

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 64

WCC No. 9708-7802

**MEADE BOWERS (deceased), by and through
JEANETTE BOWERS, personal representative of his estate**

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION ON APPEAL

Summary: Widow of decedent with disputed cause of death appealed DOL hearing officer's determination that death was not caused by exposure to workplace chemicals and dust. Among other things, widow argued that section 39-72-610(1), MCA (1993), which established a presumption of correctness in determinations of medical panels reviewing OD claims, was unconstitutional. She also argued the hearing officer erred on numerous grounds, including failure to consider or make findings regarding the testimony of one physician and failure to consider whether occupational factors contributed in any part to decedent's death.

Held: The presumption of correctness afforded medical panel reports under section 39-72-610(1), MCA (1993) of the ODA is unconstitutional as a violation of due process of law and an unlawful delegation of executive power. On remand, the hearing officer must reconsider the evidence without giving deference to the medical panel determination. Reversal is also required where the hearing officer failed to determine whether alleged occupational exposure to chemicals and dust contributed to any degree to his death. The hearing officer, as well as panel doctors, should have considered whether occupational factors were a contribution as even a small percentage of contribution would entitle widow to compensation proportionate to the contribution.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-72-610(1), MCA (1993). The presumption of correctness afforded medical panel reports

under section 39-72-610(1), MCA (1993) of the ODA is unconstitutional as a violation of due process of law and an unlawful delegation of executive power.

Constitutions, Statutes, Regulations and Rules: Montana Rules of Evidence:

Rule 301. Under the Montana Rules of Evidence, a presumption does not disappear upon a party's introduction of evidence which, if believed, would rebut the presumption. Rather, the presumption is in itself deemed an item of evidence.

Constitutional Law: Due Process: Substantive Due Process. The presumption of correctness afforded medical panel reports under section 39-72-610(1), MCA (1993) of the ODA is unconstitutional as a violation of due process of law and an unlawful delegation of executive power.

Constitutional Law: Separation of Powers: Delegation of Powers. The presumption of correctness afforded medical panel reports under section 39-72-610(1), MCA (1993) of the ODA is unconstitutional as a violation of due process of law and an unlawful delegation of executive power. Because of the deference provided to medical panel findings, the medical panel physicians are essentially fact finders, in derogation of a litigant's entitlement to have a dispute determined by duly appointed agents of government.

Occupational Disease: Disease. DOL hearing officer erred by failing to determine whether alleged occupational exposure to chemicals and dust contributed to any degree to his death. The hearing officer, as well as panel doctors, should have considered whether occupational factors were a contribution as even a small percentage of contribution would entitle widow to compensation proportionate to the contribution.

Occupational Disease: Medical Panels. The presumption of correctness afforded medical panel reports under section 39-72-610(1), MCA (1993) of the ODA is unconstitutional as a violation of due process of law and an unlawful delegation of executive power.

¶1 Meade Bowers (Bowers) died suddenly on April 24, 1994. An autopsy report listed his cause of death as "likely to be due to cardiopulmonary failure, the etiology of which is unknown." "Cardiopulmonary failure" is a descriptive term; it indicates only that Bowers stopped breathing and his heart ceased beating, i.e., he died. (Tr. at 258.) The term does not indicate why.

¶2 At the time of death, Bowers had a recent history of respiratory illness. In January 1993, he was hospitalized for an episode of what his physician diagnosed as bronchitis. A year later, in February 1994, he was re-hospitalized, again with a diagnosis of bronchitis. He continued to be treated for respiratory tract infection until the time of his death.

¶13 Believing that his death was caused by occupational exposure to chemicals at his workplace, Bowers' widow, Jeanette Bowers, made a claim for occupational disease (OD) benefits. Pursuant to section 39-72-605, MCA, the Department of Labor and Industry (Department) designated two cardiologists -- Drs. Joseph Knapp and Alan A. Gabster - to review the case. Both physicians reported that it was unproven that Bowers' death was caused by occupational exposure. The Department adopted the reports and issued a preliminary order proposing to deny the claim. Mrs. Bowers then requested a contested case hearing.

¶14 A hearing was conducted on July 2 and 3, 1997. The hearing officer admitted the reports of the two medical panel physicians, pictures and diagrams of claimant's place of work, OSHA reports for monitoring of claimant's workplace on one day in 1992 and another day in 1995, material safety data sheets for chemicals and saw dust used or created at the workplace, recorded statements of three of claimant's coworkers and supervisors, and claim related documents. Two medical witnesses testified. Dr. Ronald M. Peterson, a specialist in occupational medicine testified in person on behalf of claimant, opining that Bowers died of an acute incident of reactive airway disease, of which he apportioned 60% to his occupational exposure to chemicals and dust. Dr. Joseph Knapp, one of the panel members, testified by telephone on behalf of the insurer, opining that claimant died of myocarditis most likely caused by a virus and pulmonary arteriolar sclerosis. An industrial hygienist testified on behalf of appellant concerning workplace monitoring of chemicals and airborne dust. Four of Bowers' coworkers and supervisors testified about exposure to chemical fumes and dust at work. Finally, Mrs. Bowers testified about claimant's history of respiratory illness and smoking, as well as the circumstances of his death.

