IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 01-1127

UNITED STATES SUGAR CORPORATION,
Petitioner/Appellant,

vs.

G.J. HENSON,
Respondent/Appellee.

On Petition for Discretionary Review
From the First District Court of Appeal
Case No. 1D99-2798

PETITIONER/APPELLANT UNITED STATES SUGAR CORPORATION'S REPLY BRIEF ON THE MERITS

THOMSON MURARO RAZOOK & HART, P.A.
PARKER D. THOMSON, #081225
CAROL A. LICKO, #435872
One S.E. Third Avenue, Suite 1700
Miami, Florida 33131
Telephone: (305) 350-7200
Facsimile: (305) 374-1005

AKERMAN SENTERFITT & EIDSON, P.A.
EDUARDO E. NERET, #967882
One S.E. 3rd Avenue, Suite 2800
Miami, Florida 33131

DAVID G. PELTAN, #989282
U.S. Sugar Corporation
P.O. Drawer 1207
Clewiston, Florida 33440

Attorneys for Petitioner/Appellant United States Sugar Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE AND FACTS

Rather than an objective statement of the relevant facts, Respondent Henson's ("Claimant's") statement is intended to paint Petitioner U.S. Sugar Corporation (the "Company") as a ruthless employer who intentionally caused near-death injuries to its workers. (Ans. Br. at 1-18).[1] But the sarcastic hyperbole ("USS added 'soap' to make the pesticides stick to whatever they touched, including Henson") (Ans. Br. at 1) has no place in this appeal, and adds nothing to the fundamental facts, most of which are not in dispute: Claimant worked as an agricultural mechanic for 28 years, and as such received what Claimant refers to as "repeated secondary exposure" to low levels of pesticides. (Ans. Br. at 3-4).

The Company agrees that Claimant is seriously ill, with many medical problems. Claimant's diagnosis, for purposes of his workers' compensation claim, is also accepted: he suffers from phrenic nerve paralysis that has caused one diaphragm to be elevated, resulting in decreased capacity of his right lung.

Claimant acknowledges that phrenic nerve paralysis is a rare condition, with multiple causes, and that his condition is even more rare because the paralysis is unilateral and affects just one lung. (Ans. Br. at 6-7). Claimant's experts have acknowledged the difficulty of determining specific causation in this case, because

[1] "Ans. Br." refers to the answer brief filed by Respondent Henson. Unless otherwise noted, abbreviations used herein shall have the same meaning as set forth in the Company's initial brief.

there is no reported case in medical history where pesticides have been found to cause phrenic nerve paralysis at all, let alone unilateral paralysis. (R. 501; 535-537; 2133).[2] For this reason, this case is one of first impression in the science and medical fields as well as in the workers' compensation field. Claimant's experts testified that the most common identifiable cause of phrenic nerve paralysis is severe trauma (such as, cutting the nerve during open heart surgery, to use Claimant's example), but trauma is here not the cause. (Ans. Br. 11; 14). Diabetes is also acknowledged to be a common cause of this condition, and Claimant has diabetes, but his doctors have denied that his diabetes is related to his phrenic nerve paralysis. (Ans. Br. at 11). Another common "cause" is idiopathic infection, but Claimant denies this cause as well. Claimant's unprecedented causation theory is further complicated by the well-established fact that pesticide effects diminish over time once the pesticides are removed, while here Claimant's phrenic nerve paralysis did not improve after he was removed from his work environment. (R. 543; 1805). Claimant's doctor, Dr. Warshaw, was frustrated enough by his condition to have offered to "re-expose Henson and see what happens," a suggestion rejected by the Company (R. 1805-06; see Ans. Br. at 8).

---

[2]The First District, the JCC and the Claimant simply ignored the undisputed fact that studies of pest control workers date back to the mid-1960's, and even with the wide-spread worldwide use of pesticides, there has been no reported case of phrenic nerve paralysis caused by exposure to pesticides. (R. 477;501; 535-537; 2718).

The dispute between the Company and Claimant was simply whether, as Claimant asserts, his phrenic nerve paralysis was caused by his chronic exposure to low levels of certain pesticides used by the Company. While Claimant asserted below that his causation theory was "basic science," and "well documented" (R.V.26, pg. 3968, App. 3), the law of this case says to the contrary. The Company's experts testified that Claimant's causation theory was "biologically impossible," and "not generally accepted by the scientific community" (R. 532-535); the JCC disagreed, but the First District found Claimant's causation theory to be so novel so as to require *Frye* testing (App.1-2).[3] Claimant has not cross-appealed or disputed in any way the First District's determination that his causation theory is based upon novel science. He thus has waived any right to do so. That causation is novel science is now the law of this case.

