IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MICHAEL BRANDON VICKERS — **PLAINTIFF**

v. — **CAUSE NO. 1:21CV106-LG-RPM**

BP EXPLORATION & PRODUCTION INC.; BP P.L.C.; and BP PRODUCTION COMPANY — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE PLAINTIFF'S EXPERT WITNESS, DENYING PLAINTIFF'S MOTION FOR ADMISSION OF PLAINTIFF'S EXPERT OPINIONS, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are the [59] Motion to Exclude the Causation Opinions of Plaintiff's Expert, Dr. Jerald Cook, and the [61] Motion for Summary Judgment filed by Defendants BP Exploration & Production Inc., BP P.L.C., and BP Production Company, as well as the [67] Motion for Admission of Plaintiffs' Expert Opinions because of BP Defendants' Spoliation of Evidence of Plaintiff's Exposure filed by Plaintiff Michael Brandon Vickers. The parties have fully briefed the Motions. After reviewing the submissions of the parties, the record in this matter, and the applicable law, the Court finds that Plaintiff's Motion for Admission of his causation expert should be denied, and Defendants' Daubert Motion and Motion for Summary Judgment should be granted.

BACKGROUND

Plaintiff claims that he was exposed to oil and chemical dispersants while employed by Knight's Marine & Industrial Services, Inc., as a foreman assisting in

the clean up following the Deepwater Horizon oil spill in the Gulf of Mexico. Plaintiff's case was originally part of the multidistrict litigation ("MDL") pending before Judge Carl J. Barbier. His case was severed from the MDL as one of the "B3" cases for plaintiffs who either opted out of, or were excluded from, the Deepwater Horizon Medical Benefits Class Action Settlement Agreement. (Order, ECF No. 9). Plaintiff opted out of the settlement. (Statement, ECF No. 7). After plaintiff's case was severed, it was transferred to this Court. (Order, Ex. A, ECF No. 9). Plaintiff attempts to assert the following claims against Defendants: negligence under general maritime law, gross negligence under general maritime law, and negligence per se under general maritime law and federal law. He seeks compensatory damages, actual damages, punitive damages, pre- and post-judgment interest, attorney's fees and costs, and any other relief the Court deems just and proper.

Plaintiff claims that his exposure to oil and other chemicals after the oil spill caused him to suffer from breathing difficulties, kidney problems, peeling skin, skin rashes, skin irritation, respiratory problems, muscle cramps, muscle spasms, swollen testicles, chest pains, heart racing, headaches, vision problems, and "problems with his left leg giving out on him." (Compl. at 9, ECF No. 1). In an attempt to demonstrate that these conditions were caused by his exposure to oil and other chemicals used in the clean-up, Plaintiff has submitted the expert opinions of Dr. Jerald Cook, an occupational and environmental physician. (Def.'s Mot., Ex. 3,4, ECF No. 59). In his October 7, 2022, report, Dr. Cook explained, "The exact dose of [Plaintiff's] exposures is not clear[;] however, the it [sic] is evident that his

exposures were not trivial and were of clinical significance. Mr. Vickers was physically in contaminated seawater where he was exposed." (Def.'s Mot., Ex. 3 at 181, ECF No. 59-3). Dr. Cook reached the following conclusion:

> Following my specific causation analysis as described above, it is evident that Mr. Vickers has suffered medical problems temporarily to his exposures sustained during the BP Deepwater Horizon oil spill response and cleanup work. It is evident that he had upper respiratory problems (pharyngitis, sinusitis), lower respiratory problems (asthma, bronchitis, hemoptysis with bronchitis, dyspnea, dyspnea on exertion, shortness of breath, and restrictive lung disease with bronchodilator reversibility), ocular problems (chronic dry eye syndrome), and dermal problems (eczematous dermatitis on nose, recurrent sebaceous cyst on left neck, toxic dermatitis and chemical sensitivity) that were more likely than not the result of exposures he sustained during his participation in the Deepwater Horizon BP oil spill response and cleanup work.

(Def.'s Mot., Ex. 3 at 183, ECF No. 59-3).

In their *Daubert* Motion, Defendants argue that Dr. Cook's opinions are unreliable because "[h]e fails to identify which chemical is supposedly responsible for Plaintiff's illnesses, and he fails to identify the dose of exposure necessary to cause Plaintiff's alleged injuries." (Def.'s Mem. at 1, ECF No. 60). Defendants also seek summary judgment on the basis that Plaintiff has failed to provide admissible evidence that Plaintiff's alleged injuries were caused by the oil spill response. In his Motion alleging spoliation, Plaintiff asserts that "BP's decision not to record quantitative exposure data during the BP Oil Spill response has deprived Plaintiff of data which would quantitatively establish his exposure." (Pl.'s Mem. at 1, ECF No. 68). He seeks admission of Dr. Cook's opinions as a sanction.

