

GLEN LASKEN
ATTORNEY AT LAW, P.C.
777 NW Wall Street, Suite 308
Bend, Oregon 97703
(541) 549-0644
1-(800)-896-6976 FAX (541) 549-0647

SISTERS
220 N. Pine Street

BEND
777 N.W. Wall Street, #308

July 14, 2020

Judge Darren Otto
Workers' Compensation Board
Hearings Division
16760 SW Upper Boones Ferry Rd., Suite 220
Portland, OR 97224

RE: Claimant: Andrew K. Myers
WCB Nos.: 18-00006H; 18-04163; 19-00865; 19-01328; 19-01791; 19-02648
Claim No.: 555-232469
DOI: 1/21/17
Employer: JetBlue Airways, Corp.
D/Hearing: October 21, 2019; March 9, 2020

INTRODUCTION

Please accept the following observations, analogies, and principles of persuasion that apply broadly to the Employer's Argument.

1) Chernobyl

HBO produced an award-winning five-part drama on the Chernobyl accident. As I watched it, I realized that it was highly applicable to the case at hand.

This was the nuclear accident in the Soviet Union in the 1980's that killed tens of thousands of people, rendered uninhabitable hundreds of square miles, and requiring the permanent displacement of several hundred thousand citizens. The series covered the heroic, monumental and at times ingenious efforts to prevent an even greater catastrophe. At the same time, the series explored and ultimately solved the puzzle of how and why this

happened from a scientific standpoint. Finally, from a political standpoint they showed how the State denied, delayed and obfuscated the facts, with the effect of greatly multiplying the ensuing harm.

The first similarity occurs early in the show. The film shows us the massive explosion of the nuclear facility from a distance, and we then transition to the bunker deep down inside where the head engineer is trying to determine what has happened. He sends his assistant out with the instructions to walk around outside and then come back and report on what he finds. The assistant leaves for a while, returns, and reports that he has observed pieces of the core exposed on the grass around the building, including pieces of graphite.

The lead engineer tells him that he is mistaken. That isn't what he has seen. The assistant tells him that a fireman picked up one of these pieces and in short order his hand basically melted off. This still does not dissuade the head engineer from his opinion. He states that the only way there could be pieces of the core around the building is if the core had exploded. Since everybody knows that an RBMK reactor can't explode, he must obviously be mistaken. Even when confronted later with pictures of the clearly exploded building, he refuses to acknowledge that such a reactor could ever explode.

This made me think of the Myers case. Captain Myers has been exposed to toxic fumes and he has developed contemporaneously a variety of neurological, cognitive and visual conditions. He is told that it is impossible for these conditions to have developed from these toxic fumes because everybody knows that these fumes are harmless. Since we know that these fumes are harmless, he must not have these conditions. Therefore, Captain Myers must be faking.

Ultimately the head engineer at Chernobyl, Anatoly Dyatlov, and a local party boss, Borys Shcherbina, were sentenced to ten years for their denials and obstruction, and probably because the State needed someone who could be found to be responsible and be appropriately punished. The viewer comes to realize at the end that the real culprit was the State. They chose to build unsafe reactors, and they were told ten years earlier that the crash button that causes an emergency stop for most reactors, by inserting all the control rods simultaneously, could cause a RBMK reactor to blow under the right conditions, because, as a cost saving measure, the very tips of these control rods were made of a cheaper substance that could cause a sudden acceleration.

The second similarity concerns the basis of the State's assessment early on that there is very little to be worried about. The measurements taken at the site after the "event" revealed findings of only 3.6 roentgens which they say is equivalent to a chest x-ray. The lead scientist who finally unravels the mystery, Valery Legasov, points out that this is the equivalent of 400 chest x-rays, and the reason why all of the readings are at 3.6 is that these are a minimal dose gauges, and 3.6 is the maximum allowed on that gauge. The gauges

that can read higher are locked up in a cabinet and no one has the keys. When accurate equipment is finally presented, their radiation readings are many thousands of times higher.

Once again, the similarity is striking. The airline industry limits its assessments of air safety to only to the ortho content of tri-cresyl phosphate (TCP) and ignores all other aspects of the fumes. With this limitation in place, their research is able to show that the fumes are essentially harmless. If your goal is to prove that the fumes are harmless, you can probably come up with a test to reach that goal.

2) Rain in July

The Claimant has the burden of proof in this case. There is no dispute about that. We contend that we have carried that burden of proof with factual, medical and scientific evidence. However, while Claimant has the burden of proof, if the Employer makes a blanket assertion, they have to provide some evidence to back up the assertion. In other words, if this were a climate study symposium and they asserted that it is simply impossible for it to ever rain in Central Oregon in July, they need to provide some proof to back it up. The fact that there is historical evidence documenting prior times that it has rained in July would serve to undermine their assertion.

In the present matter, the Employer is contending that these fumes are essentially harmless and that it is impossible for them to cause any damage to the central nervous system. While their experts tell you that this is impossible, Claimant has provided medical evidence, scientific testimony and numerous scientific articles establishing that these fumes can cause and have caused neurological damage, including damage to the central nervous system. It has rained in July before.

Therefore, while Claimant has the overall burden of proof in this case, the Employer has to back up their assertion of impossibility.

3) Dose Response and the Police Officer

The Employer is attempting to create an impossible and legally unnecessary level of proof for the Claimant.

Imagine a burning building with screams coming from inside. Imagine the first person on the scene is a police officer who races into the building without protective equipment in an effort to save the person. Imagine that the police officer doesn't make it out of the building alive. Imagine that after the fire is put out his body is discovered, unburned but quite dead. Imagine that a Workers' Compensation claim is filed, and because he is not a firefighter, the firefighter presumption does not apply. Imagine that the claim is denied. Imagine that the Employer and Dr. Pleus make the argument that since

we cannot prove the exact amount and type of the toxins that were in the smoke, we cannot prove causation. Therefore, the denial of compensability must be affirmed.

Recall that on cross-examination I asked Dr. Pleus whether or not he would be willing to cede causation if Captain Myers and the First Officer were exposed to these fumes in the cockpit and had died immediately. Even then, Dr. Pleus said that he would want to know what they had to eat that day.

We submit that most judges would rule in favor of the Claimant/Police Officer, and conclude that even though his heirs could not prove the exact composition of the smoke or the exact dose, there was still sufficient evidence to conclude that the material contributing cause of his death was the smoke inhalation from that fire.

In the present matter we don't know the exact composition of the admittedly toxic fumes that my client inhaled and absorbed, and we don't know the exact dose. Just as with the deceased police officer, we submit that there is enough medical and scientific proof of causation in this case to establish that more likely than not these toxic fumes caused these disabling conditions that my client now suffers from. The assertion of those two employer experts that causation can never be established without exact dose information creates an impossible and legally unnecessary burden of proof.

4) Little Boxes

Throughout this litigation opposing counsel has skillfully attempted to limit the scope of our inquiry and the scope of our evidence by placing us into little boxes of his choosing.

For example, their experts have focused on the end result of OPIDN to conclusively prove that these chemicals can't produce OPIDN. We aren't making a claim for this condition. Under cross-examination Dr. Pleus struggled mightily to answer any question of causation regarding the conditions that are being claimed. By attempting to limit the inquiry to OPIDN from a scientific standpoint, opposing counsel is trying to place us into a little box.

A similar little box concerns my client's conditions. Throughout this matter opposing counsel suggested that really all we are talking about is toxic encephalopathy. That isn't correct. My client also has a neurocognitive disorder and two separate eye conditions. Once again, they are attempting to limit the scope of your review in this matter.

Another little box concerns the expertise of the expert witnesses. There are a wide variety of physicians and scientists who are qualified as experts to offer opinions in this matter. Throughout this case, opposing counsel has repeatedly asked every single witness whether or not they are a toxicologist. Throughout their closing argument they have

attempted to suggest that the only experts worth looking at are the toxicologists and nobody else apparently matters.

I ask this Court, what makes someone a toxicologist and why does this matter? As we pointed out in our opening argument, Dr. Harrison is not a toxicologist. Yet, even though Dr. Harrison doesn't have a degree in toxicology, but he has written medical textbooks on the subject of toxicology and his extensive experience clearly qualifies him to be called a toxicologist. Why does this matter? Dr. Michaelis has a Ph.D. specifically on the topic of toxic fume events and Dr. Kaniecki is a neurologist who has treated dozens of victims of fume exposures and is a recognized expert in the field.

It is clear that opposing counsel wants to put blinders on this Court and suggest that the scientific questions can only be answered by someone THEY call a toxicologist, which they limit to their two experts and Dr. Abou-Donia. We submit that there is no basis for doing this. There are a number of experts in this matter all of whom can offer an opinion.

5) Links of a Chain

Think of the Claimant's burden of proof as four links of a chain, each link is independent, and they join together to form a chain of causation. We have the factual link, did this event occur. On the other end we have the condition link, what conditions does Captain Myers have. Between these two links we have the medical link, is it medically probable that these conditions were caused by these fumes, and the science link, is this causation scientifically plausible.

We provided expert testimony from several doctors and several scientists. None of those doctors or scientists were in the cockpit at that time. It is a rare Workers' Compensation case where the doctor was actually at the accident. By necessity, the doctors and scientists have to assume the accuracy of the facts of the event, and it is up to us to prove those facts to this tribunal. It is not effective impeachment to deride any of the experts because they weren't there.

It should be similarly ineffective to deride the medical experts because they are not scientists and deride the scientists because they are not medical experts. Each is providing a link to the chain.

Opposing counsel has cross-examined every single one of our witnesses on the basis that they know their link of the chain but not the other links of the chain. Every single one of the medical experts was derided over the fact that they have to defer to the 'toxicologists' for the scientific portion of the chain. Every one of the scientific experts was derided for not having reviewed the thousands of pages of medical records.

In the case of the medical experts, they were assuming that these facts of the event are accurate, and they are assuming that there is science suggesting that these fumes can cause these conditions. The scientific experts are assuming that these facts happened and are assuming that the Claimant has a variety of conditions. From these two assumptions they are providing the scientific opinion that there is a scientific basis for this causation. Time and time again, throughout the Employer's argument, they have trumpeted the fact that their two experts read at least some of the medial record whereas our several experts did not, as if that somehow undermines their scientific opinion.

We respectfully submit that we have sustained our burden to prove this case through the links of the chain. We provided factual evidence that this event occurred. We have provided medical evidence that the Claimant has a variety of disabling conditions. We have provided expert medical testimony that these conditions were likely caused by the fume event. Finally, we have have provided scientific evidence that these fumes can cause these conditions.

6) Binders of Scientists

We submitted an eleven-page summary of the research box we provided, and Respondent has replied with thirty-seven pages of critique.