Despite this, Claimant continues to elaborate upon his causation theory in his statement of facts. (Ans. Br. at 1-18). In doing so, he relies upon misleading and over-broad generalizations, slick semantics, an over-simplification of the relevant scientific principles, and extrapolation based upon incredible leaps of logic. For example:

–Claimant has misconstrued the testimony of the experts, and has confused the legal standards for proving a worker's compensation claim. Thus, while Dr.

[3]*Frye v. United States*, 93 F. 1013 (D.C. Cir. 1923) ("*Frye*")

Bowsher, one of Claimant's experts, testified that pesticide exposure "caused" Claimant's phrenic nerve condition, he also admitted both that he had nothing to support this causation theory, and that his opinion was not generally accepted in the medical or scientific community. (RV.16, p.2042; 2051; 1207; 2121-22). Similarly, while Claimant's expert testified his causation theory was "basic science," he never produced a single textbook passage or study to support that theory, despite a court order compelling him to do so. (R. 2925-26). Indeed, Claimant's experts *conceded* that "phrenic nerve paralysis is not linked by case study or epidemiology to phrenic nerve paralysis." (R.V. 16, p.2133). Claimant's experts disagreed among themselves as to the specific cause of Claimant's condition,[4] and the First District disagreed with Claimant's experts. The First District, after conducting its first-time *Frye* analysis, determined that organophosphates (a class of pesticides) could have caused Claimant's condition, but this conflicts with Dr. Bowsher, who concluded that herbicides (another class of pesticides) caused the condition. Neither theory fits the facts of this case, because the herbicides used by the Company did not include organophosphates. Any further evaluation is impossible, because Claimant offered

[4]Claimant's experts could not agree at all as to how pesticides allegedly caused Claimant's phrenic nerve paralysis. Although they all asserted "pesticides" to be the cause, they contradicted each other as to how this could have happened, attributing it variously to demyelinization, axonal damage (R. 697, 736), interference with metabolism/message transmission (R. 1815), and "ways we don't understand" (R. 2091). This leaves the Court with mere conjecture.

no actual evidence of chronic exposure to any specific pesticides, or to the dosage levels of such actual exposure. (R.V. 5, p. 533-536).

–Claimant's reliance upon the EPA Handbook as "proof" of his causation theory should be rejected by this Court just as the First District did. (Ans. Br. at 4). The EPA Handbook is neither a medical nor scientific treatise; it is a general purpose publication for training employees about proper procedures for handling pesticides.[5]

–Claimant asserts as further "proof" of his causation theory the fact that Dr. Bowsher provided medical testimony "within reasonable medical certainty." However, as a review of Dr. Bowsher's testimony shows, this only means that Dr. Bowsher personally believed his testimony to be correct. It does not mean Dr. Bowsher's opinion is generally accepted by the scientific community. It is not, but rather is contradicted by generally accepted science. (R. 454;468-471).[6] Claimant's

---

[5]Claimant has improperly combined two distinct sentences in the Handbook to reach his incorrect conclusion that "chronic exposure to pesticides can cause neurological damage." The first sentence says that chronic exposure can cause serious effects (such as cancer), which is correct. The next sentence states there is a link between pesticides and effects that are chronic, including neurological problems (which is correct, with near lethal acute doses). The Handbook does not state that chronic exposure to pesticides causes neurological damage.

[6]The First District relied upon a misreading of Casarett & Doull's (2nd Ed., 1980) as support for the proposition that chronic exposure to pesticides could cause cumulative damage. However, all that textbook notes is that small doses of pesticides sufficiently close in time may act as a larger dose because the body has not yet eliminated all the molecules from the prior dose. (App. 1 at 30-31). This does not mean there is cumulative damage, particularly here where Claimant has never alleged acute exposure to any pesticides.

attempts now to distance itself from Dr. Harland's admission that he had no experience with pesticides (Ans. Br. at 6, fn. 1), but the record shows the JCC relied upon Dr. Harland's testimony when it should have been stricken. (R. 3978; JCC order at 16, par. 3).

