulz.

III. Conclusion.

For the reasons stated above, Defendant’s motion to exclude Plaintiffs’ experts [Docket No. 207] is granted in part and denied in part. Defendant’s motion is granted as it pertains to Stanley D. Pulz, and Stanley Pulz’s testimony shall be excluded from trial. Defendant’s motion is denied with respect to Daniel T. Teitelbaum, John J. Treuting, and Neil B. Jurinski as they are qualified to render the opinions contained in their reports, and Plaintiffs have demonstrated their opinions to be sufficiently reliable per *Daubert* and Rule 702.

Dated:

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