The Employer has made a number of mistakes in their argument, including their presumption that Judith Anderson must have written this summary. They are wrong. I wrote this. I consulted with Judith Anderson, as well as Dr. Harrison, Dr. Michaelis, and Dr. Van Netten to learn everything I could about the science. With their help I assembled, analyzed and summarized the findings. These are my words. If opposing council's team thinks it has found an inaccuracy or two, that is on me. It isn't evidence that Judith Anderson or any of my experts is biased or incompetent

A review reveals that there is strong scientific evidence that these fumes CAN cause neurological conditions, particularly the more recent science. There are also some studies that have concluded that the connection has not yet been proven, particularly the earlier studies. Finally, there are some scientific papers that have enough qualifying language that that there is something there for everybody. Opposing counsel has used the phrase "cherry pick" fifty-seven times in an effort to perhaps follow the principle that if you repeat something enough it will be believed. We could use the same phrase to describe the selective bits and pieces cited by the Employer in their own summary.

I suppose that I could write a sixty-page response to their forty-page response to my ten-page summary. However, this is not a High School debate competition. I am, instead, going to instead incorporate our assessment of the science within the body of the argument,

the scientific opinion provided by Judith Anderson, and the analysis of the misguided speculation from Dr. Pleus.

One thing is telling from reading their addendum. Whoever was given the assignment to take two months and find something to say about every study in the banker's box, (and I want at least four bullet points on each.....), wasn't told WHY this research was provided. There are several instances where the authors express shock that we had included a particular article that seems to support their case. How could we be that sloppy, they muse. Recall that in an effort to give this Court the COMPLETE view of the research, we endeavored to provide every paper cited by THEIR witness as well as ours. Who does that? Certainly not someone trying to hide things from this Court or attempting to deceive them.

We are going to integrate our binders of research and their response within the body of the argument, putting the scientific evidence where it relates to our Burden of Proof, and the issues before this Court. Where an assertion is made, and science is provided to prove that assertion, we will analyze that science and see if it really says what is claimed.

The point of this exercise is not to win a debate. The point of this exercise is to prove to this Court that this admitted toxic fume exposure was at least a material contributing cause of the various conditions being claimed by Captain Myers. The scientific evidence is there to demonstrate that such a connection is scientifically plausible. The medical evidence provided establishes with medical probability that the fume event caused the impairment.

7) Fun with dates

A review of the IME reports provided by the Employer reveals a disturbing trend. There are several instances where their doctors have referred to opinions authored by other IME doctors rendered at some later date. How can this be unless there is some sort of collaboration going on behind the scenes?

Start with Exhibit 58, the June 15, 2017 records review by Dr. Burton in which he refers to the findings in the reports done by Doctors Bell and Radecki three months later. He either lied about the date of his report, or Doctors Bell and Radecki are in cahoots with him and have provided him with advance copies of their reports, months in advance.

Then, in Exhibit 65, Dr. Bell performs a records review on August 9, 2017 in which she refers to Dr. Radecki's exam which is reported by Dr. Radecki as having been done seven weeks later. Either she is lying about the date of her report or Dr. Radecki told her what his exam was going to be long before it took place. Dr. Radecki's exam was finally done on September 29, 2017, Exhibit 69. We are not alone in noting this discrepancy as

even Dr. Craven on page 3 of Exhibit 80A notes the discrepancy between Dr. Burton's report and the later records he refers to. Perhaps there is an innocent explanation, but I can't think of one.

8) Mud on the Mona Lisa

The Employer presented absolutely no impeachment evidence of Captain Myers.

There were no fact witnesses, no documents, no surveillance films, nothing. Nevertheless, opposing counsel is willing to smear a little mud by suggesting in his closing argument that one year after this on-the-job injury the Claimant suddenly developed symptoms around the time that he began to get opinions from around the world. This suggestion is both inaccurate and obnoxious on several levels. First, the Claimant didn't suddenly develop symptoms a year later. The record demonstrates that there were a number of problems identified very early on. As to the experts involved in treating Captain Myers, his attending physician sent him to see Dr. Kaniecki on the East Coast and Dr. Harrison on the West Coast because they are the experts in the field of treating the effects of fume events. Neither evaluation coincided with the sudden development of symptoms.

Therefore, throwing a little mud on the Mona Lisa might be an effort to make the painting look not quite as good. But the mud doesn't detract from the intrinsic beauty of the painting. Here, despite the complete absence of any impeachment evidence, opposing counsel can't resist grabbing a handful of mud and flinging it out there.

9) What Condition My Condition Was In

During the exchange of communication concerning the briefing schedule this Court asked for some clarification as to what condition was actually accepted in the two Notice of Acceptances issued by the Employer.

Employer chose to not address this concern in their Respondent's Argument, perhaps because there is no answer they can offer. Neither the Initial Notice of Acceptance nor the Notice of Acceptance at the time of closure purports to accept any CONDITION. Acute chemical inhalation is not a condition. That describes what happened. Similarly, acute toxic inhalation doesn't represent a condition either. By the time that NOA at closure was issued, there was ample evidence as to the conditions being treated.

This creates problems for the Employer on several levels. First, the improper acceptance is not explained away with the assertion that there was very little medical evidence at that time. This is not helpful as to the Notice of Acceptance at closure issued two years later. At that point the medical record was replete with specific diagnoses and conditions which the employer could have chosen to accept. Instead, they issued an

acceptance which is really a meaningless piece of paper. This Judge has no idea what they accepted and neither do I, because they didn't accept any condition.

If Captain Myers had made a new condition claim requesting the acceptance of chemical inhalation, that would have been quickly denied and no judge in the system would have overturned that denial because it would have been an improper expansion request that doesn't allude to a condition.

Neither Notices of Acceptance issued in this case are proper. This undermines their Notice of Closure/Current Condition Denial two-step. How can they contend that the Claimant's condition isn't causing impairment or isn't even compensable when they have never accepted a condition in the first place?

The second problem this creates relates to the matter of penalties. This was an improper acceptance followed by an improper closure followed by an improper current condition denial. This misconduct justifies the assessment of penalties.

10) Where's Waldo

The airline industry, and in particular this Employer, have striven to hide the facts. As Dr. Harrison and Judith Anderson testified, the airline industry has refused to allow monitoring of the air in the cockpit and cabin of airplanes. This allows them to make the argument that without the dose response you can't have a case etc., etc.

The airline industry, and in particular JetBlue, has also been hiding and disguising fume events to avoid their reporting obligations, allowing them to make the argument that these events are isolated and inconsequential. I would point this Court's attention to Exhibit 137B which was admitted without objection. This is a letter written by a United States Senator and a United States Congressman in their capacity as sponsors of the Clean Air safety Act of 2019 to THIS Employer.

"We write to express our deep concern regarding the significant number of cabin air safety events JetBlue Aircraft have experienced over the past several months. These events pose a significant health risk to in-flight crew members and passengers, placing their employees and customers in harm's way."

In the footnotes of the letter they describe several recent incidents where planes have made emergency landings because of severe fume events. Senator Blumenthal and Congressman Garamendi closed the letter with this admonition:

"Last we would like to note that the proper term for these events is either fume event or cabin air safety event. There have been reports that

your company is reclassifying these as odor events in an apparent attempt to skirt Federal Aviation Administration reporting standards as well as state and local Workers' Compensation laws. This raises significant doubt regarding JetBlue's intention to faithfully adhere to existing health safety and labor law."

Employer has argued that evidence of the many other fume events and many other crew members being disabled by them is completely irrelevant to the case at hand because we don't know the exact facts about every one of those fume events and disabled pilots. This is germane however in light of Introduction Item Number 2, Rain in July. The Employer's case hinges on their assertion that these fumes are harmless. The reality of the situation belies this assertion.

This hide and seek with the facts relates to the Employer's conduct throughout this case. We demanded the production of all maintenance records related to this plane and this event, and a few records were provided. However, the employer hid the maintenance log of the aircraft in question. This maintenance log revealed prior fume events with THAT plane. They did not disclose this to us, in contravention of our discovery request and their discovery obligations in Oregon. This evidence was only uncovered by one of our experts shortly before trial. I saw it for the first time at trial, and when I later figured out that it had not been discovered to me, and wasn't in the record, I clamored to obtain and submit it within 48 hours of day two of trial. This document was admitted as Exhibit 34B.

Essentially, the linchpin of Respondent's Argument is that without exact information regarding the dose and composition of the fumes, it is impossible to prove the case. This is convenient since they are preventing the Claimant from having this information. However, their efforts to hide evidence are not fatal to our case because there is more than enough medical and scientific evidence to overturn the current condition denial and establish the compensability of the four claimed conditions.

I. ISSUES

There is no disagreement from Respondent, these are the ten issues before this Court.

II. FACTS

A) Captain Myers

Respondent offers no contrary facts or argument. Through his testimony

and the testimony of two of the pilots at the trial, we learn that Captain Myers was an avid pilot who loved his career. There is absolutely nothing about him that suggests that he would feign this injury or exaggerate his symptoms in an effort to avoid flying. Not surprisingly, Respondent makes no mention of the evidence regarding Captain Myers as a person or the testimony of the pilots who have known him for years. Both Captain Richards and Captain Schussler testified about the dramatic change in Captain Myers' condition following the fume event. Once again, no impeachment evidence was presented in the form of documents, witnesses or films.

This is very important in light of the Employer's only alternative explanation for Captain Myer's conditions offered by Dr. Bell; Captain Myers is either consciously or subconsciously faking. The factual evidence dispels the suggestion that Captain Myers would fake this injury or exaggerate his conditions. The medical evidence from Dr. Schock, Dr. Kreiling and Dr. Porzelius bely the unsubstantiated assertion that perhaps Captain Myers has somatoform pain disorder that could account for all of these objective conditions. Once again, the absence of any facts or argument contesting Section A in the Employer's argument is quite telling.

B) Past Medical

Respondent's rendition of the past medical is generally consistent with the facts we outlined with a couple of glaring omissions.

The Employer makes no attempt to counter the effect of the testimony regarding the Maxalt. Recall this is a pill that the Claimant took on one occasion to no effect. Recall that this made it into a chart note. Recall the cross-examination of Dr. Kaniecki and Dr. Harrison in which they were both grilled about their ignorance of the 'fact' that Claimant was regularly taking Maxalt for his extreme, constant, disabling migraine headaches. Each were asked about the importance of the fact that the Claimant was taking Maxalt for his severe headaches. This cross-examination was based on inaccurate facts.

Similarly, the cross-examination of Claimant's experts along the lines that the Claimant had severe, intractable, ongoing migraines is belied by Exhibits 20 and 22 revealing that he saw two different doctors for sinus conditions in the months prior to the on-the-job injury, and in neither case was there any report of any ongoing headaches, migraines or migraine-related symptoms.