–Claimant also complains the NOPES studies were not filed as part of the record with the JCC. (Ans. Br. at 18). However, a review of the record shows that Dr. Wernke talked about the NOPES findings and their significance to this case during the final hearing. The Company's counsel then offered to introduce the NOPES studies to the JCC for the record, but the JCC replied that she did not have the "spare time" to read such studies. (R. 454-456). The NOPES studies are important because they show that everyone is exposed to pesticides in their daily lives, and the human body is quite capable of handling long term, low-level exposures without adverse affects. (R.454-455). These studies also show that when the appropriate thresholds for these pesticides are crossed, the effects are always the same: the affected person will, within two hours, suffer from what the experts call "DUMBLES" – that is, diarrhea; urination; myosis; bronchospasms; lacrimation; emesis; and salivation (R. 447-8). But here, Claimant never suffered acute exposure to any pesticide, and never suffered from "DUMBLES." (R.447-448).

–Finally, Claimant tries to minimize the affect of the First District's admitted reliance upon an outdated edition of Casarret & Doull's for its *Frye* determination.

The First District acknowledged its error on rehearing, but because the later edition omits the passage upon which the First District had relied in its initial opinion, held this omission somehow satisfied Claimant's burden of proof . (App.2, at 5). This is legal nonsense, particularly in light of the First District acknowledgment that there were no medical tests or scientific studies supporting Claimant's causation theory. (App.3, at 33).

SUMMARY OF ARGUMENT

The First District held that Claimant's causation theory was novel science, and Claimant did not cross-appeal that decision. This Court is thus left with the legal issue of whether *Frye* is applicable to workers' compensation proceedings where novel science has been relied upon by either claimant or employer. For all the reasons discussed in the initial brief and herein, the Company maintains that *Frye* must be applied to those cases where novel science is relied upon, regardless of whether the case involves a workers' compensation claim, a civil claim, or a crime.

If *Frye* is exempted from workers' compensation claims, parties will be free to introduce whatever junk science they wish, with results like the case here: where hundreds of thousands of dollars are demanded from the employer for a medical condition allegedly caused by the secondary effects of low-levels of pesticides, a causation theory with no scientific basis. On the other hand, if the certified question is answered in the affirmative, the First District's first-time *Frye* review must be

rejected, and this case remanded for a proper *Frye* hearing before the trier of fact.

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE, HOLDING THE *FRYE* RELIABILITY TEST MUST BE APPLIED WHENEVER AN EXPERT PROFFERS NOVEL THEORIES GROUNDED ON SCIENCE THAT IS NOT GENERALLY ACCEPTED.

Claimant argues that *Frye* testing should be reserved for those death penalty cases that involve execution of an innocent person. (Ans. Br. at 34). Claimant's arguments are enthusiastically endorsed by the plaintiffs' trial bar, which seeks to eliminate the requirement for *Frye* reliability testing from all civil claims so they can introduce junk science whenever they see fit. (See amicus brief filed by Florida Academy of Trial Lawyers).[7] However, Claimant's arguments are the best evidence as to why *Frye* must be applied in those workers' compensation claims where a claimant or employer chooses to rely upon novel scientific theories of causation that are not generally accepted. Claimant contends that the certified question should be answered in the negative because (he says) "*Frye* should be viewed as fundamentally at odds with Chapter 440." But the Rules of Evidence have been held time and time again to apply to workers' compensation proceedings,[8] and the *Frye* test supplements

---

[7]All the reasons cited by Claimant for exempting workers' compensation claims from *Frye* testing are the same reasons cited by the amicus Florida's American Trial Lawyers' Association for eliminating *Frye* altogether.

[8]*See*, *ITT/Palm Coast Utilities v. Douglas*, 696 So.2d 390 (Fla. 1st DCA 1997); *Alford v. G. Pierce Woods Memorial Hospital*, 621 So.2d 12880 (Fla. 1st DCA 1993); *Martin Marietta Corp. v. Roop*, 566 So.2d 40 (Fla. 1st DCA 1990).

the requirements of Section 90.702, Fla. Stat., *Ramirez v. State*, 651 So.2d 1167 (Fla. 1995) ("*Ramirez"*). Claimant alternatively requests that "at a minimum, this Court should hold that the opinions of physicians otherwise admissible under Fla. Stat. Sec. 440.13(5)(e) (i.e., authorized treaters, IMEs and EMAs) and offered within reasonable medical certainty, are exempt from *Frye* or *Daubert*[9] testing." (Ans. Br. at 30).[10]

Claimant's opposition to *Frye* has no legal or logical merit; nor is it grounded in sound public policy. This Court has held, time and time again, that any party to a civil or criminal proceeding in this State has the right to invoke the scientific reliability test established by *Frye*. *Ramirez*, 651 So.2d at 1167; *Brim v. State*, 695 So.2d 272 (Fla. 1997) ("*Brim I*"); *Flanagan v. State of Florida*, 625 So.2d 827 (Fla. 1993). Further, the Florida Legislature has similarly spoken. The Legislature has not exempted workers' compensation claims (whether claimant or employer) involving novel scientific theories from *Frye* testing. Rather, the Florida Legislature has required that medical opinions be supported by substantial competent evidence, and offered by competent witnesses with a reasonable degree of certainty. Clearly, any opinion based upon novel scientific theories that are not generally accepted could not by definition be offered with a "reasonable degree of certainty."

---

[9]Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 126 L.Ed.2d 469, 113 S.Ct 2786 (1993)

[10]This Court has ruled that the applicable standard to be used in Florida for novel science is *Frye*, not *Daubert*. Bundy v. State, 471 So.2d 9, 18 (Fla. 1985).

Claimant's assertion further ignores the realities of the workers' compensation system. The use of *Frye* would be very rare in workers' compensation proceedings, as evidenced by the fact that this case in one of first impression in the entire 65-year history of workers' compensation. Further, even if use of *Frye* would result in some "delay and greater cost and inefficiency," (Ans. Br. at 24-35), it would nonetheless increase justice. There is no logical reason for exempting workers' compensation claims from *Frye* reliability testing that is applicable to *all* other civil and criminal claims in Florida.

Claimant's contention that Section 440.13, Fla. Stat., requires the admission of all expert testimony simply misreads that statute. Section 440.13 requires that "medical reports" — not scientific reports or opinions — be admitted into evidence. Where, as in this case, medical physicians cross the line to become scientists, and proffer a novel theory not generally accepted in the scientific community, they must be held to the *Frye* standards. Indeed, in light of the admission of Claimant's expert that his causation opinion was not generally accepted in either the scientific or medical communities, and the scientific proffer of the Company's experts showing it is "biologically impossible" for Claimant's condition to have been caused by pesticides, it was essential that the JCC conduct a *Frye* review to assist her in resolution of this case.

It is not possible, even using plain common sense, to reconcile the Legislative

standards of substantial competent evidence, proof to a reasonable degree of medical certainty and, in this exposure case, clear and convincing evidence of causation (see Harris v. Josephs of Greater Miami, Inc., 122 So.2d 561 (Fla. 1960); Norman v. Morrison Food Services, 245 So.2d 234 (Fla. 1971)), with a claim based upon a causation theory that is "biologically impossible," and which, if upheld, would be the first reported "case" of phrenic nerve paralysis "caused" by the secondary affects of low-level pesticides.[11]

II. CLAIMANT DID NOT APPEAL THE FIRST DISTRICT'S DETERMINATION THAT HIS CAUSATION THEORY WAS NOVEL SCIENCE; AND THUS IF THE CERTIFIED QUESTION IS ANSWERED IN THE AFFIRMATIVE, THIS CASE MUST BE REMANDED FOR A *FRYE* PROCEEDING.

Claimant did not cross-appeal the First District's determination that his causation theory was novel science, and is thus bound by that determination. Moreover, Claimant's answer brief simply ignores the Company's contention that the First District's application of *Frye* was erroneous and fundamentally violated due process. Indeed, Claimant substantively ignores the decisions of this Court in

[11]Finally, Claimant's contention that most states have rejected *Frye* in workers' compensation proceedings is very misleading. Most states have not addressed this issue; and the two key cases upon which Claimant relies *(Sheridan v. Catering Management, Inc*., 558 N.W.2d 319 (Neb. App. 1997) and *Armstrong v. City of Wichita*, 907 P.2d 923 (Kan. App. 1995), *review denied*, 259 Kan. 927 (1996), arise from jurisdictions in which the rules of evidence have been held *not* to apply in workers' compensation cases. This is not the case in Florida, where it is well established that the Rules of Evidence apply to workers' compensation proceedings.

Ramirez, *supra*; *Hadden v. State*, 690 So.2d 573 (Fla. 1997); *Murray v. State*, 692 So.2d 157 (Fla. 1997); and *Brim I, supra*; and the decisions of the Second and Third Districts: *Brim v. State*, 779 So.2d 427 (Fla. 2d DCA 2000) ("*Brim II*"); and *E.I. Dupont Nemours v. Castillo*, 748 So.2d 1108 (Fla. 3d DCA 2000), *rev. granted*, 770 So.2d 156 (Fla. 2000). The First District could not properly conduct its own initial *Frye* determination where no such hearing has been held by the trier of fact; and could not review and rely upon materials outside the record and unknown to the parties, without notice to the parties, and without an opportunity to respond.

Instead Claimant wishes to remove the initial *Frye* determination even further from the trier of fact, suggesting that *this Court* conduct the *Frye* analysis. (Ans. Br. at 38-48). Claimant has listed nearly *ten full pages* of alleged references and authorities purporting to support his theory that exposure to pesticides caused his phrenic nerve paralysis, with no explanation as to how these references and alleged authorities support his causation theory. *Nearly all of these references and alleged authorities are being cited for the first time, are not in the record of this case, and have not been previously provided to the Company, the JCC or the First District.*

Ramirez tells us this Court may conduct a de novo review of a trial court's *Frye* determination. Subject to compliance with due process considerations (opportunity to be heard, to submit evidence, cross-examine, etc., all denied by Claimant's approach), this Court may review material outside the record in conducting its review.

Ramirez equally tells us (at 1168) that Claimant is wrong in suggesting that this Court may step into the shoes of the JCC and conduct a *Frye* analysis where no *Frye* hearing was ever conducted by the trier of fact.

Finally, Claimant's argument that the Company somehow "invited" error by the First District by demanding a *Frye* analysis ignores the procedural posture of the proceedings below. In this case, the JCC did not rule on the motion in limine until after the hearing, when she ruled for Claimant, holding no *Frye* hearing was necessary because Claimant's causation theory was not "novel science." The First District held the Claimant's causation theory *was* novel science, and that *Frye* should have been applied. The First District then had two choices: either it could have remanded for a *Frye* hearing, or, it could have determined that Claimant's evidence simply did not support his causation theory. The First District did neither. It instead conducted its own first time *Frye* analysis, without notice to the parties, with no opportunity to be heard, and in reliance upon extra-record materials not identified to the parties. This was wrong.

III. THE COMPANY DID NOT WAIVE ITS RIGHT TO *FRYE*.

Claimant's argument that the Company "waived" its right to a *Frye* hearing is without merit. Certainly, the Company could not have waived a right that the First District acknowledged has not yet been established. Once the Company raised *Frye* objections, it became the obligation of the proponent (Claimant) to seek a hearing and

prove the reliability of its expert testimony. Claimant failed to do so.

Claimant's reliance upon *Hadden* for its waiver argument is misplaced. In *Hadden*, this Court held that a *Frye* objection made at trial was sufficient to preserve the issue. In this case, the Company's motion in limine was filed prior to the final hearing on the merits, and specifically raised *Frye* objections. Claimant presented no live expert testimony at the final hearing. The JCC specifically accepted the *limine* motion as continuing, until the JCC decided (erroneously) that *Frye* did not apply and thus denied the motion. Moreover, even prior to the motion in limine, the Company made specific objections under Section 90.702, Fla. Stat., at each of the key expert depositions. As the Third District acknowledged in *Castillo*, 748 So.2d at 1113, the *Frye* issue relates to the competency of witnesses, and is properly analyzed under Section 90.702. Under these facts, the Company could not have "waived" any entitlement to *Frye*.

CONCLUSION

For the reasons discussed herein and in its initial brief on the merits, Petitioner/Appellant U.S. Sugar Corporation respectfully requests that this Court (i) accept jurisdiction of this case pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) and (v); (ii) answer the certified question posed by the First District in the affirmative, holding that *Frye* applies to workers' compensation proceedings where a party seeks to introduce new and novel scientific principles; and (iii) hold that the record before the

JCC shows Claimant wholly failed to satisfy *Frye*, and remand this case to the First District for remand back to the JCC to conduct a proper *Frye* hearing and analysis.

THOMSON MURARO RAZOOK & HART, P.A.

_____

PARKER D. THOMSON, #081225
CAROL A. LICKO, #435872
One S.E. Third Avenue, Suite 1700
Miami, Florida 33131
Telephone: (305) 350-7200
Facsimile: (305) 374-1005

Attorneys for Appellant/Petitioner United States Sugar Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 13th day of September, 2001 to:

Randy D. Ellison, Esq.
1645 Palm Beach Lakes Blvd.
Suite 350
West Palm Beach, Florida 33401-2289

Nina A. Sachs, Esq.
3 Harvard Circle
Suite 104
West Palm Beach, Florida 33409

Phil Parrish
9130 South Dadeland Blvd.
Suite 1704
Miami, FL 33156

H. George Kagan
Elaine L. Thompson
250 Australian Avenue South
Suite 1660
West Palm Beach, FL 33401

_____

CERTIFICATE OF FONT

I HEREBY CERTIFY this brief has been printed in scalable Times New Roman 14 point type.

_____