DISCUSSION

I. DEFENDANTS' MOTION TO EXCLUDE THE CAUSATION OPINIONS OF DR. JERALD COOK

The party offering the proposed expert has the burden of proving by a preponderance of the evidence that the expert's proffered testimony satisfies Rule 702 of the Federal Rules of Evidence. *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002). Rule 702 provides that an expert witness "who is qualified as an expert by knowledge, skill, experience, training, or education" may testify if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Therefore, "expert testimony is admissible only if it is both relevant and reliable." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243 (5th Cir. 2002). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). To be reliable, an expert's opinions must be based on sufficient facts or data and must be the product of reliable principles and methods. Fed. R. Evid. 702(b), (c).

The Court may consider the following factors in determining reliability: (1) whether the technique has been tested, (2) whether the technique has been subject to peer review and publication, (3) the technique's potential error rate, (4) the existence and maintenance of standards controlling the technique's operation, and

(5) whether the technique is generally accepted in the relevant scientific community. *Burleson v. Tex. Dep't of Crim. Just.*, 393 F.3d 577, 584 (5th Cir. 2004). These factors "do not constitute a 'definitive checklist or test.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (quoting *Daubert*, 509 U.S. at 593). Rather, courts "have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152.

Dr. Cook's causation opinions are at issue here. The Fifth Circuit has thus far declined to address the question of whether the toxic tort standard of causation applies to the BP oil spill litigation, but the Eleventh Circuit and numerous district courts, including the Southern District of Mississippi, have held that the toxic tort standard applies. *See McGill v. BP Expl. & Prod., Inc.*, 830 F. App'x 430, 434 (5th Cir. 2020); *In re Deepwater Horizon BELO Cases*, No. 20-14544, 2022 WL 104243, at *2 (11th Cir. Jan. 11, 2022); *Curbelo v. BP Expl. & Prod., Inc.*, No. CV 17-3690, 2023 WL 2742136, at *3 (E.D. La. Mar. 31, 2023); *Salmons v. BP Expl. & Prod. Inc.*, No. 1:20-CV-38-LG-RPM, 2021 WL 2149206, at *4 (S.D. Miss. May 26, 2021).

In toxic tort cases, "[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case." *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). These two requirements are referred to as "general causation" and "specific causation," respectively. *See Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007). To establish general causation, the plaintiff must show that "a substance is

capable of causing a particular injury or condition in the general population." *Id.* A plaintiff demonstrates specific causation with evidence that "a substance caused [that] particular [plaintiff's] injury." *Id.* If the Court finds that the plaintiff has not demonstrated general causation, there is no need to consider specific causation. *Id.* As a result, B3 Plaintiffs in BP oil spill cases "must prove, at a minimum, that exposure to a certain level of a certain substance for a certain period of time can cause a particular condition in the general population." *Williams v. BP Expl. & Prod.*, No. 18-9753, 2019 WL 6615504, at *8 (E.D. La. Dec. 5, 2019) (citing *Knight*, 482 F.3d at 351).

In the present case, Plaintiff acknowledges that Dr. Cook's opinions concerning BP oil spill exposure have previously been excluded by numerous district courts. He argues:

> This District's sections of court which have disqualified Dr. Cook have been unpersuaded by his reliance on the scientific literature and have focused on Dr. Cook's lack of quantification of a level of exposure to a specific chemical or chemicals. This reasoning puts plaintiffs in a difficult position because the courts are requiring of Dr. Cook a level of exactitude in his opinions which the best scientists, with the massive resources of the National Institutes of Health, and a decade of time to do their research have not been able to do. As the undersigned's prior memoranda have been found unpersuasive by so many judges, this opposition takes a different tack. It focuses on the scientific robustness of Dr. Cook's reliance literature and the fact that there are no alternative studies on which he could properly rely to support his opinions.

(Pl.'s Mem. at 2, ECF No. 70).