C) The Fume Event

Respondent glosses over this to no one's surprise. The facts as described in our Opening Argument are considerably more dramatic and revealing. These fumes became so intense that both Captain Myers and his co-pilot were gagging and twitching, virtually leading them to practically climb out of their window to get air. Captain Myers'

body was shaking so badly that he had to reach over with his left arm to turn off engines 1 and 2.

The aftermath of this event is detailed carefully on Page 10 of our Opening Argument. It is telling that this is completely ignored in the Employer's Argument. This is particularly true since opposing counsel grilled our medical experts in the early depositions with the argument that Captain Myers must not have been affected by these fumes since he was able to fly the next day. Now that the facts reveal that Captain Myers' conduct after the fume event is entirely consistent with having been poisoned, the Employer has abandoned this line of reasoning.

Employer also skips a rather important piece of cross-examination that led to the need to call Dr. Michaelis to testify about the fume event itself. At the tail end of Dr. Harrison's deposition, opposing counsel derided him for not understanding how and why this fume event happened. He tried laying the seeds of doubt about the incident since the APU unit appeared to be the problem and yet the APU unit was not even on during the fume event. This led me to question whether or not I actually understood how and why this fume event happened. I also realized that if I don't understand, how am I going to be able to convince any judge of what happened either. On Page 62 of Exhibit 139 opposing counsel grills Dr. Harrison about the fume event itself:

"Ok. Do you know in this case if we are talking about what was coming out of the jet engines versus the APU?"

He was then shown the maintenance report that showed that there had been a problem with the APU. Leading to the question on Page 63:

"Ok. So we are talking about exposure coming out of the APU, not the jet engines, correct?"

Dr. Harrison states he would want to know where the original jet oil came from. Was it derived from the engine or the APU, acknowledging that we need to know more.

The litigator in me saw a potential weakness in our case that opposing counsel might try to exploit. If the problem was with the APU, and the APU wasn't even on at the time of the fume event, how do we know that there even was a fume event? At that moment, I knew that I had to bring in an engineering expert to explain exactly how and why this fume event occurred.

During the course of accumulating research in this matter, I came across the several recent articles written by Dr. Michaelis (which have been included in our research box). I realized that in her, I had an expert who could not only talk about the most up-to-date research regarding fume events, with a Ph.D. to back up her expertise, we also had an

individual who was the UK equivalent of an NTSB investigator. This is a classic two-for-one proposition. I had an opportunity to bring in a witness who was also an airline pilot who has suffered a fume event, who has got a degree in engineering and a Ph.D. on this exact topic, who has published numerous articles and conducted research into this matter. She would be able to conclusively answer any question about the nature of this fume event.

Recall that at day two of the trial, opposing counsel had to begin his cross-examination of Dr. Michaelis with the observation that what we apparently now conclusively know exactly what happened during the fume event, so let's move on to something else. This also led Respondent to offer no argument whatsoever about the nature of the fume event.

Opposing counsel can accuse me of overkill in bringing in someone who is more qualified than I needed to. I don't have the luxury of providing just barely enough evidence. I am operating under a contingency and opposing counsel is not. If I come up just short, I get paid zero for my time, I eat all these costs and my client has a devastating, life-changing legal opinion. Given what is at stake and given the contingency nature of our case, forgive me for attempting to win by a couple of touchdowns. I don't have the luxury of trying to figure out what is just barely enough. This has a significant bearing on the discussion of costs covered later in this argument.

D) The early medical care

Respondent's argument is essentially consistent with the facts we outlined with one notable exception. Repeatedly, throughout their argument, Employer suggests that Captain Myers was essentially perfectly fine for a long time, and then suddenly, years later, after talking to worldwide experts, decided that he had symptoms.

As is discussed above, this is inaccurate. The medical evidence reveals that Captain Myers had progressive neurocognitive symptoms that began with the fume event and continued until the time of trial. He had visual problems for many months before he was able to see an expert for a proper diagnosis. He had sufficient neurological symptoms that a variety of scans were performed shortly following this fume event. Therefore, while the general description of the medical care following the event is accurate in the Fact section of their argument, these facts are then twisted into submission during the Argument phase of Employer's Argument. Dr. Harrison testified that the symptoms came on so quickly that he wouldn't even consider the onset to be 'delayed'.

A similar argument concerns the fact that my client is an uber-alpha male who is not going to sit idly by and hope someone figures out why he can't keep his balance, focus his eyes or think straight. He is going to ask everyone he can for information. So, yes, he learned what TCP was fairly early on and mentioned that possibility to the first ER docs he saw. However, this tribunal will decide the medical and scientific causation question

based on the opinions of about one dozen scientists and medical specialists, none of whom care what Claimant thinks is the cause.

E) The Medical Experts

1) Dr. Schloesser

Employer has little to say about Dr. Schloesser's medical evidence other than to malign the nerve conduction study he performed. They then spent several paragraphs arguing that Captain Myers does not have peripheral neuropathy, something that isn't being claimed.

One important part of Dr. Schloesser's evidence was completely omitted by Respondent. He is in the unique position of having seen the Claimant before and after the fume event. Based upon this first-hand observation, he specifically states that Captain Myers' condition was completely different than the condition he had before the fume event. He also reinforces the firmly established fact that Captain Myers is not the type of person who would fake an injury or exaggerate his symptoms. Finally, he confirms that Captain Myers had a variety of neurological problems in the weeks and months following the event which were completely different than the brief period of migraines he had prior to the event. This is important for three reasons.

First, it reaffirms that there was a dramatic change in Captain Myers' condition following the fume event. Second, it reinforces the fact that Captain Myers is not a faker or malingerer. Third, it undermines the insinuation in Respondent's Argument that Captain Myers was fine for a year or two and then suddenly all of these symptoms appeared coinciding with having talked to worldwide experts.

The evidence from Dr. Schlosser completely dispels the suggestion that perhaps Captain Myers' condition now is just a continuation of the migraines he had before. This ties into the Employer's suggestion of possible other causes which include the comment that a possible other cause would be the migraines. Every doctor and scientist in this record including the great Dr. Pleus all agree that the prior migraines are irrelevant. This is again important because the cross-examinations of Dr. Abou-Donia, Dr. Harrison and Dr. Kaniecki hammered home the importance of these prior migraines and the failure to understand the significance of these prior migraines. As it turns out, these prior migraines are not significant at all.

2) Dr. Bass

Very little is said about Dr. Bass in Respondent's Argument other than to remind

everybody that he is not a toxicologist (see the Little Box discussion in the Introduction). Once again, Employer completely omits the fact that Dr. Bass has seen the Captain Myers multiple times before and after the fume event and has stated that Captain Myer's condition was completely different after the fume event than it was before.

3) Dr. Ugalde

The Employer argues that they have conclusively established through their cross-examination that she is not a toxicologist. They also belittle her for not knowing the science in this matter. (Recall both the Links of the Chain and the Little Box discussion in our Introduction).

Dr. Ugalde does firmly establish that Captain Myers had ongoing neurological problems in the months following the on-the-job exposure, again belying the suggestion that these problems all suddenly cropped up years later. She has firmly concluded that Captain Myers has toxic encephalopathy and that the major contributing cause of his condition was the result of the fume event.

Dr. Ugalde is providing a medical opinion that relies upon the other two links of the chain, that this event really happened and that there is a scientific basis for causation as well. The fact that she can't attest to the other two links of the chain does not undermine her medical opinion. As the attending physician, she is probably in the best position to offer an opinion about Captain Myers' condition. She conclusively states that he was suffering from the same condition at the time of the current condition denial that he had following the fume event. There was no change in his condition. There was no cessation of his condition. Her testimony refutes the current condition denial and the denial of the toxic encephalopathy.

This testimony is also important from a standpoint of penalties. If this Court concludes that Employer's conduct was unreasonable, there has to be an amount due upon which to attach penalties. Dr. Ugalde has consistently stated that Captain Myers was precluded from working throughout this record. That inability to work didn't suddenly change with the improper current condition denial or the improper closure of the claim.

Finally, Employer derides Dr. Ugalde for having the temerity to refer Captain Myers to various experts for his various conditions, including Doctors Harrison and Kaniecki, because of their expertise in treating the result of fume events, Dr. Scott because of her expertise in dealing with visual problems, and Dr. Schock because of her expertise in assessing neurocognitive disorders. This is what an attending physician is supposed to do. Despite this, Employer concludes their remarks about Dr. Ugalde by observing that her opinion is worth very little. We submit that the opposite is true. We have the burden of proving medical causation of toxic encephalopathy as well as undermining the improper

current condition denial. Dr. Ugalde's medical evidence strongly supports Captain Myers' position in both respects.

4) Dr. Scott

Employer reminds us that we learned through the deposition of Dr. Scott that she is not a toxicologist! Very little else is said about Dr. Scott, not surprisingly. The Employer disregards the fact that objective tests have demonstrated that Captain Myers has two separate visual problems that cannot be faked. She has offered the medical opinion that both of these visual problems are the result of the exposure to toxic fumes. THERE IS NO EVIDENCE TO THE CONTRARY.

It is therefore undisputed that Captain Myers has both of these objectively demonstratable conditions. This has an obvious bearing on the later argument raised by Employer to the effect that there is simply nothing objectively wrong with Captain Myers. They conveniently ignore Dr. Scott's evidence and her testimony.

5) Dr. Schock

Virtually all of Employer's Argument here centers on the fact that Dr. Schock is not a toxicologist and she does not have a scientific basis to make a scientific opinion. (once again, the Little Boxes and the Links of the Chain). Very little is said about the testing she performed or the testimony she provided. Employer implies in her argument that Dr. Kreiling's findings were very different from Dr. Schock's. Through Dr. Schock's testimony we learned that their findings were virtually identical and that three separate tests by two separate doctors would be impossible to uniformly fake. Dr. Kreiling noted that if anything, Captain Myers was underplaying the extent of his impairment, something that is very common for airline pilots to do. This is rather the opposite of suggesting he is malingering or faking. The only other difference between their conclusions was that Dr. Schock felt that Captain Myers was mildly impaired and Dr. Kreiling concluded that he was moderately impaired, due to his problems with managing his affairs. Dr. Schock thoroughly explained the insignificance of this difference in her testimony.

Not surprisingly, the Employer completely disregards the substantive portion of Dr. Schock's testimony described on Pages 21 through 25 of our Opening Argument. Through her testimony in court she provided rather compelling and conclusive analysis that completely undermine the records review and IME performed by Dr. Bell. Nowhere in the Employer's Argument do they rehabilitate Dr. Bell. This will be covered more thoroughly later in the argument.

