IN THE MATTER OF

FOSTER-MILBURN COMPANY AND STREET & FINNEY, INC.

Docket 5937. Order and opinion, Sept. 24, 1954

Order ruling on interlocutory appeals from hearing examiner's rulings—

Granting the appeal of counsel supporting the complaint from rulings (1) striking doctor's testimony as biased and (2) refusing to permit counsel supporting the complaint, on rebuttal, to present scientific witnesses to testify concerning clinical tests performed on human subjects; and

Denying remaining appeals of both counsel.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Denning & Wohlstetter, of Washington, D. C., and *Ballantine, Bushby, Palmer & Wood*, of New York City, for respondents.

ORDER RULING ON INTERLOCUTORY APPEALS

This matter came before the Commission upon the interlocutory appeal filed on April 19, 1954, by counsel supporting the complaint from various rulings made by the hearing examiner on March 25, 1954, and upon the interlocutory appeal of counsel for the respondents filed on May 19, 1954, from the hearing examiner's order of April 27, 1954, and the answers submitted in opposition to such appeals, and oral arguments of counsel.

For the reasons stated in its accompanying opinion, the Commission is of the view that the appeal of counsel supporting the complaint should be granted in part and denied in part as there noted, and that the appeal of counsel for the respondents should be denied.

It is ordered that the appeal of counsel supporting the complaint be, and it hereby is, granted in part and denied in part as noted in the accompanying opinion.

It is further ordered that the appeal of counsel for the respondents be, and it hereby is, denied.

Commissioners Howrey and Gwynne concurring in the result.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

This case is before us upon interlocutory appeals separately filed by counsel supporting the complaint and counsel for respondents from various rulings of the hearing examiner and upon the answers submitted in opposition to such appeals, and the oral arguments of counsel.

These being interlocutory appeals, this case is still in the course of trial and the rulings challenged under both appeals occurred subsequent to the time when testimony and other evidence had been introduced in support of the case-in-chief, and the respondents likewise had rested after presenting their case on defense. Certain of the matters presented for our consideration under the appeals are closely related, their determination manifestly will have important bearing on the course of future hearings herein, and we have concluded that the appeals should be entertained and now ruled upon.

The complaint which instituted this proceeding alleges in effect, among other things, that respondents have represented in advertising disseminated in commerce for the purpose of inducing the purchase of Doan's Pills and that the preparation is a cure for kidney and bladder diseases and dysfunctions, and that its use will relieve various symptoms of them as designated in the advertising. Alleging that the preparation has no therapeutic value in the treatment of any disorder of the kidneys or bladder and that it will have no beneficial effect upon any symptom or condition arising from them, the complaint additionally charges that the advertisements referred to have constituted false advertisements, and that their dissemination has been in violation of the Federal Trade Commission Act. After the filing by respondents of their answer denying various allegations of the complaint and affirmatively alleging that the preparation may be helpful in treating the symptoms enumerated in case they are due to causes referred to in the answer, hearings proceeded in the case.

Under one of the rulings of March 25, 1954, to which the appeal of counsel supporting the complaint relates, the hearing examiner declined to permit counsel as part of the case on rebuttal, to present scientific witnesses who would testify in reference to clinical tests which had been made or were then being performed with Doan's Pills on human subjects. Immediately following the hearing examiner's refusal to receive the testimony on rebuttal, counsel supporting the complaint, reserving such rights as he might have to appeal from that ruling, requested that the case-in-chief be reopened for the reception of evidence to enable him to present testimony and other evidence relating to clinical tests being conducted with Doan's Pills. Although the hearing officer then indicated that this motion likewise would be denied, he reserved his decision, however, in order to permit counsel for respondents to consider the motion and to elect whether the defense would answer or submit matters for the record in reference thereto. On April 27, 1954, and after counsel supporting the complaint had appealed from the first ruling, the hearing examiner filed his order

ruling on counsel's second motion and granted the motion to reopen the case-in-chief. The appeal filed by counsel for the respondents challenges and relates solely to that order of reopening.

In denying the request of counsel supporting the complaint to submit evidence respecting the experiments as part of the case on rebuttal, the hearing examiner in effect held that rebuttal evidence should consist of none which properly could have been received as proof in chief and he ruled that the evidence referred to could and should properly have been presented during the case-in-chief. In support of his appeal, counsel supporting the complaint states that the scientific testimony presented during the course of the case-in-chief consisted primarily of expressions of opinion by qualified experts to the effect that use of the preparation will not relieve the conditions and symptoms referred to in the advertising. Counsel further asserts that the expert witnesses called by the respondents expressed opinions to the contrary and that, basing their views in instances on clinical experiments and other knowledge, they attested additionally that the relief which they believed was afforded from the preparation's use stemmed from a diuretic action or other pharmacological effects exerted by Doan's Pills. Counsel contends that a prime purpose for seeking to present testimony on rebuttal relating to the experiments is to contradict or rebut the testimony of defense witnesses respecting the method under which the pills assertedly act in affording therapeutic value. In this connection also, we note the statement appearing in the brief of counsel supporting the complaint that he learned in January 1954, which date is subsequent to that when the case on defense was closed, that it would be possible to secure the performance of clinical tests on human beings to determine whether the preparation has the pharmacological effects thus attributed.

