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MCSA NEWS

VOLUME 3 ISSUE 11 NOVEMBER 2008

Oregon Appellate Court Rules



MCS Testimony Is Admissible

Legal

Oregon Appellate Court Rules MCS Testimony Is Admissible

“The Oregon Court of Appeals ruled scientific expert testimony on multiple chemical sensitivity (MCS) may not be excluded from testimony.”

In an unprecedented October 1, 2008 decision, the Oregon Court of Appeals ruled scientific expert testimony on multiple chemical sensitivity (MCS) may not be excluded from testimony simply because the condition is thought to be controversial. “It is the role of a jury, not a judge acting pretrial, to determine where the truth lies,” the court stated, “We trust juries to be able to find the truth in the classic battle of the experts.”

In *Kennedy v. Eden Advanced Pest Technologies*, the plaintiff, who suffers from multiple chemical sensitivity, claimed that the defendant’s application of pesticides in his home caused a chemical injury. The plaintiff hired the defendant to apply a chrysanthemum flower product called Tri-Die to treat carpenter ants. It had previously been determined in lengthy discussions between the plaintiff and defendant

that TriDie would be safe and not aggravate the plaintiff’s medical condition.

Upon calling Eden, the defendant, it was decided that Termidor would be

used instead. Howell, an Eden employee stated that Termidor was safe for people with MCS and other chemical sensitivities. However, when Eden performed the application, the Termidor was in short supply and the job was completed with another product, Cy-Kick, without prior notification to the plaintiff.

When Kennedy returned home that evening, he became ill with a bad taste in his mouth, nausea, and jitters that progressed over the following weeks and months into disability. Dr. William Rea of the Environmental Health Center in Dallas diagnosed Kennedy with chemical sensitivity, toxic encephalopathy, toxic effects of pesticides, allergic gastroenteritis, chronic fatigue, malabsorption, hormone imbalance, muscle pain, deficiency of all classes of immunoglobulin, acute inflammation of the mucosa of the nose and paranasal sinuses, and abdominal pain.

Kennedy took legal action which alleged claims of fraud, negligence, intentional infliction of emotional distress, and trespass. The jury found for the plaintiff on the negligence and trespass claims in an amount close to \$120,000. However, Dr. Rea was not allowed to testify and the court ruled the other charges in favor of the defendant.



“The MCS diagnosis, therefore, may not be excluded from testimony.”

Kennedy appealed for inclusion of testimony by Dr. Rea. Judge Edmonds agreed, stating, “Controversy within the scientific community is not necessarily a basis to exclude scientific evidence. Although defendants' experts reject the methodology and the conclusions reached by plaintiff's expert, the competing views between the two schools of scientific thought did not authorize the trial court in its gate keeping function to exclude plaintiff's evidence.”

Since the plaintiff had shown that the testimony was relevant and would have assisted the jury in making a decision, Edmonds concluded, “Given the Oregon legislature's strong policy to aid the trier of fact to understand the evidence presented at trial in the context of the parties' theory of the case, we believe that the legislature intended controversial evidence like Rea's testimony to be presented to the jury... Evidence adduced at the hearing indicated that many legitimate entities view MCS as a legitimate diag-

nosis.”

“The “ICD-9” (International Classification of Diseases, Ninth Revision), which is maintained by the National Center for Health Statistics, includes chemical sensitivity as a diagnosis,” according to Edmonds. “The State of Washington maintains a registry for those with chemical sensitivities, and that the United States Housing Authority recognizes the diagnosis. Also, the United States Social Security Administration recognizes MCS as a medically determinable impairment for Social Security disability income purposes.”

The MCS diagnosis, therefore, may not be excluded from testimony.

A copy of the decision may be found at: <http://tinyurl.com/58a8qs>

Reference

Kennedy v. Eden Advanced Pest Technologies. *Court Of Appeals of the State Of Oregon*. CV04120346 , A132638. October 1, 2008.