6) Dr. Kreiling

Not surprisingly, the Employer glosses over Dr. Kreiling's findings. This had to be a rather disappointing piece of evidence for them. Here is an IME that they paid for in the hope of defending their denials, and instead Dr. Kreiling strongly supports causation in favor of Captain Myers. In his professional opinion the diagnosis of major neurocognitive disorder was due to the toxic inhalation, and he also agreed with the diagnosis to toxic encephalopathy as a byproduct of the inhalation.

7) Dr. Porzelius

The Employer essentially ignores Dr. Porzelius as well. His chart notes are instructive in debunking Dr. Bell's theory that perhaps Captain Myers has somatoform pain disorder. As we note in Exhibit 55, Dr. Porzelius provided a psychological assessment of Captain Myers and did not diagnose somatoform pain disorder and noted absolutely no indication of malingering.

F) The Scientists

1) Dr. Kaniecki

Employer's Argument begins with a familiar theme, Dr. Kaniecki is not a toxicologist! They gloss over the fact that he is a medical doctor who has evaluated and diagnosed Captain Myers, that he has treated dozens of similarly afflicted flight attendants and pilots and that he is generally acknowledged to be the East Coast expert on these matters. We respectfully submit that even though Dr. Kaniecki is not a toxicologist, his expert opinion is persuasive expert evidence on the topic of Captain Myers' diagnosis and its likely cause.

Dr. Kaniecki provided important testimony that was reiterated by Judith Anderson in her assessment of the research relied upon by Dr. Pleus. On Exhibit 138A Pages 11 and 12 Dr. Kaniecki describes that there is a significant difference between a smell event and a fume event. A fume event is bad enough to result in a diversion of a flight and/or medical care for those affected. The distinction is that a fume event has some impact on the subjects involved. This becomes an important distinction when evaluating the opinion proffered by Dr. Pleus to the effect that he can calculate the exact amount of the maximum possible toxic fume exposure that could ever happen based on a few isolated air samples taken during smell events.

Cross-examination of Dr. Kaniecki continued along the lines of his lack of knowledge about Captain Myers' prior migraines and the fact that he was regularly taking

Maxalt. We learned that Captain Myers was not regularly taking Maxalt and we learned through virtually all of the experts in this case that the brief period of migraines suffered by Captain Myers are essentially irrelevant to his current condition. Dr. Kaniecki was given a complete and accurate history at the time of the deposition and his testimony was based upon a knowledge of the prior medical care.

Dr. Kaniecki reiterates that the PET Scan findings revealed increased uptake in the cerebellum and brain stem which documents some degree of dysfunction in those areas of the nervous system which correlate with a number of Captain Myers' symptoms. He noted that nobody can fake a PET Scan and that Captain Myers' symptoms were consistent with the PET Scan findings. He noted that the blood work performed by Dr. Abou-Donia is at least consistent with the neurocognitive disorder.

The Employers' rendition of Dr. Kaniecki's opinion evolves over the course of the argument, and by the time they get to the conclusion portion, Dr. Kaniecki is described as someone who basically doesn't know anything and can only say that we need to learn more about the topic. This is a rather misleading description of Dr. Kaniecki's opinion set forth on Pages 37 and 38 of Exhibit 138A. It is his medical opinion based upon reasonable and medical probability that the major contributing cause of Captain Myers' condition would be the toxic exposure. He also opined that the organophosphate poisoning can affect both the nervous system and the central nervous system, again belying the unsubstantiated assertions of Dr. Pleus.

2) Dr. Harrison

Once again, the Employer devotes considerable time assessing whether or not he is a toxicologist. Despite Dr. Harrison's clear qualifications as a toxicologist, when we get to the conclusion portion of Employer's Argument, they state that the only toxicologist in the record are Doctors Burton, Pleus and Abou-Donia. Please recall that neither Dr. Burton nor Dr. Pleus have degrees in toxicology.

The Employer implies that, since they don't consider Dr. Harrison to be a toxicologist, his opinion doesn't really matter. We would turn your attention to Pages 7 and 8 of Exhibit 139, wherein Dr. Harrison describes his training in toxicology, his thirty years of practice in which he has treated or evaluated over 5,000 individuals with chemical exposure, and the fact that he designed and implemented the medical monitoring programs for toxic chemical exposure. He co-edited the major textbook in the field in Occupational Medicine which included hundreds of pages on this topic of toxicology that he either wrote or reviewed.

When asked whether or not he would consider himself to be a toxicologist, he answered yes. In that same deposition, opposing counsel admitted that Dr. Harrison qualified as being a toxicologist since he helped write a medical textbook on toxicology.

However, at the end of the Employer's Argument, they left Dr. Harrison off their list of 'toxicologists', apparently forgetting that their own attorney agreed that he could be called a toxicologist. My point is, who cares whether Dr. Harrison fits into opposing counsel's little toxicologist box. Dr. Harrison is obviously a highly qualified expert who can render an opinion in this matter.

The Employer then goes on to demean Dr. Harrison because he wasn't at the fume event and doesn't know exactly which toxic chemicals Captain Myers was exposed to and in what dose.

Finally, the Employer leaves off any discussion of Exhibit 149 offered by Dr. Harrison in response to the IME doctors. Dr. Harrison writes in his own hand that there was objective evidence of a neurocognitive disorder due to the toxic chemical exposure, and that the toxic encephalopathy and visual problems were also due to the toxic exposure. He found Captain Myers to be highly credible .

Dr. Harrison also debunked the Employer's reliance on OPIDN as the endpoint, stating that an individual does not have to rise to the level of OPIDN to be impaired from the toxic fumes.

Dr. Harrison also confirmed that the progression of Captain Myers' symptoms was so immediate that he would not even consider this to be a delayed onset. In addition, Captain Myers' attempt to fly the next day is also entirely consistent with what he has seen in his practice, debunking the Employer's argument that these symptoms suddenly erupted years after the event coinciding with obtaining worldwide experts, or that his conduct on the day after the event in any way belies the legitimacy of the claim.

Finally, and most importantly, Dr. Harrison addresses the fact that both Dr. Burton and Dr. Pleus are of the opinion that without exact measurements (dose response) no opinion can be offered. In his own hand, Dr. Harrison writes:

"Yes. In my practice of Occupational Medicine I routinely perform this type of qualitative exposure assessment in the determination of specific causation. It is not necessary nor is it usually available to have quantitative data about exposure."

In addition, Dr. Harrison debunks Dr. Pleus' wild assertion that he knows what the maximum levels of exposure must be based upon other measurements that have been taken. Dr. Harrison notes that the data concerning exposure to TCP's on aircraft are not based on actual fume events but are rather taken during routine flight operations.

Finally, Dr. Harrison stated that he agreed that the condition was compensable:

“Yes, as noted above, it is a standard practice in the field of Occupational Medicine to make a qualitative exposure assessment for determination of specific causation. In this case, based upon the history it is likely that Captain Myers was exposed to neurotoxic chemicals as a result of the emission of toxic air contaminants into the cabin air.”

This is a firmly stated opinion based on an incredible amount of training and experience and provides much more than simply a conclusory opinion. Importantly, Dr. Harrison addresses the assertions made by the insurance company doctors.

3) Dr. Michaelis

Employer makes no effort to impeach Dr. Michaelis’ expertise in establishing exactly how this fume event happened and why the culprit may have been the APU unit even though it wasn’t on when Captain Myers was spooling up the engines. As discussed above, opposing counsel raised this as an issue in his cross-examination of Dr. Harrison, and we felt the need to respond conclusively.

Respondent’s cross-examination of Dr. Michaelis centers on three things. First, she is not a toxicologist! Second, she has not reviewed the medical records (please recall the Links of a Chain and Little Box discussions in the Introduction).

Finally, we went through a lengthy rendition of the cross-examination regarding one of the research articles cited in her several publications. This led to an episode in the theater of the absurd.

In particular, Dr. Michaelis has written and published several papers. These several papers have cited to dozens of prior scientific papers. Opposing counsel picked out one of these papers cited in her publications, the 1999 *Mackerer* report. From that they pulled out one line from that lengthy report. This report provides language useful to both sides, including one comment regarding the impact of brain NTE resulting from meta or para isomers. Without having the *Mackerer* report in front of her, which opposing counsel conveniently did not provide to her, she was uncertain as to whether they were talking about the para or meta isomers as opposed to the mono or di-isomers. She responded honestly: “I am not willing to try to second guess a paper I haven’t got in front of me and didn’t look at in that respect.”

This led to a frankly obnoxious question: “So I mean in all due respect, you’ve traveled half-way around the world to present expert testimony. This is one of the papers you cite, and you are not prepared to testify as to what this paper says?” Credit opposing counsel with pinning down Dr. Michaelis on one comment made in one paper cited in one

published article, and then grilling the living crap out of her over that one comment. It should be noted that unlike Dr. Pleus, she is not a professional witness. She began her testimony by confirming that she had NEVER testified before. Credit opposing counsel for being able to get her flustered and confused during cross-examination.

This is an attempt to divert the Court's attention from the wide body of work that Dr. Michaelis has done, including her work studying the effects of toxic fume exposure on airline personnel and her research into the nano particles and other components that have toxic effect. The research box provided at the time of hearing reveals that Dr. Michaelis has authored or co-authored more than two dozen papers, thirteen of which are reflected in the research accumulation.

Respondent suggests that it was a waste of time to have Dr. Michaelis paint a completely accurate picture of the fume event when they have accepted that the fume event happened. This argument ignores one of the assertions made by Dr. Pleus. He testified that even if there were any toxic fumes in the cockpit, they would be quickly dissipated within the normal circulation system on the airplane, along with his comment that this is akin to putting a drop of oil in a swimming pool in terms of its dissipation.

Dr. Michaelis' testimony completely debunked that theory with the detailed description that the air circling out of the cockpit goes back into the condenser where it is joined by more toxic fumes which are then combined and injected back into the cockpit. There is no quick dissipation and there is no swimming pool with a drop of oil. Once again, Dr. Michaelis' testimony demonstrates the shallow knowledge that Dr. Pleus has regarding the operation of an aircraft, the air circulation, and the extent to which fumes can enter and stay in an aircraft.

Dr. Michaelis also debunked Dr. Pleus' assertion that there is no evidence of anyone ever being affected by a fume event. Her individual research has revealed that hundreds of people have been affected. She also expanded upon the fundamental flaw in Dr. Pleus's report and testimony which relies upon OPIDN as the only final result that should be measured.

One would never know about this extensive and persuasive testimony offered by Dr. Michaelis by reading the Employer's Argument. However, her testimony is described at length in Captain Myers' Opening Argument and her testimony strongly supports the scientific causation link in the chain.