¶15 On July 18, 1997, the hearing officer issued his Findings of Fact; Conclusions of Law; and Final Order, finding insufficient evidence to link claimant's death to an OD. The decision is 12 mostly double-spaced pages, including a Certificate of Mailing. The findings of fact constitute 8½ pages. The findings regarding the medical controversy take up approximately 5 pages (Findings 7 through 11.) Of those 5 pages, nearly 4 pages constitute a verbatim recitation of the panel reports of Drs. Knapp and Gabster and the testimony of Dr. Knapp. The hearing officer did not mention Dr. Peterson's testimony in his findings or conclusions. He relied heavily, if not exclusively, on the presumption of correctness afforded medical panel opinions.

¶16 Following the decision, Mrs. Bowers filed her appeal with this Court.

Additional Facts

I. Smoking

¶17 Meade Bowers was a smoker. While the evidence concerning his total lifetime consumption was conflicting, there is little dispute that it was somewhere between 20 and

40+ pack years.⁽¹⁾ At the time of his death, claimant was suffering from emphysema or chronic obstructive pulmonary disease,⁽²⁾ probably due to his cigarette smoking. (Tr. at 64-66; 227-28, 234; Resp't Ex. 18.) However, the emphysema was not life threatening and did not trigger or cause his death. (Tr. at 65, 67, 268-69.)

II. Workplace Exposure to Chemicals and Dust

¶18 During the 18 years prior to his death, claimant was employed by S&S Canopies and Campers Manufacturing, Inc. (S&S) in Kalispell, Montana. S&S manufactures pickup campers. Claimant worked primarily on plumbing systems for the campers.

¶19 During most of the years of Bowers' employment, the campers were manufactured on an assembly line which was set up in a 200 by 50 foot building. In late 1989 or 1990, a 200 by 25 foot shed-type addition was added to the original building. A wall separates the main building from the addition, but the two areas are accessible to each other through three 8 feet by 7 feet openings in the wall. (Ex. 39; Tr. at 154-60.)

¶110 S&S uses numerous chemicals in its manufacturing, including various types of glue, lacquer thinner, various types of paint, sanding sealer, pipe joint compound, and cleaners. The sawing of plywood and paneling creates saw dust, which is also considered a potential occupational hazard.

¶111 The Occupational Safety and Health Administration (OSHA) sets allowable work-place exposure levels for chemicals and saw dust. The levels, referred to as "threshold level values" or TLVs, are fixed in terms of total allowable exposure during an 8-hour work-day. (Tr. at 62.) Different chemicals and dusts have different TLVs.

¶112 On March 11, 1992, an OSHA inspector requested Ellie Allen (Allen) and another worker to wear monitors to detect formaldehyde, vinyl acetate and wood dust. (Ex. 3; Tr. at 33-34.) Both individuals wore the monitors for four hours. The monitoring disclosed that the eight hour exposure levels (apparently extrapolated from four hours of actual exposure) were significantly less than the TLVs for those items. There is no evidence of any other OSHA monitoring prior to Bowers' death.

¶113 Mrs. Bowers presented evidence that the 1992 sampling was atypical and understated actual exposure because supervisors ordered Allen to reduce her sawing and opened building doors not normally open at that time of year. The insurer presented evidence that the day and the work were in fact typical. The hearing officer resolved the conflicting testimony in the insurer's favor, finding that "it is clear that typical work was being performed at the time of the OSHA inspection." (Finding of Fact 14 at 9.)

¶114 The parties also focused on where various chemicals were used in the facility and by whom. Different workers used different chemicals in their work.

¶15 Finally, they focused on the air circulating capabilities of fans, vacuums, furnace, and open doors. The insurer argued that air circulation in the building minimized the amount of chemical fumes and saw dust in the air. Mrs. Bowers urged that air circulation was insufficient or could even concentrate fumes and dust in parts of the plant. No specific data was offered as to Bowers' actual exposure. Other than the OSHA data on the two days in 1992 and 1995, no specific data was offered by either party as to any other employee's exposure at any other time.

III. Medical Evidence

¶16 Three physicians provided evidence in this case. Two of the physicians - Drs. Joseph Knapp and Alan A. Gabster - are cardiologists. They are members of the Department's OD medical panel and were designated by the Department to review the possible relationship of Bowers' death to his occupational exposure to chemicals and dust. The third physician was Dr. Ronald M. Peterson, a specialist in occupational medicine, who testified on behalf of Mrs. Bowers.

¶17 Dr. Peterson testified that claimant died as the result of an acute attack of reactive airway disease (RAD). (Tr. at 65-66.) RAD is another term for what is popularly called asthma. (*Id.* at 276.) He described chronic and acute RAD as follows:

In most cases, reactive airway disease is treatable on a fairly urgent basis. If someone develops shortness of breath or coughing related to exposure to an irritant, medication is either an inhaler form or a pill form or sometimes an intravenous form can be given to reverse the condition and improve the symptoms.

(*Id.* at 66.) Dr. Peterson opined that air inhaled by claimant triggered a reaction preventing him from breathing and that his inability to breath ultimately led to his cardiac arrest. (*Id.* at 73.)

¶18 Dr. Peterson apportioned 60% of the cause of the fatal respiratory event to occupational factors. (*Id.* at 73.) His attribution of occupational factors was not based on any specific exposure levels to any specific chemicals at work. (*Id.* at 83.) Rather, he noted that exposure to any chemicals and dust at work, as well as exposure to cigarette smoke and even cold air, increased claimant's susceptibility to RAD. (*Id.* at 72-73, 83.) He noted that exposures to respiratory irritants, including workplace chemicals and dust, were more significant near the end of Bowers' life than earlier on. (*Id.* at 86, 96.)

¶19 Drs. Knapp and Gabster disagreed with Dr. Peterson as to the cause of claimant's death and the role of workplace chemicals and dust. Dr. Gabster, who wrote a one page opinion and did not testify at trial, opined that the claimant's death was due to "acute and chronic myocarditis, heart failure, and severe chronic obstructive pulmonary disease [COPD]." (Respt's Ex. 18.) Dr. Knapp did not attribute any part of the cause of death to COPD. He testified that claimant's death was due to viral myocarditis and pulmonary

arteriolar sclerosis [scarring of the walls of the left and right ventricles⁽³⁾], which caused his heart to fail. (Tr. at 235, 238; Respt's Ex. 18.) He pointed out that the acute cardiac failure will cause respiratory distress and further testified that the pathological autopsy findings did not support respiratory distress as the precipitating event leading to death. (Tr. at 267-68, 275-76.) Dr. Knapp testified that the most likely cause of myocarditis was a virus, however, he also acknowledged that the condition may be caused by idiopathic (unknown) agents. (*Id.* at 279.) Ultimately, Dr. Knapp was unable to determine what, in fact, caused the condition in claimant. (*Id.*) On the other hand, he testified that, on a more probable than not basis, the myocarditis was not due to exposure to workplace chemicals. (*Id.* at 282.)

Issues

¶20 The appeal raises multiple issues, including serious constitutional questions regarding the medical panel and hearing procedures of the Occupational Disease Act (ODA). Notice of the constitutional challenges was given to the Attorney General, who declined to intervene. (Notice of Intent Not to Intervene (October 28, 1997).)

¶21 Mrs. Bowers has stated the issues in the affirmative. She argues the following errors:

- § 39-72-605 MCA is unconstitutional.
- Rule 24.29.207(1) (n) ARM is unconstitutional.
- § 39-72-610 MCA is unconstitutional.

4. The decision of the hearing officer was based on unlawful procedures because:

- a. the determination of the panel physicians was made without notice and opportunity for hearing;
- b. the Department improperly prejudiced the determination of the panel physicians by using the investigative services of the insurer;
 - the Department failed to provide the panel physicians with all available evidence.
- d. the Department failed to provide the panel physicians with material evidence that was false and misleading; and
- e. the hearing officer considered facts not in evidence.
 - The hearing officer erred as a matter of law by disregarding the uncontroverted opinion of Dr. Peterson.
 - The hearing officer failed to make findings of fact on an issue essential to the decision, and [sic] although requested to do so.

- The decision of the hearing officer was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

(Appellant's (Claimant's) Brief) at 6.)

Standard of Review

¶22 The appeal in this matter is governed by section 39-72-612, MCA, which provides in relevant part:

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. The judge may overrule the department only on the basis that the department's determination is:

- in violation of constitutional or statutory provisions;
- in excess of the statutory authority of the agency;
- made upon unlawful procedure;
- affected by other error of law;
- clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

All but subparagraph (f) are implicated in the present appeal.