Plaintiff relies on an affidavit signed by Linda S. Birnbaum, Ph.D., who was the Director of the National Institute of Environmental Health Services (NIEHS)

and the National Toxicology Program (NTP) from January 2009 to October 2019. Dr. Birnbaum opines, "Once spill response activities were over, it was too late to collect biological samples to quantitatively assess responder exposures at the time of exposure." (Pl.'s Mem., Ex. 1 at 5, ECF No. 70-1). She further testifies:

> The proposition that it is possible to establish a BP Oil Spill responder's quantitative exposure to a given chemical at a given level based on the data that was collected during the BP Oil Spill response, is not plausible. If it were, the GuLF STUDY scientists with all of their expertise, time, and funding would have done it.

(*Id.* at 7). She also provides support for Dr. Cook's reliance on the Gulf Long-Term Follow-Up Study ("GuLF STUDY"),[1] stating that "GuLF STUDY's exposure assessment and epidemiology are the current, best, and state of the art scientific literature on the exposure and health effect outcomes of BP Oil Spill responders." (*Id.*) Given Dr. Birnbaum's opinions, Plaintiff argues that the causation standard courts have adopted for BP Oil Spill cases cannot be satisfied because biomonitoring and dermal exposure monitoring were not performed during the oil spill response.

As Defendants correctly note, Dr. Birnbaum's opinions are not relevant to the present Motion because they pertain to specific causation — the ability to determine a plaintiff's exposure to a particular chemical.[2] Before addressing specific

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[1] The GuLF STUDY was conducted by the NIEHS under Dr. Birnbaum's leadership in order to study the exposure and long-term health effects on BP Oil Spill responders. (Def.'s Mot., Ex. 3 at 71, ECF No. 59-3; Pl.'s Mem. at 3, ECF No. 70).

[2] Dr. Birnbaum's affidavit and opinions should also be excluded because Plaintiff did not designate her as an expert witness by the October 5, 2022, deadline. *See* Fed. R. Civ. P. 26(a)(2)(A) (requiring disclosure of expert witnesses); Local Uniform Civil Rule 26(a)(2) (requiring expert disclosures no later than the time specified in the case management order); *see also* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party

causation, this Court must first determine whether here is evidence of general causation —the exposure level at which a chemical is toxic to humans. As Judge Barbier explained in an Eastern District of Louisiana case:

> [The general causation] inquiry does not depend upon environmental sampling data taken as part of the incident. As Judge Vance stated, "Dr. Cook was not prevented from consulting the relevant scientific and medical literature on the harmful effects of oil to determine whether a relevant chemical has the capacity to cause the harm alleged by plaintiff in the general population. He was not limited to data from the Deepwater Horizon oil spill, and in fact did rely on studies from previous oil spills."

Ross v. BP Expl. & Prod. Inc., No. CV 17-4287, 2022 WL 2986561, at *4 (E.D. La. July 28, 2022) (quoting *Dawkins v. BP Expl. & Prod., Inc.*, No. CV 17-3533, 2022 WL 2315846, at *10 (E.D. La. June 28, 2022)). Although Dr. Cook provided an additional report in the present case that included information specific to Plaintiff, Dr. Cook's general causation analysis is largely unchanged from the opinions he provided in the Eastern District of Louisiana cases. Since Dr. Cook thus far has failed to identify the dose of any chemical that would result in the adverse health effects alleged by Plaintiff, his report is unreliable and inadmissible. Defendants' Daubert Motion to Exclude Dr. Cook's opinions is granted.

II. Plaintiff's Motion for Admission of Plaintiffs' Expert Opinions because of Defendants' Spoliation of Evidence

Plaintiff argues that the Court should admit Dr. Cook's report as a sanction for Defendants' "decision to not record quantitative exposure data during the BP Oil

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is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

Spill response" because this failure "has deprived Plaintiff of data which would quantitively establish his exposure." (Pl.'s Mem. at 1, ECF No. 68). The Fifth Circuit has held:

> Spoliation of evidence is the destruction or the significant and meaningful alteration of evidence. We permit an adverse inference against the spoliator or sanctions against the spoliator only upon a showing of "bad faith" or "bad conduct." A party's duty to preserve evidence comes into being when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant. Bad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.

Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. 2015). "[C]ourts have consistently held that the failure to create evidence is not spoliation." *Fairley v. BP Expl. & Prod. Inc.*, No. CV 17-3988, 2022 WL 16731817, at *3 (E.D. La. Nov. 3, 2022); *see also United States v. Greco*, 734 F.3d 441, 447 (6th Cir. 2013) ("A failure to collect evidence that may or may not have been available for collection is very different from the intentional destruction of evidence that constitutes spoliation.").