4) Judith Anderson

The Employer argues without evidence that Judith Anderson has no qualifications and is biased.

Her qualifications, described on Page 43 of our Opening Argument, include degrees in chemistry and bio-physiology, and a Masters of Science in Occupational Hygiene. She has investigated and analyzed hundreds of fume events involving flight attendants and, as part of her occupation, is up to date on the research involving these fume events. While she is not a toxicologist, she is highly qualified to render an expert opinion in this matter given her education, her training in chemistry, her substantial experience investigating fume events and her degree of familiarity with the research. She testified that there are a wide variety of degrees and specialties that have expertise in this matter besides somebody who happens to have a degree in toxicology, which, by the way, is something that neither Dr. Burton nor Dr. Pleus has.

The State of California commissioned Judith Anderson, Dr. Harrison and several other scientists to prepare a handbook for medical professionals regarding the identification and treatment of victims of fume events. We respectfully submit that Ms. Anderson is qualified to testify as an expert in this matter.

The second attack on Judith Anderson's testimony concerns the Employer's assertion that she is biased. At one point they even offer the unfounded and outrageous statement of speculation that this case is somehow being driven by the unions. This is an Oregon Workers' Compensation claim involving an injured Oregon worker. The Employer confuses the distinction between being an advocate and being unreliably biased. Ms. Anderson is certainly an advocate for the well-being of flight crew members given the nature of her position. However, the Employer's insinuations that she is biased or trying to mislead the Court are not borne out by the evidence in this case. This brings up the matter of the summary of her testimony. I prepared this summary in an effort to distill a mountain of information into a form and organization that would apply to our specific burden of proof in this matter. The scientific analysis is hers, the wording of the summary is mine. This summary is akin to an opening statement. I am organizing her testimony and predicting to you what she will say. She then proceeded to testify about each item in the summary during the trial.

Finally, the Employer assails Ms. Anderson's testimony because she didn't read the voluminous medical records prior to testifying. Harken back to the Links of the Chain. She is not offering a medical opinion, she is offering a scientific opinion based on her expertise, her experience and her review of the literature in this matter.

Her testimony is important in two respects. First, she has personally investigated many fume events and has observed that many flight personnel have developed neurological conditions following these events. Captain Myers is not alone in developing his conditions, it has rained in July before. Second, she was instrumental in our quest to show this Court all the relevant research. With the help of her degree in chemistry, she has helped me and this Court understand what this research has shown regarding the toxic effect of these isomers. Her knowledge of the science underlying this research, her

familiarity with all of the relevant research and her personal experience investigating these events makes her uniquely qualified as an expert witness in this matter.

Her scientific opinion is based upon the assumption of the validity of the bookends on either side of her link of the chain: this event happened, and Captain Myers does have impairment. The fact that she wasn't in the cockpit at that time or with him in the doctor's office doesn't undermine the force and persuasive value of her testimony.

Captain Myers has the burden of proving that this admitted exposure to toxic fumes is at least a material contributing cause of his impairment, which include toxic encephalopathy, neurocognitive disorder, saccadic eye movement and convergence insufficiency. The facts in this case establish the bookends, this toxic exposure took place and Captain Myers is impaired in a manner consistent with a fume event. The two links of the chain that connect those bookends are the medical evidence and the scientific evidence.

The medical evidence has been supplied by Dr. Ugalde, Dr. Scott, Dr. Schock, Dr. Kaniecki, Dr. Harrison and Dr. Kreiling, all of whom have opined that Captain Myers' various impairments have been caused in major part by this toxic exposure. It is well established that evidence establishing major contributing cause by definition satisfies the material contributing cause standard.

This leaves the scientific link. We have supplied the scientific evidence that these toxic fumes can have neurotoxic effects. The Employer's position is that this is impossible. The employer also contends that unless we can prove exactly what was in the toxic fumes and exactly how much was in the toxic fumes, we can't establish causation. This is belied by the testimony of Dr. Harrison, Dr. Kaniecki and Dr. Michaelis, all of whom are of the opinion that there is ample evidence in this record to make that scientific connection.

Ms. Anderson's scientific research into this matter is summarized in the addendum summarizing her testimony. On Page 2 of that summary she listed more than a dozen scientific articles and studies that concluded that these toxic fumes can have neurotoxic effect.

Please bear in mind that there are ten isomers to tri-cresyl phosphate, and the tri-ortho isomer has been studied the most extensively, as it is the most toxic. Three things are important to bear in mind in viewing the science.

First, while there is very little of the ortho content left, there likely is still some ortho content and Captain Myers' individual susceptibility may have produced these impairments despite the small dose. Recall the cross-examination of Dr. Pleus regarding the anaphylactic effect of a bee sting. What might cause little harm to a thousand people might be fatal to a susceptible individual.

The second factor to bear in mind is that there is substantial scientific evidence that the other nine isomers have neurotoxic effect. The mono-ortho isomer, the di-ortho isomer, the meta isomers and the para isomer have all been shown to have toxic effects. In addition, these toxic fumes were the result of pyrolyzed jet oil which produces a wide variety of other toxic chemicals including formaldehyde, naphthylamine and carbon monoxide to name a few. Recall the stricken police officer analogy in our Introduction. This is why we called this a primordial soup of toxins. Please keep in mind what each side is attempting to demonstrate to you. We are attempting to demonstrate that it is plausible that these toxic fumes caused this neurological damage. The Employer is attempting to establish that these fumes are harmless, and it is impossible for these impairments to have come from this exposure. It has never rained in July.

Looking at the research through that lens we see that the first study cited, *Hunter 1994*, does conclude that the ortho isomer is not the only one having neurotoxic capabilities. They conclude that the tri-meta isomers produced both weakness in the legs of the test subjects as well as respiratory paralysis. Polyneuritis and peripheral neuropathy were not the only symptoms reported.

The next citation is the 1952 *Bock* study which the Employer contends that the only potential effects are to the autonomic nervous system. That is not what the study says. In their conclusion section they specifically state:

“It appears that dermal absorption leads most commonly to peripheral nerve disorders, while inhalation tends to cause symptoms of the central nervous system.” (Emphasis added).

The 1953 *Aldridge* study concludes that the ortho isomer is MORE toxic than the meta para isomers. However, keep in mind the Employer’s assertion of impossibility. *Aldridge* concluded that the mono-ortho isomer and the di-ortho isomers were considerably more toxic than the tri-ortho isomer, the only one that has been reduced, and they also found that both the meta and para isomers do have neurotoxic capabilities. We respectfully submit that if the remaining isomers have some potential for toxicity, that deflates the Employer’s assertion of impossibility.

Similarly, in 1958 *Henschler* does conclude that the tri-ortho isomer was toxic, and the mono-ortho isomer was ten times more toxic and the di-ortho isomer was five times more toxic than the tri-ortho isomer that has been so extensively studied. They also specifically conclude that mixing all of the various isomers together produces more toxicity than individually. These conclusions are not overstated, despite the protestations of the Employer.

The 1988 *Mobil Memo* specifically concludes that tri-orthocresyl phosphate alone is not a reliable indicator or neurotoxicity or predictor of neurotoxicity. The paper does not limit the effect specifically to NTE rather than AChE. The paper shows that mixed isomer tri-cresyl phosphate even with very minimal ortho content causes measurable impacts on blood enzymes that would normally only be attributed to tri-orthocresyl phosphate.

Here we have the memorandum from the manufacture of the oil itself warning that narrowing your inquiry to only the ortho content is not a reliable indicator of toxicity.

Similarly, the 1990 *Mobil Memo*, again from the manufacturer of the oil, specifically states that many components of tri-cresyl phosphate other than the ortho isomer can be neurotoxic. They suggest that exposure standards should not only apply to the tri-orthocresyl phosphate. This is exactly the point of our case. The Employer's effort to minimize this glaring conclusion falls short of the mark. For example, they state that the potency can vary and from their standpoint the risks are minimal. Once again keep in mind that it is our burden to establish that there CAN be a scientific basis for these poisons to cause these impairments, whereas the Employer is trying to convince you that this is completely impossible. This theory of impossibility flies in the face of these direct conclusions of both the 1988 and the 1990 *Mobil Memos*.

The *Fruedenthal* study also looked at the toxicity of these isomers and they found significant neurotoxicity that could not be explained by the low ortho content. They go on to evaluate their estimate of the extent of poison it would take to produce OPIDN. Please recall the Little Boxes argument in the Introduction that we are not making a claim for OPIDN despite the efforts of the Employer to force us into that box.

Lipscomb also found neurotoxicity from the pyrolyzed or vaporized form of this oil. There are two important aspects of the *Lipscomb study*, neither of which are refuted effectively by the Employer. First, this pyrolyzed oil results in changes in the compound that result in neurotoxicity. Second, they noted that when the vapors are thoroughly decomposed, such as happened in this case, the compounds undergo chemical changes and that the rats who inhaled these vapors were significantly more affected than the ones who ingested the compound. Employer points to the fact that the oils used in these experiments had similar but not exact compounds with Mobil Jet Oil 2. The fact that these similar compounds were found to have neurotoxic effects is relevant to the effect of this jet oil, because it involves the same compounds. The evidence that toxicity increases with inhalation is relevant to the likely effects on Captain Myers of these pyrolyzed particles.

The 1999 *Craig & Barth* study is again very useful for us and not meaningfully or accurately contested. The study did conclude that both the mono-ortho and di-ortho isomers were considerably more toxic than the tri-ortho isomer, the only one that has been

largely eliminated from Mobil 2. They also specifically concluded that dermal absorption can produce even more toxicity than ingestion. They say on Page 1 of their report:

“Tri-orthocresyl phosphate was thought to be the component primarily responsible for OPIDN. It is now clear that other constituents, particularly the mono esters, are not only neurotoxic, but also may be more potent than pure tri-orthocresyl phosphate.”

This flies in the face of the Employer’s assertion that the virtual elimination of the ortho content renders the remaining toxic fumes harmless.

Despite the protestations of the Employer, these scientists did proceed to make simplifying assumptions in their experiment. Their direct words are instructive:

“The simplifying assumption is that all inhaled test material is absorbed in a manner equivalent to that which is administered by the oral route, which was employed.”

This simplifying assumption is similar to the simplifying assumption made by Dr. Pleus that inhalation is no worse than ingestion. It is an assumption without merit.

In 2005 Professor Winder and our own expert witness, Dr. Michaelis, authored a report that demonstrated that there are many aspects of tri-cresyl phosphate which produced neurotoxicity besides the ortho content. The Employer misquotes their findings in an effort to suggest that the only neurotoxic isomer found was the tri-ortho isomer. That is not what they said. On Page 230, the authors state that while the ortho isomer is the most toxic, they were also looking at the mono-ortho and di-ortho isomers and they did not say that this was the only toxic isomer, only that it was the most toxic isomer.

