

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 42

WCC No. 9601-7481

JOHN BOLDOSSER

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION ON APPEAL

Summary: 35 year old former construction worker filed occupational disease claim alleging that construction work aggravated his back condition. Relying on presumption of correctness of medical panel reports (§39-72-610(1), MCA (1993)), hearing officer ruled claimant did not prove work caused his condition. Claimant appealed to WCC.

Held: Where record revealed panel physician did not properly apply ODA (reference was made to causation of condition by "injury" on a particular date), WCC reverses DOL decision and remands for designation of new panel and for a new hearing.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-610(1), MCA (1993). In deciding occupational disease case, DOL hearing officer relied on presumption of correctness of medical panel report, but record revealed that panel physician likely did not properly apply ODA where reference was made to causation of condition by "injury" on a particular date. Decision reversed by WCA and remanded for designation of new panel and for a new hearing.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-612(2), MCA (1993). Statute permits WCA to reverse DOL hearing officer where decision below was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-706(1), MCA (1993). Aggravations of preexisting conditions or diseases are compensable under the ODA.

Judicial Review: Standard of Review: Clearly Erroneous. Section 39-72-612(2), MCA (1993) permits WCA to reverse DOL hearing officer where decision below was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

Occupational Disease: Medical Panels. In deciding occupational disease case, DOL hearing officer relied on presumption of correctness of medical panel report, but record revealed that panel physician likely did not properly apply ODA where reference was made to causation of condition by "injury" on a particular date. Decision reversed by WCA and remanded for designation of new panel and for a new hearing.

This is an appeal from an Order of the Department of Labor and Industry denying an occupational disease claim.

The appellant/claimant in this matter is John Boldosser (claimant). He suffers from a bad back and filed a claim for occupational disease benefits based on his employment as a rough carpenter during 1991 to 1993. A hearing officer from the Department of Labor and Industry (DLI) found that he had not carried his burden of proof to rebut a medical panel report finding that he does not suffer from an occupational disease. In his appeal to this Court, the claimant contends that the hearing officer's finding is clearly erroneous in view of reliable, probative and substantial evidence on the whole record. This Court agrees.

Record on Appeal

The record on appeal consists of a transcript of the hearing, a copy of the deposition of Dr. Michael Lahey, and nine exhibits.

Background Facts

The claimant is 35 years old. He has primarily worked in heavy labor in the construction business. He also worked for a dairy in Pennsylvania for five years. Currently he is self-employed doing painting, pipe fitting, landscaping, electrical wiring, and some plumbing.

In 1991 claimant went to work for Larry Karper, who operates a construction company. Karper is a sole proprietor but carried workers' compensation insurance on his employees. At the time the alleged occupational disease arose, Karper was insured by the State Compensation Insurance Fund.

Karper's construction firm specializes in framing buildings. Framing includes the construction of walls, floors, and roofs. It also includes the installation of siding. It is heavy

work requiring workers to lift walls into place, to lift, pull, and carry heavy sheeting, and lift large beams and trusses.

Sometime in December of 1992, claimant fell approximately eight feet from a ladder. He did not experience any immediate discomfort as a result of his fall and completed his shift. However, he testified that he went to a physical therapist a "couple days -- within a week, I think, after that" (Tr. at 30.) He explained that he sought physical therapy "[c]ause, I was having a lot of back pain . . . I was having some serious back pain, so I went to see him [the physical therapist]." (*Id.* at 44, 45.) Claimant further testified that the physical therapist told him that he "would want to look into other types of employment, that my employment was probably aggravating my condition." (*Id.* at 28.)

Claimant made only one visit to the physical therapist. He explained that he could not afford continued treatment:

BOLDOSSE: . . . And as far as following up on anything, he explained to me that it would take a bunch of expensive tests and x-rays and time off work to try to correct the situation, so that's basically why I didn't, I didn't have the time or the finances at that time to follow up on it.

(Tr. at 29.) The exhibits presented at hearing do not include any physical therapy notes so further information concerning the physical therapy is unavailable.

Following the ladder incident the claimant continued to work until October 1993. During that time he missed only a half day of work, and that was on the day of his physical therapy appointment. (*Id.* at 30.) In October claimant quit his job.

Claimant testified that he continued to have back pain while working in 1993, and that his pain increased with time:

TOOLE: In the last, in the last two months that you were there [working for Karper], was the back pain worse than it had been?

BOLDOSSE: Yeah.

TOOLE: The period just before that, say in the spring and summer of '93, how was the back pain then? Gradual thing or was it up and down? What was it?

BOLDOSSE: I would say it was a pretty gradual thing. It just seemed to be getting worse, and the more I worked, the more it aggravated it.