Here, there is no evidence that Defendants destroyed evidence. Plaintiff argues that Defendants should have created or collected evidence by conducting additional testing on workers during the oil spill response. As Judge Sarah S. Vance has explained in an Eastern District of Louisiana case in which the plaintiff made the same argument, Plaintiff identifies "no source (statute, rule, or other dictate) imposing a duty on BP to conduct such monitoring and, by suggesting that monitoring was necessary to create evidence of exposure, . . . concedes that no such evidence ever existed for BP to preserve." *Mackles v. BP Expl. & Prod., Inc.*, No. CV 17-4003, 2023 WL 2646431, at *10 (E.D. La. Mar. 27, 2023).

Furthermore, as previously explained, if Defendants had conducted the testing Plaintiff claims they should have, there is no indication that the testing would have assisted Plaintiff in establishing general causation, which is a required element of causation in this toxic tort case. The testing Plaintiff describes would have pertained to specific causation, not general causation.

Plaintiff's Motion alleging spoliation and seeking admission of Dr. Cook's report is denied. Plaintiff has not identified sanctionable conduct on the part of Defendants, and even if he had, the Court would decline to admit an expert report that it has deemed unreliable as a sanction.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment may be filed by any party asserting that there is no genuine issue of material fact, and that the movant is entitled to prevail as a matter of law on any claim. Fed. R. Civ. P. 56. The movant bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25. The non-movant may not rest upon mere allegations or denials in its pleadings but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Factual controversies are resolved in favor of the non-moving party, but only when there is an actual controversy, that is, when both parties have

submitted evidence of contradictory facts. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Defendants seek summary judgment because Plaintiff cannot establish general causation as required in toxic tort cases. *See Knight*, 482 F.3d at 351. Plaintiff argues that expert medical testimony is not necessary to establish causation for his temporary pain and suffering claims, citing the decisions of Judge Barbier in three Eastern District of Louisiana cases. However, those decisions pertained to specific causation, not the required element of general causation which is at issue in the instant case. *See Stephens v. BP Expl. & Prod. Inc.*, No. CV 17-4294, 2022 WL 1642136, at *4 (E.D. La. May 24, 2022); *Turner v. BP Expl. & Prod. Inc.* , No. CV 17-4210, 2022 WL 1642142, at *4 (E.D. La. May 24, 2022); *Wallace on behalf of Wallace v. BP Expl. & Prod. Inc.*, No. CV 13-1039, 2022 WL 1642166, at *4 (E.D. La. May 24, 2022). Moreover, Judge Barbier ultimately granted summary judgment in favor of Defendants in two of those cases on the basis that Dr. Cook's general causation opinions had been excluded. *See Stephens v. BP Expl. & Prod. Inc.* , No. CV 17-4294, 2022 WL 2355501, at *6 (E.D. La. June 29, 2022); *Turner v. BP Expl. & Prod. Inc.*, No. CV 17-4210, 2022 WL 2342548, at *6 (E.D. La. June 29, 2022). In the third case, *Wallace*, the plaintiff's claims were ultimately dismissed on the basis that the plaintiff did not certify her claims, so Judge Barbier did not reach the issue of general causation.

As the Fifth Circuit has clearly stated, "*[s]cientific knowledge* of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to

such quantities, are minimal facts necessary to sustain a plaintiff's burden in a toxic tort case." *Allen*, 102 F.3d at 199 (emphasis added). Without expert testimony on the harmful level of exposure to a chemical, Plaintiff cannot meet his burden of establishing general causation, an essential element of his claim. Defendants' Motion for Summary Judgment must be granted.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion to Exclude Dr. Cook's opinions, denies Plaintiff's Motion to Admit Dr. Cook's opinions as a sanction for Defendants' alleged spoliation, and grants Defendants' Motion for Summary Judgment. This lawsuit is dismissed with prejudice.

IT IS THEREFORE ORDERED AND ADJUDGED that the [59] Motion to Exclude the Causation Opinions of Plaintiff's Expert, Dr. Jerald Cook, is **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED that [67] Motion for Admission of Plaintiffs' Expert Opinions because of BP Defendants' Spoliation of Evidence of Plaintiff's Exposure filed by Plaintiff Michael Brandon Vickers is **DENIED**.

IT IS FURTHER ORDERED AND ADJUDGED that the [61] Motion for Summary Judgment filed by Defendants BP Exploration & Production Inc., BP P.L.C., and BP Production Company is **GRANTED**. This lawsuit is hereby **DISMISSED WITH PREJUDICE**. The Court will enter a separate judgment as required by Fed. R. Civ. P. 58.

SO ORDERED AND ADJUDGED this the 8th day of May, 2023.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE