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The Status of Drug Recognition Experts Remains Unresolved & the Impact on the Workplace Impairment Recognition Expert (WIRE)

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On February 17, 2023, the New Jersey Supreme Court issued a unanimous decision in *State v. Michael Olenowski*, the latest chapter in the ongoing dispute whether the testimony of certified Drug Recognition Experts (DREs) is admissible as expert testimony in court. Resolution of this question will have serious implications for the so-called Workplace Impairment Recognition Expert (WIRE) program that the New Jersey Cannabis Regulatory Commission (CRC) is mandated to create. Unfortunately, despite two trips to the Supreme Court and a Special Master's report of over 300 pages in length, the issue remains unresolved.

The *Olenowski* saga began in 2015, when Michael Olenowski was charged on two separate occasions with driving under the influence of drugs. Olenowski was evaluated in each case by a DRE. In each case, the DRE formed an opinion that Olenowski had been driving under the influence of impairing drugs. The municipal court judge allowed the DRE testimony in each case over Olenowski's objection, leading to his conviction in each case. His convictions were upheld upon a consolidated trial *de novo* in the Law Division of the Superior Court, and were affirmed a second time by the Superior Court, Appellate Division.

On March 8, 2019, the New Jersey Supreme Court granted Olenowski's petition for certification on the question whether DRE testimony was sufficiently reliable to be admitted into evidence as expert testimony. After briefing and oral argument, the Court issued an order on November 18, 2019, appointing a Special Master to conduct an evidentiary hearing on the issue. The Court directed that the Special Master apply the standards established in a case called *Frye v. United States*, which New Jersey had historically used as the standard for admissibility of proposed expert testimony in criminal cases.

Under the *Frye* standard, scientific evidence is admissible if it is "generally accepted and reliable." The proponent of scientific evidence can prove its general acceptance and reliability in one of three ways: (1) by expert testimony as to the general acceptance in the applicable profession of the premises on which the proposed expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the relevant scientific community accepts the premises underlying the proposed testimony, or (3) by judicial opinions that show that the proposed expert's premises had gained general acceptance.

The Special Master conducted 18 case management conferences and 42 days of hearing, in which he received testimony from 16 witnesses. The list of exhibits entered into evidence before the Special Master runs 27 pages in length. All case management conferences and hearing dates were transcribed. And after receiving briefing from the State, the Office of Public Defender as lead defense counsel, and additional briefing from seven parties appearing as "friends of the court," the Special Master issued a 332-page opinion on August 18, 2022. He found that the State "has clearly established that the *Frye* standard for admissibility" of DRE testimony "has been met." He found that DRE evidence "satisfies the reliability standard" of the New Jersey Rules of Evidence "and should be admissible."

One would have thought that this would have ended matters. But no. In its February 17, 2023, decision, the State Supreme Court determined that the *Frye* standard should no longer be used in criminal cases. The Court held that the standard used in civil cases, based on a United States Supreme Court decision in a case called *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, should be utilized instead.

The *Daubert* standard requires courts to directly examine the reliability of expert evidence and consider a broader range of relevant information beyond mere "general acceptance." The *Daubert* analysis "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and ... properly can be applied to the facts in issue." The non-exclusive list of factors to be considered under the *Daubert* analysis are (1) whether the scientific theory or technique can be, or has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the theory or technique, as well as the existence of standards governing the operation of the technique; and, (4) general acceptance in the

relevant scientific community. The focus must be solely on principles and methodology, not on the conclusions they generate.

Despite its long-standing use in criminal cases, the Supreme Court reasoned that the *Frye* standard posed difficulties and had been the subject of criticism. The *Frye* standard permitted judges only to consider the views of individuals in the relevant field, rather than actual measures of reliability. The *Frye* standard was deemed “both unduly restrictive and unduly permissive” because “it excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot bear rigorous scientific scrutiny.” The *Frye* standard presented the difficult threshold question of identifying the “relevant scientific community” in which general acceptance must be measured. *Frye*’s reliance on general acceptance had also come under criticism, and application of the *Frye* standard had not led to uniformity or predictability in practice. The Court concluded that an approach based on *Daubert*, currently used in civil cases, should be henceforth used in criminal cases as well. It therefore remanded the matter to the Special Master for reconsideration using the *Daubert* analysis. “In his discretion, [the Special Master] may rule on the basis of the existing record, or ask for and accept additional evidence, briefing and argument from the parties and [friends of the court].” In other words, a “do-over.”

It is worth noting that the Special Master found evidence that DREs had correctly identified true positive results in non-training cases between 85.3 and 92.3 percent of the time, depending on the stringency of the match criteria used. He further found that out of the total number of instances in which a subsequent toxicology report demonstrated that subjects had drugs in their systems, DREs had given correct opinions between 82.5 and 92.6 percent of the time in non-training cases. And out of 2,551 drivers examined in non-training cases in which toxicology reports had also been obtained, DREs presented “false positive” opinions only 82 times, or 3.2 percent of cases. Yet despite these findings, the Supreme Court felt it necessary for the Special Master to reevaluate matters under a new legal standard that expressly requires consideration of error rates.

It is not known how long it will take the Special Master to submit his second report. Given the thoroughness with which he conducted his initial hearing, it is likely that he will afford all parties the opportunity to submit additional argument, evidence and testimony, and that he will prepare another detailed, well-reasoned report. This means it will take some time before we have a final judgment on the reliability of DRE evidence. And because the CRC is unlikely to adopt WIRE standards until the DRE dispute is resolved, employers will need to continue to rely on the CRC’s interim guidance for assessing workplace impairment due to cannabis.

Employers are therefore encouraged to consider taking the following steps:

- Update their drug-free workplace policies and procedures to ensure that they are in full compliance with current New Jersey law regarding cannabis use among employees and use in the workplace.

- Familiarize themselves with the CRC's interim guidance and follow its recommendations regarding the detection of workplace impairment.
- Review the updated policy with competent legal counsel.
- Educate employees on the updated policy.

Link to CRC Workplace Impairment Guidance & CRC Sample Workplace Impairment Observation Form: www.nj.gov/cannabis/businesses/resources

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