(Tr. at 50.)

Larry Karper testified that he noticed claimant's work "slacking" over the last two months of his employment. (Tr. at 20.) When his attention was drawn to a statement in medical notes

indicating that claimant had quit his job due to a disagreement with his supervisor, Karper further testified:

KARPER: Well like I, I got a little impatient with him not being able to perform some of the duties and maybe I just didn't really understand that a lot of it was coming from physical problems.

....

WITTE: Umhuh. What do you mean when you say it would be fairly obvious what he couldn't do?

KARPER: Well bending and stuff, you know, wincing and just kind of standing and holds his back, and stuff like that, you know. He wouldn't come right out and say. He would just try to go ahead and do the work but then he'd get, well it seemed like he kind of act lazy which wasn't really wasn't the case because I know John was, is not a lazy person but you could tell he was suffering.

(Tr. at 20-21.) Karper did not feel that claimant's slackening was attributable to his December 1992 fall:

TOOLE: Your feeling was that the ladder incident was not really related to the things that you noticed in the last two or three months of his work?

KARPER: No, I never connected those, those two things.

(Tr. at 22.)

In January 1994, claimant sought care from Partnerships in Health Care [PIHC] and was seen by Mindy Opper, a physician's assistant. The records of that care were not offered at hearing. However, Dr. Dana Headapohl, who later conducted an occupational disease panel examination of claimant, apparently had access to the records and refers to them in a report which is found at Exhibit 5.

Claimant also reported to Dr. Headapohl that he had seen a physician in December 1993. Her report reflects that he provided her with the following history:

Because the back pain worsened in December 1993, he sought treatment from a physician, his back hurt "really bad . . . didn't know if I was going to end up in a wheelchair." He had difficulty straightening up and was finding at that time nonsteroidal anti-inflammatory agents were not bringing about significant improvement.

(Ex. 5 at 7.) It is unclear whether, when talking to Dr. Headapohl, claimant was referring to his visit to PIHC. There is no other indication that he was seen by any physician in December and he could have incorrectly been referring to Ms. Opper as a physician rather than a physician's assistant.

In any event, he was seen by Ms. Oppen on January 5, 1994. Dr. Headapohl's report summarizes the visit as follows:

The first clinical note is from 01/05/94 in which a history of low back pain, increasing since September 1993, is given. The history states patient slipped on some sawdust at work in September 1993 and since that time has had increasing back pain. . . .

The diagnosis was severe lumbar strain.

(*Id.*) Dr. Headapohl noted that claimant had not reported any September 1993 incident to her, although he had reported the ladder incident of December 1992.

Claimant returned to Ms. Oppen for a follow-up visit on January 25, 1994. According to Dr. Headapohl's review of the visit, there was no change in his symptomatology. However, claimant was described as being "agitated and concerned something else must be wrong." Ms. Oppen recommended physical therapy, heat, ultrasound, massage and flexibility training, and prescribed Amitriptyline for chronic pain and sleep. (*Id.*)

Claimant visited Ms. Oppen a third time on February 15, 1994. By that time he had attended two physical therapy sessions. He had no new symptoms and the intensity of his symptoms was unchanged. However, because claimant expressed concern that he had undetected damage, Ms. Oppen referred him to Dr. Michael Lahey, an orthopedic surgeon.

Dr. Lahey examined claimant on March 30, 1994. His report is found at Exhibit 7. He reviewed x-rays previously taken on February 15, 1994, and wrote: "He is noted to have decreased disc height with osteophyte formation at L5-S1. He has fairly straight lumbar spine with loss of lumbar lordosis." (Ex. 7 at 2.) Dr. Lahey's impression was "probable mechanical low back pain due to degenerative disc changes at L5-S1." (*Id.*) He recommended that claimant pursue less strenuous vocational options than construction, continue his exercise program, use Ibuprofen or a similar medication, and try prescription medication for a sleep disorder.

During his deposition, Dr. Lahey explained osteophyte formation:

A: [O]steophyte formation is the body's attempt to stabilize a motion segment. .

..

....

A: It's a body's response, generally, to either abnormal motion or abnormal stresses across that -- that segment.

Concerning the presence of osteophytes in claimant, he further explained:

A: . . . It's presumed that this had certainly been there for a period of time. And my medical judgment is that it's been there for closer to years than just having occurred over a period of months.

(Lahey Deposition at 25-26.)

At the State Fund's request, Dr. Headapohl was designated by the DLI to conduct an occupational disease evaluation. Dr. Headapohl, who has testified before this Court on several occasions, specializes in occupational and environmental medicine and has been designated a member of the Montana Occupational Disease Panel.

Dr. Headapohl examined claimant on August 15, 1994. On August 31, 1994, she provided the DLI with a report of her examination and conclusions. (Ex. 5.) She also responded to specific questions posed by the DLI. (*Id.* at 4-5.) One of the questions posed to her was, "Is the claimant suffering from a disease that is the result of his employment (an occupational disease?)" (*Id.*; parenthesis and punctuation in the original.) She responded: "There is insufficient evidence in the medical record to support this claim." (*Id.*) She was also asked, "If the claimant is suffering from an occupational disease, can the claimant's employment be traced as the proximate cause?" A list of the proximate cause criteria found in section 39-72-408, MCA, accompanied the question. She answered, "Not all the criteria have been met." (*Id.*)

Based on Dr. Headapohl's responses, on September 16, 1994, the DLI issued an Order Referring Copy of Medical Reports to Parties. (Ex. 3.) In the Order, the DLI found as follows:

Based on the attached report of the first examining physician, the Department's preliminary determination concerning the claimant's claim for occupational disease benefits is the claim would be denied and the claimant would not be entitled to receive benefits under the Occupational Disease Act.

The Order went on to notify the parties that they could request a second examination or a hearing. Neither party requested a second examination but claimant requested a hearing.

A hearing was thereafter held on March 29, 1995, before a hearing officer of the DLI. Claimant and his former employer, Larry Karper, testified by telephone. A deposition of Dr. Lahey was also submitted. Dr. Headapohl was not deposed, so all information concerning her examination and opinions comes from her report and her responses to the DLI letter.

On December 14, 1995, the hearing officer issued his Findings of Fact, Conclusions of Law, and Order. Relying on the presumption of correctness statutorily afforded medical panel reports in occupational disease cases, section 39-72-610(1), MCA, the hearing officer placed the burden on claimant to overcome Dr. Headapohl's opinion by a preponderance of the evidence. The hearing officer then found that Dr. Lahey's testimony was insufficient to overcome the presumption and concluded that claimant does not suffer from an occupational disease. This appeal followed.

Scope of Review

In his Notice of Appeal the claimant urges that the hearing officer's decision "is clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record." On that basis he asks that the Court reverse the decision below and award him \$10,000 pursuant to section 39-72-405, MCA.

The ground of review urged by claimant is contemplated by the statute applicable to this appeal. Section 39-72-612(2), MCA, provides in relevant part:

The judge may overrule the department only on the basis that the department's determination is:

....

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

....

While the Court may review, and if appropriate reverse the hearing officer's decision, an appeal of the DLI decision does not extend to claimant's request for a \$10,000 award. That issue was outside the scope of the issues presented below. The sole issue below was whether the claimant suffers from an occupational disease, and the review on appeal will be limited to that issue.

Discussion

When reviewing a decision under the clearly erroneous standard, the Court is precluded from reweighing the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992). However, in this case all of the medical evidence was submitted by way of deposition and medical records. The standard of review is therefore broader. "Where crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence." *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255-56, 746 P.2d 99, 101 (1987).

The thrust of claimant's argument on appeal is that the hearing officer misread and improperly disregarded Dr. Lahey's testimony concerning occupational disease. In his findings, the hearing officer quoted extensively from the doctor's testimony but then concluded:

The medical information given by Dr. Lahey was inconclusive as to etiology but did shed some light on the disease process (degenerative disk disease) and the *possible* relationship of symptoms to the work the claimant performed. Dr. Headapohl, on the other hand, spoke to the claimant's symptoms as they related to

"his occupational injury" and found that there was no cause and effect relationship because of the lack of symptomatology immediately following "the injury." By "injury" it is assumed here that she was referring to the fall from the ladder. Her conclusion, again, was that there was "insufficient evidence to support his claim" of occupational disease.

(Findings of Fact, Conclusions of Law, and Order at p. 10.) Claimant argues that, contrary to the hearing officer's ultimate finding, Dr. Lahey's testimony establishes he had preexisting degenerative disk disease with osteophyte formation which was aggravated by his employment with Karper Construction.

The Court disagrees that Dr. Lahey's testimony, *read in its entirety*, establishes that claimant suffers from an occupational disease. However, I am also unpersuaded that Dr. Headapohl's report and letter, *read together and as a whole*, support a finding that claimant does *not* suffer from an occupational disease. While claimant bears the burden of rebutting Dr. Headapohl's report, sections 39-72-609, -610(1), MCA, and Mont.R.Evid. 301(b)(2),⁽⁴⁾ Dr. Headapohl's report and letter suggest that she may have been addressing the claimant's fall from a ladder in December 1992, rather than his employment as a whole in reaching her conclusions. The situation presented is thus similar to that in *Duane Erickson v. Champion International*, WCC No. 9506-7336 (March 12, 1996). In *Erickson* the Court reversed a hearing officer's decision finding that claimant did not suffer from an occupational disease because the opinion of the medical panel doctor, which was the only opinion offered in the case, appeared to have been predicated on an erroneous legal standard. The case was remanded for a new hearing based on the proper standard.

1. Dr. Lahey's testimony.

Claimant's argument that Dr. Lahey's testimony establishes that he suffers from an occupational disease is based on the following questions and answers taken from his deposition:

Q: Is it your impression that Mr. Boldosser is suffering from an occupational disease as a result of his employment as a carpenter for two or three years prior to seeing you?

A: I'll answer that question after you clarify an issue.

It's my understanding that an occupational disease is a disease where the occupation can either produce or aggravate a condition that may have previously been present. Is that ...?

Q: That's true.

A: In that context, Mr. Boldosser is **likely** to have an occupational disease, in that his condition **could be** aggravated by the physical requirements of his employment.

Q: Which, as you understand it, was in construction?

A: That's correct.

Q: Do you know how long he would have to be in construction to cause the condition that you saw him for?

A: I don't believe that -- again, there's a fine line here. I don't believe his employment produced the degenerative disk.

Q: Okay.

A: By itself. Will the employment aggravate symptoms due to a degenerative disk? Yes, it will. Or it's reasonable to assume from a medical stand-point that those activities could aggravate his -- degenerative disk or motion segment.

It did not produce, as far as I can tell with any medical certainty, that condition.

Q: Okay.

A: But it certainly can aggravate it, mechanical symptoms associated with the degenerative disk.

(Lahey Dep. at 26-27.)

Aggravations of preexisting conditions or diseases are compensable under the ODA. Section 39-72-706(1), MCA, provides in relevant part:

[I]f disability or death from any other cause not itself compensable **is aggravated, prolonged, accelerated, or in any way contributed to** by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death. [Emphasis added.]

Thus, as under the WCA, the employer and its insurer take the worker as they find him, with all of his underlying conditions, diseases, weaknesses, and predispositions. The fact that a claimant has a preexisting condition does not preclude the finding of an occupational disease where the physical activities at work accelerate further degeneration of the underlying condition and thereby cause additional disability, although the ultimate disability must be apportioned pursuant to section 39-72-706(1), MCA. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 829 P.2d 1 (1992).

Read alone, the foregoing passage from Dr. Lahey's deposition might support a conclusion that claimant suffers from an occupational disease. However, his repeated use of the word "could", along with his other testimony, show that he was discussing possible aggravation

in general and was not rendering a specific opinion concerning the effect of claimant's work on claimant's condition. When asked if claimant's work was a "primary source" or "cause" of claimant's back pain, Dr. Lahey responded that he could not answer that question because he and claimant had not discussed his work in terms of his symptoms:

Q: Is it fair to say that his work was the primary source of the difficulties that -- as he perceived them in causing the back pain?

A: I really can't answer that. The patient didn't fill out the form that would indicate when the last day he worked was. He had no plan to be back on his regular job in six months. **We didn't discuss what role was -- you know, his work was causing in terms of his symptoms at the time I saw him.**

He had had problems for a year. I don't know that his ongoing problems were due to work, because I don't know that he had been working. He was unemployed at the time I saw him.

(Lahey Dep. at 21.) Still earlier, Dr. Lahey also indicated that there had been no discussion of the effect of work on his back condition:

Q: Was it your understanding that he felt that his back pain worsened when he was doing this work?

A: I'm not sure that we specifically went into that, but he related that in the activity portion of the evaluation he was having difficulty with standing, walking, sitting activities and, particularly, bending backwards, or raising up from a bent-over position. I don't think we addressed other issues.

(*Id.* at 10-11.) At another point he said that if claimant's back condition became symptomatic while working, then it is "possible" that his work aggravated his underlying condition.

Q: (By Mr. Toole) And I would invite you to take the context of the question and answer it in whatever way is most appropriate to you. But his mechanical low back pain was presented at the time of your examination and I'm wondering if -- if anything that he had would have been aggravated, any symptoms that you could see in the x-rays could be aggravated by this work?

A: Well, I guess the -- if I understand the gist of the question, I think the gist of the question is did his -- did his work produce his symptoms or aggravate the condition that is -- and is causing the symptoms that he's having, is that . . . ?

Q: Yes. I think "produce," on the one hand, is a little different from aggravating something that may have already been in existence. But you're the person that I guess needs to --

A: We need to clarify that because in terms of aggravating an x-ray, it doesn't aggravate an x-ray. You know, we treat people according to symptoms, not specific x-rays.

Is it possible that his work may have aggravated his symptoms? Yes, it is. If he became symptomatic in his work because of the -- of the stresses and the strains and the positions, worsened his back symptoms, then yes, it is possible that his work was aggravating his condition.

(*Id.* at 14-16.) Thus, it is clear that Dr. Lahey was not aware of and did not consider claimant's specific work and was testifying in terms of mere "possibility". He also did not attempt to determine what other non-work related activities may have contributed to claimant's symptoms. (*Id.* at 20.)

Moreover, Dr. Lahey testified in terms of an aggravation of *symptoms*. Symptom aggravation may be temporary or permanent. Under the Workers' Compensation Act, temporary flare-ups due to work do not constitute a permanent worsening or aggravation under the ODA. See *Walker v. UPS*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993). It is not clear whether Dr. Lahey was referring to a temporary or permanent aggravation.⁽²⁾

2. Dr. Headapohl's opinions.

While Dr. Headapohl answered the occupational disease questions in the negative, her report does not discuss occupational disease and appears to focus on claimant's fall from a ladder in December 1992. The report specifically mentions the claimant's fall from a ladder, and the fact that claimant ultimately filed an injury claim which was denied. At the end of her report she gives her impression as follows:

IMPRESSION Chronic low back pain secondary to L5-S1 disc degeneration. It is unclear that Mr. Boldosser's current condition is related to his occupational **injury** as there is little evidence in the medical record immediately following the **injury** that he had significant symptomatology. [Emphasis added.]

(Ex. 5 at 10.) When asked about this impression, Dr. Lahey read it as referring to the ladder accident. (Lahey Dep. at 29-30.) The Court reads her report the same way.

This reading is important because when answering the specific occupational disease questions, Dr. Headapohl did not set forth any discussion or basis for her opinions. In light of the specific impression in her report, and no discussion of occupational disease, it is possible if not likely that she was focused on the claimant's ladder fall rather than his overall employment. That may not be the case, but without further elaboration or explanation her report and responses are at best ambiguous and do not affirmatively show that this claim was properly analyzed under the ODA.

Under the Occupational Disease Act, the medical panel procedures have special significance. Panel members are selected for their expertise in occupational disease and are designated by the Department. Thus, they answer to neither the claimant nor the insurer and are presumed to be objective. As a measure of its confidence in panel members' ability to render objective opinions, the legislature enacted a presumption favoring panel opinions. § 39-72-610(1), MCA. Given the deference granted to panel opinions, it is imperative that they be based upon proper legal standards.

In this case the report of Dr. Headapohl and her responses to questions, taken together, fail to show that the criteria of the ODA were properly applied. Without further explanation, her report cannot be considered prima facie evidence and is not entitled to presumptive correctness.

While the claimant ordinarily bears the burden of proof in an occupational disease case, he is entitled in the first instance to the benefit of an objective opinion based on the standards set forth in the ODA. His burden does not arise until and unless such an opinion is provided.

Since the record in this case fails to support either a finding that claimant does suffer from an occupational disease or that he does not, the decision of the hearing officer must be reversed.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by the DLI hearing officer on December 14, 1995, are **reversed**. This matter is **remanded** for a further opinion by an occupational disease panel designated by the DLI and for a new hearing.

Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

Dated in Helena, Montana, this 10th day of June, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Howard Toole
Ms. Susan C. Witte
Ms. Christine L. Noland
Mr. Brian McCullough - Zip Mail
Submitted: April 23, 1996

1. Section 39-72- 609, MCA, provides that the report of the medical panel "is prima facie evidence as to the matters contained in the report." Section 39-72-610(1), MCA, provides

that "there is a rebuttable presumption that the report of the medical panel and any medical examination reports by members of the medical panel are correct." The Montana Rules of Evidence govern the effect of a rebuttable presumption, providing:

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

Rule 301(b)(2), Mont.R.Evid.

2. Based on testimony presented in other cases, the Court is aware that some physicians limit the use of the word "aggravation" to a permanent worsening and use other words, such as exacerbation or flare-up, to characterize temporary worsening of symptoms, but such semantical distinctions are not universal among physicians testifying before the Court. See, e.g., *Hash v. Montana Silversmith*, 256 Mont. 252, 255, 846 P.2d 982 (1993). Counsel practicing before the Court, as well as the Court itself, see, e.g., *Walker v. United Parcel Post*, 262 Mont. 450, 454, 865 P.2d 1113, 1115 (1993), have also used the phrase "temporary aggravation".