The receipt of evidence respecting clinical experiments performed with Doan's Pills at Government installations or by scientists elsewhere would look to securing all the facts and perhaps would be of aid to an informed determination as to the merits of that preparation. Administrative agencies are not bound by the strict rules of procedure prevailing in courts of law. Moreover, questions relating to precise limits of rebuttal testimony are matters resting largely in the discretion of the court or other tribunal encharged with ultimate responsibility for conducting the proceeding and determining its merits. Appraised against the background of the factual situation here presented, it seems very clear to us, who are thus encharged, that the ruling of the hearing examiner was unduly restrictive. We accordingly have concluded that counsel's appeal from that ruling has merit

and should be granted. The same general considerations likewise apply in appraising the matters presented under the respondents' appeal. It was not error for the hearing examiner subsequently, in the exercise of his discretion, to grant the motion to reopen the case on direct. The contentions advanced in support of the respondents' appeal from that ruling are deemed to be without merit and their appeal must be denied accordingly.

Among other rulings of the hearing examiner challenged in the appeal of counsel supporting the complaint is that striking all the testimony of Dr. Bartter of the National Institutes of Health, insofar as his testimony pertained to certain experiments performed by a physician called by the respondents, and the ruling under which the witness was precluded from continuing with his testimony appraising those experiments. At the conclusion of an examination on *voir dire*, the hearing examiner stated that he deemed the witness to have been testifying to matters with which the witness agreed but which appeared in statements, largely in some instances and in others entirely, prepared by Dr. Dobbs, the Commission's chief medical officer, and the examiner rebuked counsel supporting the complaint for the manner in which the arrangements for securing Dr. Bartter's testimony were conducted by the medical officer. Stating that the circumstances under which this testimony was secured were such that they constituted a flagrant violation of traditional principles of procedure and ordinary fairmindedness, the hearing examiner additionally held that the witness must be regarded as biased and lacking in objectivity. He accordingly disqualified the witness, struck his prior testimony and declined to receive his testimony when counsel asked to recall him to testify without using notes or memoranda.

When called by counsel for the respondents, a Dr. Ezickson had testified, among other things, to a clinical study completed by him with respect to 85 patients and received in evidence were a summary and observation reports purporting to show the number of cases in which improvement of patients' subjective and objective symptoms was noted by the doctor. Submitted and identified also were the doctor's data sheets in reference thereto and hospital records likewise pertaining to those patients, these apparently comprizing altogether more than 2,500 sheets of records. The appeal brief states that, on behalf of counsel supporting the complaint, Dr. Bartter was requested to review that testimony and all related exhibits with a view to appraising such clinical study. It further appears that he and counsel supporting the complaint later conferred, and it was decided that the practical way for the doctor to testify to his opinions and expedi-

tiously identify and discuss for the record particular exhibits on which he would base his conclusions as to whether Dr. Ezickson's findings in instances contained discrepancies or had adequate support in case records, was to reduce his testimony to writing.

During his examination, the doctor testified that he received the transcript of Dr. Ezickson's testimony and the case records and other exhibits in October 1953, and went over them and formed his opinion with respect to the evidence and made notes. In January 1954, he requested Dr. Dobbs' help in reviewing the records for factual material. Dr. Dobbs likewise had prepared some notes and they conferred and discussed their respective longhand notes and Dr. Bartter's conclusions, and the latter requested that changes be made in Dr. Dobbs' notes and that they be typewritten as revised. Upon their receipt, the witness, with the records and his own notes in front of him, proceeded to revise those typewritten notes in accordance with his views. Except for the typewritten notes pertaining to the records of approximately ten patients, which the doctor upon the basis of his own study adopted as correct without changes, the notes as revised were then dictated by him to a stenographer and those groups constitute the notes which he used or proposed to use when he was on the stand.

We think it apparent from the record that the witness had fair opportunity to form his own candid scientific opinions as to the design and merit of the clinical study in question. Even prior to the time when any assistance was enlisted by him, the witness had considered the testimony and exhibits and apparently formulated conclusions in broad reference to the procedures pursued in the clinical study. Dr. Bartter testified to the effect that he confirmed the citations to the record as contained in the original typewritten notes and that the matters contained in the notes which he was using represented or were adopted as his own conclusions based on his study of the records. In rejecting the contentions of counsel supporting the complaint and in concluding in effect that the witness must be deemed not to have formed independent views of his own with respect to the tests, the hearing examiner ignored the sworn testimony in reference to the witness's own studies in preparing to testify. The fact that the doctor's professional life has been spent in close contact with experimental research, his apparent professional standing, and the position occupied by him in the service of our Government go far in dispelling mere supposition that the interpretations and opinions expressed by him and contained in the notes have stemmed from his intellectual subservience to another's views. These considerations and other matters contained in the record, we believe, create a fair pre-

sumption that the views expressed in his testimony and notes represent opinions sincerely entertained and adopted by him upon the basis of his own individual study and consideration of the tests.

Under procedures prevailing in the courts, matters in reference to bias or interest on the part of expert witnesses relate to the weight and credibility of their testimony rather than their eligibility to testify in the first instance. There, as in administrative proceedings, the right to cross-examine affords a means of testing whether the views of the witness are sincere and based on accurate facts and conform to scientific truth. In the situation presented here, we emphatically reject the hearing examiner's view that the assistance rendered to the witness was furnished in disregard of principles of fairmindedness or that its acceptance was improper. We accordingly hold that the hearing examiner erred in refusing to permit counsel to proceed with the witness' examination. Inasmuch as the rulings forbidding the use of notes and memoranda and striking his prior testimony were made under an erroneous assumption that the matters attested to could not be deemed to represent the witness' own scientific views, these rulings manifestly were improper and the appeal of counsel supporting the complaint therefrom is similarly being granted. It is our observation, moreover, that the censure which the hearing officer directed in the course of those rulings to counsel supporting the complaint and others was unwarranted.

Other matters presented under the foregoing appeal pertain to counsel's contention that the hearing examiner erred in refusing to receive Dr. Bartter's typewritten notes and memoranda in evidence and to his challenge to the ruling rejecting them under an offer of proof. These notes were indeed received but such reception was solely for the purposes of the voir dire examination. Since we have noted that the hearing examiner concluded in effect that all evidence to be adduced by the witness was incompetent but that such conclusion was patently erroneous, all the exclusionary rulings including the rejection of certain offers of proof can be regarded as lacking sound basis. On the other hand, inasmuch as an appeal was filed and the case presented on a record adequate for our review of the rulings, questions pertaining solely to the rejection by the hearing examiner of this as well as another related offer of proof now appear moot. Moreover, it is conceivable that criteria or considerations other and additional to those now appearing and originally controlling to informed decision as to the admissibility of the oral and documentary evidence offered through the witness might become relevant when the previous ruling excluding the documentary evidence is reconsidered below in the light of our opinion

here upon any reoffer of the notes. With due regard to these considerations, we have decided that granting of counsel's appeal on these aspects is not warranted.

In concluding, we deem it appropriate to interject reference to a matter outside the scope of the issues presented under the appeals. As of the time these appeals were filed, no ruling had been made by the hearing examiner with respect to a motion to dismiss made orally by respondents on November 30, 1953, more than three months prior to the time when any of the appealed from rulings occurred. The respondents contended in support of the motion, among other things, that the Commission's prior decision in *Docket No. 2711* is *res judicata* and bars decision on the merits of the issues here, and ruling was reserved by the hearing examiner. The hearing examiner should have ruled on that motion prior to or contemporaneously with the rulings which were appealed from and presented for review here.

Commissioners Howrey and Gwynne concur in the result.

IN THE MATTER OF

UNITED STATES STEEL CORPORATION ET AL.

Docket 6078. Order and opinion, Sept. 24, 1954

Order denying appeal of steel drum manufacturers from hearing examiner's adverse ruling on their request for an order authorizing an informal stipulation-agreement in settlement of the charge of unlawful combination and agreement to fix prices of steel drums; and granting in part respondents' motion for a bill of particulars.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Fletcher G. Cohn, *Mr. James I. Rooney*, *Mr. Paul R. Dixon*, *Mr. Everette MacIntyre* and *Mr. William A. Mulvey* for the Commission.

Mr. Thomas Lynch, of New York City, and *Mr. L. L. Lewis*, *Mr. Merrill Russell*, *Mr. John C. Bane, Jr.* and *Reed, Smith, Shaw & McClay*, of Pittsburgh, Pa., for United States Steel Corp. and United States Steel Co.

Mr. J. Theodore Ross, of Pittsburgh, Pa., for Jones & Laughlin Steel Corp. and Jones & Laughlin Steel Barrel Co.

Mayer, Froedlich, Spiess, Tierney, Brown & Platt, of Chicago, Ill., for Inland Steel Co. and Inland Steel Container Co.

Mr. Gordon W. Mallatratt, of Richmond, Calif., and *Dickler & Halbert*, of New York City, for Rheem Manufacturing Co.

Mr. Thomas F. Patton, *Mr. Harold C. Lumb* and *Mr. William J. De Lancey*, of Cleveland, Ohio, for Republic Steel Corp.

ORDER RULING ON RESPONDENTS' APPEALS AND DIRECTING COUNSEL SUPPORTING THE COMPLAINT TO FURNISH CERTAIN INFORMATION

This matter having come on for hearing upon the respondents' appeal dated October 26, 1953, from the hearing examiner's order of October 15, 1953, and the appeal additionally filed by them on November 5, 1953, from the hearing examiner's order of October 28, 1953, denying respondents' joint motion for a bill of particulars and upon the briefs and other memoranda filed in support of and in opposition to such appeals and oral arguments of counsel; and

The Commission having duly considered the appeals and having determined, for reasons stated in the accompanying opinion, that the appeal dated October 26, 1953, should be denied and that the appeal filed on November 5, 1953, should be granted in part and denied in part:

It is ordered that respondents' appeal of October 26, 1953, from the hearing examiner's order of October 15, 1953, be, and the same hereby is, denied.