Fast forward to the 2014 *De Boer* study which is again very supportive in concluding that the ortho isomer is not the only toxic isomer, there is a wide variety of susceptibility between individuals, and inhalation is more toxic than ingestion. In their conclusion they note that additional study is needed to understand the various toxic effects of these isomers.

Our analysis of the research also included the 2017 article by *Houtzager* which specifically stated that the pyrolyzation of the oil increases the toxic effect and that several of the isomers have toxic effects. The Employer apparently missed this study in their Argument, because no contrary assessment is provided by them.

Similarly, the 2018 article by Professor Howard and our own expert Dr. Michaelis concluded that nanoparticles are created from the pyrolyzation of the oil and these

nanoparticles are more toxic. The statement that the toxicity can result from a very low level of pyrolyzed oil does not support Dr. Pleus' or Dr. Burton's theory.

The Employer suggests that there is no science behind this. This ignores the work done by Professors Elsaegger and Howard in 2011 as well as the ground-breaking work done by Professor Wright in 1996. He concluded that toxicity was greatly increased in chemicals that are pyrolyzed, and new nano-toxins are created. Employer attempts to deflect this paper by noting that the test was not specifically done on Mobil Jet Oil 2. Employer misses the point of this article. Pyrolyzation of similar compounds produces new compounds, nanoparticles, which can have increased toxicity.

Finally, we have provided a 2020 article from Professor Howard that reveals that the ortho isomer is not the only isomer capable of having neurotoxic effects and the combustion of these compounds produces smaller, even more dangerous compounds.

This wealth of scientific evidence does demonstrate that it is plausible that these toxic fumes can produce neurotoxic effects on a victim like Captain Myers, even though most of the ortho content of the tri-cresyl phosphate has been driven out of the oil. In light of this wealth of scientific evidence, it should be difficult for the Employer to prove that these fumes are harmless and Captain Myers' afflictions could not possibly have been caused by the toxic fumes.

Judith Anderson further testified about the other factors that increased the toxicity of these isomers. Inhalation has been shown to be more toxic than ingestion. This was a fundamental conclusion of the *Houtzager* EASA study done in 2017 which again was not analyzed by the Employer. He specifically found that these toxins can produce neurotoxic effects through direct pathway to the brain bypassing the liver. He specifically found that being processed by the liver is not the only way to produce a neurotoxic effect, contrary to the assertions of the Employer.

You have been provided with expert testimony by Dr. Harrison, Dr. Michaelis and Dr. Abou-Donia who have all testified that exposure to complex mixtures can have an even greater toxic effect on an individual because the body is overwhelmed, and its defense mechanisms can't fend off all of the poisons.

The Employer's witness contends that even if neurological damage were to happen, it is only the peripheral nervous system and not the central nervous system. This is inconsistent with both the science and the reality we are faced with.

Judith Anderson testified about this specific issue. She described fifteen separate papers and studies which have found neurological effects that go far beyond the peripheral nervous system.

For example, the *Carletti* study from 2011 concluded that organophosphate poisoning affects both the NTE and the AChE and the BChE. The effects are not limited to the peripheral nervous system. It is worth noting that the Employer offered no evaluation or response to this science. *Bondy* in 1960, *Abou-Donia* in 1981, *Fruedenthal* in 1993, *Abou-Donia* again in 2002, *Colosio* in 2003 and *Baker* in 2012 all found effects that go beyond the peripheral nervous system. In 2012, *Baker* concluded that the para-isomers can inhibit several enzymes including APH which is implicated in cognition. Not only are the ortho isomers extremely toxic, but the para isomers can also affect the central nervous system.

In the present matter, Captain Myers was likely exposed to all of the isomers of tri-cresyl phosphate along with a wide variety of other toxins. In *Baker*, they concluded that the combination of toxins can lead the para-isomers to inhibit the central nervous system along with the clear central nervous system effect of the ortho isomers.

The second half of this analysis involved the substantial number of airline personnel who have had central nervous system conditions as a result of exposure to these toxic fumes, including the studies by *Winder* in 2000 and 2002, *Heuser* in 2005, *van Netten* in 2005, *Harrison/Murawski* in 2008, *Murawski* in 2011. We understand that the fact that dozens or even hundreds of other flight crew are being similarly affected to Captain Myers does not prove causation in Captain Myers' case. We are proving this causation through medical evidence and scientific evidence that applies to Captain Myers' situation. However, the plethora of other affected individuals belies the Employer's assertion that these fumes are harmless and cannot affect the central nervous system. The science that has developed and the reality of this situation world-wide belies such a blanket assertion.

5) Dr. Abou-Donia

The Employer spends five pages of their argument skewering Dr. Abou-Donia. Their argument frankly tells you nothing that we didn't say in our Opening Argument. As we describe on the top of Page 52 of our Opening Argument, Dr. Abou-Donia's opinion is of limited use. He developed a blood test that can reveal biomarkers that are consistent with brain damage. However, his effort to provide medical opinions regarding the significance of the prior migraines and Captain Myers' diagnoses are contradicted by all the other scientists and doctors in this case. So, the Employer had lots of fun skewering Dr. Abou-Donia's rambling testimony. However, most of this has little bearing on the case we are attempting to prove.

G) The Industry Response

1) Dr. Radecki

The Employer offers no comment regarding Dr. Radecki's report which has proven to be completely relevant.

2) Dr. Craven

Once again, the Employer offers no analysis of Dr. Craven's opinion which initially strongly supported causation and then inexplicably denied causation.

3) Dr. Bell

The Employer reiterated a number of Dr. Bell's conclusions, but they unfortunately could make no meaningful effort to rehabilitate the severe infirmities revealed in the Opening Argument.

Dr. Bell concluded that Captain Myers' symptoms are not consistent with a toxic exposure because his symptoms didn't follow a straight-line recovery over time. However, this assumption is contradicted by every doctor in this record including the great Dr. Pleus. She makes the inaccurate medical conclusion that there is no objective evidence that anything is wrong despite the wealth of evidence to the contrary.

After Dr. Bell examined Captain Myers, her opinion became even less persuasive. Her rendition of the medical record is incomplete, inaccurate and severely slanted. In response, Employer points out that she did in fact reference several of the prior medical records. Fine. Please review Pages 64, 65, and 66 of the trial transcript from day one, as Dr. Schock illustrates how Dr. Bell has ignored or mischaracterized all of the evidence supporting Captain Myers' claim. If one were to take a look at Dr. Bell's description of the medical records in this case set forth in her report, you would seriously have to wonder whether or not she is looking at the same case.

Finally, Dr. Bell offers the Employer's only alternative explanation for Captain Myers' condition, he is consciously or subconsciously faking. This is contradicted by all of the factual evidence in this case and all of the medical evidence in this case. There is simply nothing credible about Dr. Bell's opinion.

4) Dr. Burton

The Employer rehashes the three opinions offered by Dr. Burton in this case with very little in the way of response to the infirmities of these opinions described in our Opening Argument on Pages 56 and 57.

In his first report he wrongly observes that all the medical evaluations have failed to identify any evidence of any organic illness or injury for Captain Myers. In his follow-up report, he states that there has been no case whatsoever of any individuals who have had a documented toxic reaction to cabin air, despite the hundreds of events to the contrary. He then talks at length about hydraulic fluid, something not involved in this case, and then

talks at length about aerotoxic syndrome, something not being claimed. Is he even talking about the same case.

He has never examined Captain Myers and yet he feels capable of contradicting all of the doctors who have examined Captain Myers. and offers a medical opinion that there is nothing wrong with Captain Myers. Finally, he parrots Dr. Pleus' assertion that without exact dose information no assessment can be made, something contradicted by Dr. Kaniecki, Dr. Harrison and Dr. Michaelis.

5) Dr. Pleus

The six-page regurgitation of Dr. Pleus' report and testimony fails to address the primary concerns raised in our Opening Argument.

In the Executive Summary of his report, he describes the conditions the Employer asked him to assess. This did not include any of the conditions being claimed by Captain Myers. Not surprisingly, his testimony focuses on OPIDN, something not being claimed. It was only after questioning by Claimant's counsel, the Judge and opposing counsel did he finally realize what he was supposed to say, and offered that those conditions aren't compensable either, somewhat as an afterthought.

Dr. Pleus asserted that even if there were a little bit of bad air the cockpit, it would be quickly dissipated by the normal environmental systems of the aircraft. This was completely debunked by someone who knows a little bit more about aircraft engineering, Dr. Michaelis. His characterization of the medical evidence in his report on Pages 13 – 16 suffers from the same kind of limitations and bias revealed by Dr. Bell's assessment.

While opposing counsel wants to trot out Dr. Burton and Dr. Pleus as his toxicologists, they neglect to rehabilitate the misleading and inaccurate CV in which Dr. Pleus claims he has a Ph.D. in toxicology. We learned that he has a degree in pharmacology, not toxicology. Once again, the whole exercise in determining whether or not someone qualifies as a toxicologist is both inane and pointless.

There is no effort to rehabilitate his absurd assertion that, because there have been a few anecdotal measurements taken on aircraft during normal flight operations and during a few smell events, HE can calculate what the maximum possible exposure would be on any possible fume event. Recall the testimony during trial from Judith Anderson that this is somewhat akin to determining the maximum amount of smoke that can ever occur in a house fire by measuring the quality of the air in the living room when the house is not on fire. Once again, no response is offered in the Employer's argument.

In the final part of cross-examination at trial Dr. Pleus admitted that he was completely unfamiliar with a wide variety of science concerning the composition of these

toxic fumes or the effect of pyrolyzation. Put that into perspective when you look at the mind-numbing cross-examination of Dr. Michaelis over her inability to recall one sentence from one study cited in one paper she published. Dr. Pleus farmed out the research to his staff and admitted to being unfamiliar with every single study we asked him about in cross-examination.

Dr. Pleus has made a variety of assertions in his hundred-page report and in his testimony, and he has thrown out a string of scientific citations to back up his assertions. Captain Myers, through his counsel and with the help of Judith Anderson, has carefully reviewed these scientific studies to see if they stand for the propositions that Dr. Pleus claims they do. Careful scrutiny does not bear out his assertions. Please reference Pages 4-8 of the summary of Judith Anderson's scientific opinion.

First, OPIDN is not the only possible consequence and is not the only endpoint to gauge. Pleus cites the 1999 *Mackerer* study to support this proposition when in fact they chose to only look at OPIDN and never looked at other consequences and never concluded that other consequences weren't possible. Interestingly enough, they also concluded that both the meta and para isomers were neurotoxic.

As we discussed in the Little Boxes portion of our Introduction, the industry effort to limit this inquiry to a condition that Captain Myers does not have is misleading at best.

Dr. Pleus cites three studies for his proposition that Captain Myers' conditions are non-specific, and he chose to include the *Winder* study which concluded the exact opposite.

To support his proposition that absent the ortho content, the remaining toxic fumes are in fact harmless, he includes seven citations discussed on Page 5. *Henschler* in 1958 concluded the opposite. His lengthy reference to *Douglas* in 2019 isn't a published paper or a study. He references *Siegel* in 1965 even though it only looked at hydraulic fluid. The other studies have been already discussed at length.

The Employer offers very little response to Pages 5 and 6 of this summary of Judith Anderson's testimony. One of Dr. Pleus' primary assertions is that he can calculate the maximum possible exposure that could ever take place in the cockpit (and therefore the exact exposure that Captain Myers was confronted with). He provides citations to twelve different studies, each of which is examined by Judith Anderson. Dr. Pleus first cites *Nagda* which is not original research. It simply reviews several prior studies of air quality done during normal flight operations. The Employer offers no answer to this observation.

2008 *Muir* involved samples not taken during a fume event as was the case with 2009 *van Netten*. The *Solbu* study, cited by Dr. Pleus, involved measurements taken on the tarmac not on the plane. None of these infirmities revealed in our Opening Argument are rehabilitated by Employer.

Dr. Pleus cites 2011 *De Nola*, and the Employer provides no answer to the revelation that they disregarded two of the measurements because they considered them to be too high, and none of the measurements that were taken occurred during an actual fume event.

Dr. Pleus then goes on to cite 2011 *Crump*, 2013 *Houtzager*, 2014 *Rosenberger* and 2018 *Schuchart* all of which involve samples taken during normal flight operations. Please recall the analogy provided during the trial regarding a house fire. If you take measurements of smoke during a particular fire, that does not tell you what smoke every other fire will produce, or what the maximum concentration of smoke could ever be. Even worse, taking an air sample when the house is not on fire is not going to provide relevant information as to what the maximum possible smoke content could be during a fire.

Procedural Status

There is no disagreement regarding the procedural status of the case.

III. ARGUMENT

A) Bookends

The Employer completely misunderstands this argument. There are three parts to the bookend argument, and they ignore the middle part. The first two parts are the bookends, this event happened, and Captain Myers is impaired. The third part of the bookend argument is in between those two bookends. The medical and scientific evidence we have provided comprise the middle two links of the chain, and thereby establishes this causation.

The Employer proudly trots out some Latin "*post hoc ergo propter hoc*" to suggest that our claim must fail because we are simply relying on the fact that B followed A and therefore A must have caused B. This ignores the third piece of the bookend argument, the medical and science causation. This argument would have merit if we offered no medical evidence and offered no scientific evidence, and our case simply consisted of our assertion that our guy is messed up and since this happened after the fume event it must have been caused by the fume event. This argument ignores hundreds of pages of medical evidence and testimony, and thousands of pages of scientific evidence and testimony that we provided regarding causation. The bookend argument is a way to illustrate the reasoning in this case.

1) This event happened.

Employer offers no contrary evidence.

2) Captain Myers is impaired.

The Employer goes at great length to assert that Captain Myers apparently isn't impaired. They trot out the old argument that the symptoms are non-specific, ignoring the fact that we have addressed this in our Opening Argument. Non-specific symptoms mean that there are other potential causes. In the present matter, all of the other potential causes have been eliminated. Calling them non-specific doesn't mean that they don't exist or aren't legitimate.

Next, they indicate that all of these purported conditions relate to the central nervous system which is completely unaffected by tricresyl-phosphate. This is covered at length in the research portion which reveals that a number of scientists have concluded that these fumes can affect the central nervous system and produce neurocognitive effects and central nervous effects.

We then have a lengthy argument about the fact that Captain Myers doesn't have peripheral neuropathy, vocal cord disorder or pulmonary dysfunction, all conditions that are not being claimed.

Finally, they acknowledge that perhaps the neurocognitive disorder is objective, but they rely upon the severely debunked opinion of Dr. Bell to suggest that there must be some other cause besides the toxic exposure.

The Employer argues that the PET Scan is not conclusive for determining brain damage caused by toxic exposure, something we already told you in our Opening Argument. However, it IS evidence of some brain dysfunction or damage. Similarly, while the blood work analysis does not conclusively establish causation, it strongly suggests that there has been damage to the brain.

Finally, the Employer's assertion that there is nothing wrong with Captain Myers completely ignores the objective evidence established by Dr. Scott regarding the two visual disturbances.

Overall, Captain Myers has provided substantial evidence from both a factual and medical standpoint that he has suffered impairment in his functioning from the toxic encephalopathy, the neurocognitive impairment, the saccadic eye movement and the convergence insufficiency. We have provided clear medical evidence and testimony from Dr. Ugalde, Dr. Schock, Dr. Scott, Dr. Kreiling, Dr. Kannecki, and Dr. Harrison, all of whom confirm that captain Myers is objectively impaired.

3) The bookends are connected, one caused two.

A) Every credible doctor in this record has supported causation.

Dr. Burton has never examined Captain Myers, and Dr. Bell's opinion is severely flawed.

B) All of the other possible physical and psychological explanations have been eliminated.

In response, the Employer circles back to Dr. Bell's severely debunked theory of perhaps there are psychogenic factors or "prior exposure", or "history of headaches". This is frankly a bit of a reach. Every doctor and scientist in this record, including Dr. Pleus, has stated that the brief period of migraines before this event has little bearing on his current condition. He certainly didn't develop neurocognitive disorder as a result of migraines. There is no evidence of any prior exposure.

This leaves the psychogenic factors. It is simply implausible to conclude that Captain Myers is faking or exaggerating his injuries. This is inconsistent with all of the evidence in this record. As to somatoform pain disorder, this has been severely debunked by the testimony of Dr. Schock and is inconsistent with the diagnosis from Dr. Kreiling and Dr. Porzelius. There simply is no evidence other than hopeful thinking of some other cause of Captain Myers' condition.

C) The science supports causation.

The Employer has suggested that our theory of the case has drifted over time and our scientists cannot agree. Our theory of the case is and always has been that Captain Myers was poisoned on the flight deck. The difficult part is evaluating which of the many toxins in these fumes is to blame. Reasonable minds can disagree over which toxin is the culprit. However, all of our scientists agree that some combination of THESE toxins disabled Captain Myers. Of course, we would know for sure, not just what is most likely, if the Employer allowed air monitoring.

It is worth noting that the evidence can develop along the way in 18 months of litigation, and the extent to which the litigators understand the significance of the newly developed evidence can shape their theories of the case. Look at the cross-examination of Drs. Bass, Scott, Schock and Ugalde. All were asked how there could be any problem with Captain Myers if the First Officer was unaffected, and Captain Myers flew the next day with little or no problems. Once we learned that there is wide variability of susceptibility, the First Officer was initially affected, Captain Myers didn't fly the next day, and the brief

delay in onset of the symptoms is entirely consistent with organophosphate poisoning, opposing counsel abandoned this line of questioning and it was not even raised in their argument.

Similarly, all of our experts were rigorously cross-examined about their knowledge of the prior migraines and the long history of taking Maxalt, with the implication that these experts were operating from an incomplete history, and perhaps Claimant's problems are just a continuation of these migraines. Recall the cross-examination of Dr. Harrison where he acknowledges that he doesn't know exactly why those prior migraines came along and exactly why they went away. How could you possibly render an opinion on this case if you don't know that...etc., etc. Fast forward to Employer's Argument and NO effort is made to assert that the prior migraines caused Claimant's condition. This strategy change was no doubt influenced by the testimony of their own Dr. Pleus to the effect that the prior migraines could have had so many explanations that they are irrelevant to the cause of Claimant's condition. Any good litigator has to adjust to the evidence as it develops.

There is one scientific opinion that deserves a closer look, and not just because it is the most recent science, from 2020, but because it is directly on point to the case at hand.

Dr. Howard is a medically qualified toxico-pathologist specializing in the problems associated with the actions of toxic substances on health. He is a professor of bioimaging at the University of Ulster. He has authored over 130 peer reviewed articles, predominately in the field of quantitative toxicology. He has studied the neurotoxicological properties of organo-phosphorous compounds both individually and in mixtures. His research into nano-particles and their toxicity is included in the research box at the year 2011. Amongst his many titles, he served as a toxicologist on the UK Government Advisory Committee on Pesticides which applied regulatory toxicology and risk assessment to agrochemicals, including organophosphates. His qualifications are delineated in the 2018 paper by Dr. Howard which is also in your materials.

In his 2020 publication, in the Open Access Journal of Toxicology, Dr. Howard specifically addresses these same assertions that Dr. Pleus has been making for years, that since the ortho content is SO low, the remaining fumes cannot cause neurological harm. Dr. Howard makes his opinion clear on the top of Page 4 of his paper:

"Therefore, by solely concentrating on TOCP in deliberating the toxicity of oil in fugitive jet engine fumes, the toxicity of the ortho-isomers in cresyl phosphate is being underestimated by about 6 million fold, as independently determined by Winder and Balouet. To this, the toxicity of the meta and para isomers of cresyl phosphate would need to be added alongside the other (generally unspecified) impurities present in the technical mixture, and, additionally, the pyrolysis products which appear as the oil ages in use."

On Page 6 of this paper, Dr. Howard refutes the analysis by Dr. Pleus. He describes in technical terms the flaw of extrapolating the oral dose response of hens to the response by humans to inhalation of this poison, and the further error of using OPIDN as the only endpoint when that is not what is afflicting crew members (or Captain Myers for that matter).

D) Many other people have been stricken by the toxic fumes.

In response, the Employer argues that the specifics of these cases are not in the record and that therefore they shouldn't be considered. Circle back to our Introduction and the Lack of Rain in July. The Employer's defense rests upon their assertion that these toxic fumes are actually harmless and that nobody else has ever really been affected and perhaps they are all hysterical liars and fakers anyway. This hopeful thinking ignores the research performed by Dr. Michaelis and by Judith Anderson. This ignores the actual clinical experience of Dr. Harrison and Dr. Kaniecki. It does rain in July. Maybe not very often, but it can and has.

There is something going on out there, and Captain Myers isn't the only one being affected. This is not direct proof of causation for Captain Myers' condition. For this, we are offering a substantial amount of direct medical and scientific proof establishing causation. The fact that hundreds of other people have been stricken is relevant to the Employer's assertion that these fumes are harmless. If they want to tell you that one plus one equals three, they have to provide some evidence to establish that.

4) Overview of the Issues

The Employer offers no response.

5) The Denials Can't Stand.

1) Current Condition denial.

The Employer accurately states that the law requires them to establish that the accepted conditions are no longer materially contributing to the Claimant's current condition. Here is the problem for the Employer. They have never accepted any condition. This makes the two Notices of Acceptance and the Current Condition Denial impermissible.

The evidence from Dr. Ugalde strongly establishes that Captain Myers was suffering from the same condition at the time of hearing as he had immediately following the fume event, toxic encephalopathy. Dr. Scott has testified that Captain Myers has two visual disturbances which continue to be due to the on-the-job injury. There is no contrary

evidence. Dr. Schock has written a report, testified in deposition and testified at trial that Captain Myers continues to have a neurocognitive disorder that was directly caused by this toxic fume event.

The overwhelming medical evidence in this case belies this current condition denial.

2) Toxic Encephalopathy.

The Employer correctly observes that we are operating under the Material Contributing Cause standard and circles back to their now debunked argument that our entire case is based upon their fancy *post hoc* Latin terminology. This ignores the hundreds of pages of medical evidence and thousands of pages of scientific evidence that establish that there is causation.

They rely on Dr. Pleus and Dr. Burton to assert that, in the absence of knowing exactly which poisons and exactly what dose, causation can never be established. This is contradicted by Dr. Harrison, Dr. Kaniecki and Dr. Michaelis. There is ample evidence from both a medical and scientific standpoint to establish causation without knowing the exact dose. (please recall the Parable of the Dead Police Officer in our Introduction).

The Employer then argues that there is no difference between a fume event and a smell event. This is contradicted by Dr. Harrison, Dr. Kaniecki, Dr. Michaelis and Judith Anderson. This difference is alluded to in the letter from the US Congress to this Employer. A smell event can happen if you sit next to somebody who has bad flatulence. A fume event requires that the plane has been diverted or passengers and/or crew have required medical attention. This relates to Dr. Pleus' wild assertion that he knows what the maximum exposure could ever be in light of the measurements that have been taken in various studies. None of those measurements involve any instances where a fume event has taken place. This is simply an absurd extrapolation.

The Employer offers no response to our argument that Dr. Pleus is incorrectly focusing his attention on OPIDN as the only endpoint worth measuring. It was only with great pulling of teeth that he offered the after-the-fact opinion that oh yes, those other conditions aren't compensable either.

In our Opening Argument we firmly establish on Page 70 that Captain Myers does in fact does have toxic encephalopathy. No contrary evidence has been provided by the Employer. As to the second point, we have provided several medical experts and scientific experts who have opined that the toxic encephalopathy was caused at least in material part by the accepted industrial exposure. No credible evidence to the contrary has been provided.

3) Neurocognitive Disorder.

Captain Myers has neurocognitive disorder. This has been firmly established by Dr. Schock and the IME doctor, Dr. Kreiling. No meaningful evidence to the contrary has been provided.

The neurocognitive disorder is compensable. Again, the only “evidence” provided by Employer is the severely debunked conclusory and speculative opinion offered by Dr. Bell.

4) Convergence Insufficiency.

Captain Myers has this condition and it is compensable. The only thing offered by the Employer is their completely unsubstantiated speculation that this is all part and parcel of toxic encephalopathy. They provided no medical evidence or scientific evidence to back up this assertion. The same can be said for number 5, saccadic eye movement.

5) Saccadic Eye Movement.

The same analysis applies. The Claimant has this condition, there is objective medical evidence establishing this condition, the only evidence in this record establishes that it is compensable, and the only response is the unproven and unsubstantiated assertion by opposing counsel that this is all part of toxic encephalopathy.

E) The Procedural Issues

1) The Claim was prematurely Closed, and the Reconsideration Order should be affirmed.

In response, the Employer suggests that Dr. Ugalde didn't attribute Captain Myers' current disability to the accepted 'condition'. By now it should be very evident to this Court that the Employer didn't accept any condition. The Department appropriately determined that the closing examinations did not address the substantial number of Captain Myers' ongoing conditions and disabilities. No medical evidence or factual evidence has been presented suggesting that this Order is incorrect.

2) The medical transfer order was sent to the Hearings Division to determine whether or not the Claimant's condition was compensable.

If this Court determines that the Claimant does have a compensable condition, the transfer order should be sent back to the Department. Please note that the Attending Physician, Dr. Ugalde, began prescribing acupuncture (the denied treatment) in her very

first chart note. (Exhibit 41-4). The referrals for acupuncture continued, as did the treatment, until the insurer began denying this treatment.

F) Penalties

The Employer responds by suggesting that they had a legitimate doubt about the compensability of four claimed conditions, and to some extent that is true. However, that doesn't answer the concerns about both Acceptances being improper and the Current Condition Denial being improper, and it doesn't address the gamesmanship throughout this litigation or the Employer's efforts to hide critical evidence regarding the fume event. The whole concept of accepting a non-existent non-condition and then using that as a springboard to shut down a claim by issuing a Closure and Current Condition Denial should, as they say, stick in your craw.

The second half of penalties concerns the amount due. We know from Captain Myers' testimony that he is at the maximum time loss rate, given his salary, in excess of \$250,000. We know that his time loss was cut off at the time of the Current Condition Denial and the Closure, and it has not been reinstated. We also know from his testimony and the medical evidence that he is still impaired and unable to do any work. It is therefore a relatively simple mathematical calculation to determine the payment of maximum time loss from February 6, 2019 until sometime in August of 2020, when the Opinion and Order is issued in this case. A twenty-five percent penalty on eighteen months at the maximum time loss rate is $\$1,454.24 \times 75 \text{ weeks} = \$109,068$. A 25% penalty on that would be \$27,267. This also justifies a commensurate penalty-related attorney fee on top of our requested attorney fee.

G) Extraordinary costs

The Employer makes some unique arguments in this regard. They suggest that traveling to depositions is not covered as a cost when in fact it is. The case the cite discusses is mileage reimbursement for traveling from Stayton to Salem.

They suggest that all the costs associated with Dr. Michaelis' testimony should be disregarded because they accepted the fume event. This disregards the fact that through cross-examination of Dr. Harrison they raised the prospect of some contention regarding the nature of any fume event that took place. This ignores the need to counter Dr. Pleus' argument that hinges on his assertion that the normal circulation of air in the aircraft would quickly dissipate any toxic fumes like a drop of oil in the swimming pool. Dr. Michaelis was able to answer both issues decisively.

Dr. Michaelis is involved in cutting edge research and has published numerous papers in the last fifteen years directly on this topic. Given a choice of conjuring up somebody who is marginally qualified and bringing in somebody who is extremely

qualified, and given the contingent nature of this litigation, excuse me for going all out to win this case.

This brings up a side note that is reflective of the fact that the employer does not contest the time and effort we spent on this case. We have faced a stiff opposition. They have cross-examined every witness, questioned every document and raised every possible argument. We were faced with two choices: give up and limp away or man up and fight with everything we have. I would like to think that my client would prefer that we take the latter course of action. There are probably few Claimant's lawyers who would have the time, energy, resources or passion to take on such a case. So, yes, there have been an extraordinary amount of costs and time spent on this case. I respectfully submit that this is required by the complexity of the case, the importance of the case, and the enormous effort spent by the other side to defeat this case.

H) Extraordinary attorney fee

We went through great length to examine factors 1-8 to establish that an extraordinary fee is warranted. It is worth noting that none of this was contradicted in any respect by the Employer. They clearly do not doubt the time we spent on the case, there is no argument on the complexity of the issues involved or the value of the interest involved. They haven't questioned their own skill level or mine. They have not argued that the nature of the proceedings or benefits secured do no warrant an extraordinary fee. Similarly, they don't deny that there is a substantial risk of not being compensated.

It is interesting to note that the Employer appears to have adopted my theory of how to apply the time spent on a case with the several other factors to be considered...except they have taken it to another level by suggesting that you just multiply their chosen rate by my estimate of hours.

On Page 79 in my Argument, I offered three scenarios for an assessed fee, based on either the \$275/hr., the rate that attorneys used to be compensated for in statements, \$400/hr., or \$500/hr. Multiplying these rates by my time in the case would provide a range for a reasonable assessed attorney fee. Not surprisingly, the Employer chose \$275/hr. to justify a fee they would agree with, in the amount of \$101,200 based on multiplying that rate by my estimated time. This does not take into effect the fact the Administrative Rule on attorney's fees has now been changed with respect to statements, and as of June 1 Claimant's attorneys are compensated at \$350/hr. This would result in an attorney fee of \$128,800, if you do nothing more than multiply my hours by the current rate for statements, a figure that Employer would presumably support.

I am not requesting that particular fee. While I am glad that the other side acknowledges that my efforts would justify an assessed fee in excess of \$100,000, I am concerned that they could be attempting to trick you into an appealable error. Please recall

that I began the attorney fee discussion in my opening argument by citing the cases that have thrown out attorney fee awards based simply on using a multiplier, which is exactly what the Employer is suggesting that you do. Don't just use a multiplier. The time I have spent is but one factor.

I asked for a fee of \$140,000 in my Opening Argument, which included an estimate of 16 hours to respond to the Employer's Argument. I obviously wasn't anticipating having to respond to 135 pages. Over the past 8 days I put in nearly 40 hours on this argument, so a fee of \$150,000 is probably more appropriate. However, the other relevant factors, including the contingency factor, could justify a fee as high as \$200,000. Where you end up in the range of \$100,000 to \$200,000 is the result of your evaluation of these factors, not a mathematical calculation based on my hours multiplied by some fee rate. The case law is clear that, especially where there is an extraordinary fee, all of the 8 factors must be addressed.

CONCLUSION

We have provided solid factual and medical evidence establishing that this toxic fume event happened, and that Captain Myers is impaired. We have provided solid medical and scientific evidence that these several conditions were caused in material part by this toxic fume exposure.

We have responded to every argument raised by their doctors, their scientists and their attorney. We have proven that the current condition denial was improper and unsubstantiated, and that it was based upon a completely improper set of Acceptances. We have shown that the claim was improperly closed, and medical services have been improperly denied.

We therefore respectfully request that these denials be overturned, the Reconsideration Order be affirmed, and the Medical Services dispute be sent back to the Department. We request that penalties be assessed, and you conclude that both extraordinary costs and extraordinary attorney fees are appropriate and warranted.

Thank you for your attention to this matter.

Sincerely,


Glen Jasken

GJL/wlr

Encs.

Cc: Mr. Andrew Myers (via U.S. Mail)
Matthew M. Fisher, AAL, Reinisch, Wilson, Weier PC