Discussion

¶23 In addressing the issues raised on appeal, the Court begins its review from the perspective that constitutional questions should be avoided whenever possible. *Wolfe v. State, Dept. of Labor and Industry, Bd. of Personnel Appeals ex rel. Helena Educ. Ass'n*, 255 Mont. 336, 339, 843 P.2d 338, 340 (1992). I will therefore address the non-constitutional issues first.

I. Sufficiency of the Evidence.

¶24 Mrs. Bowers argues that the evidence presented to the hearing officer was insufficient to support his denial of her claim. Her argument takes two forms. The first is that Dr. Peterson's opinion was uncontroverted and therefore should have been adopted by the hearing officer. (Appellant's (Claimant's) Brief at 24-27.) The second is that Dr. Knapp's and Dr. Gabster's opinions were fatally flawed, therefore the hearing officer erred in relying upon them.

¶25 The first argument is straightforward. Mrs. Bowers argues that since Dr. Knapp could not determine the cause of the myocarditis and pulmonary sclerosis, the hearing officer

was legally required to accept Dr. Peterson's opinions. She cites *Holloway v. University of Montana*, 178 Mont. 198, 582 P.2d 1265, 167 (1978). In *Holloway* the Supreme Court reaffirmed the general rule that a trier of fact may not disregard uncontroverted evidence. However, Mrs. Bowers ignores the qualification the Supreme Court put on the rule. The Court said:

Holloway correctly states the general rule, but falls short of sustaining his contentions for two reasons. First, considerably more goes into a trial judge's examination of the evidence than Holloway contends. Second, a trial judge is not bound to find in favor of a party simply because one of his witness' testimony is not directly controverted. **The evidence in its entirety forms the basis of the Court's decision.**

178 Mont. at 200-01; 582 P.2d at 167 (emphasis added).

¶26 Contrary to Mrs. Bowers' assertion, Dr. Peterson's opinions were contradicted. While Dr. Peterson opined that death was due to an acute episode of RAD, which in turn was 60% attributable to Bowers' occupational exposure to chemicals and dust at his workplace, Dr. Knapp⁽⁴⁾ testified that the cause of death was not due to RAD, rather it was due to claimant's heart condition. He testified on a more probable than not basis that the heart condition was not due to claimant's exposure to chemicals at his workplace. Dr. Peterson did not address the role of workplace exposure in myocarditis and pulmonary sclerosis. His testimony concerning the role of Bowers' occupational exposure in death focused exclusively on RAD. He did not establish any connection between occupational exposure and myocarditis and pulmonary sclerosis. Thus, his testimony concerning occupational exposure was dispositive **only if** the hearing officer determined that Bowers died of RAD. In fact, the hearing officer adopted Drs. Knapp's and Gabster's opinions as to the cause of death.

¶27 Mrs. Bowers also argues that the hearing officer's decision was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." § 39-72-612 (2)(e), MCA. Under the clearly erroneous standard of review, this Court must first review the record to determine if the hearing officer's findings of fact are supported by substantial evidence. If substantial evidence is found, the Court must then determine whether the hearing officer misapprehended the effect of the evidence. Finally, if substantial evidence exists and the hearing officer has not misapprehended the effect of the evidence, the decision must nonetheless be reversed if a review of the record as a whole leaves the Court with a definite and firm conviction that the hearing officer was mistaken. *State Compensation Ins. Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85, 88 (1992); and see *Small v. Good*, 284 Mont. 159, 943 P.2d 1258, 1259-60 (1997).

¶28 "Substantial evidence is the amount of relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *In re Marriage of Nevin*, 284 Mont. 468,

472, 945 P.2d 58, 61 (1997). The issue in this case is a medical issue and the medical testimony was conflicting. While there may be persuasive arguments as to why the hearing officer should have accepted Dr. Peterson's testimony, that is not the test. My review is "to determine whether there is evidence to support the decision of the court, not whether evidence was presented which might have supported contrary findings." *Montana Dept. of Natural Resources and Conservation v. Montana Power Co.*, 943 P.2d 1251, 1254, 54 St. Rep. 747, 748 (Mont. 1997). Dr. Knapp provided ample evidence to support the hearing officer's decision and the hearing officer did not misapprehend the effect of the medical testimony.

¶29 Finally, after reviewing the record as a whole, I am unable to reach a firm conviction that the hearing officer was mistaken. As stated earlier, there was a conflict of opinions regarding the cause of death. Dr. Knapp opined that it was due to cardiac failure and Dr. Peterson opined that it was due to an acute episode of RAD. Dr. Knapp pointed out that there was no objective evidence for Dr. Peterson's RAD theory of death and that, had Bowers died of RAD, there should have been pathological evidence of that fact. (Tr. 275-77, 282.) He also noted that chronic RAD may cause hypertrophy (thickening of the walls) of the right ventricle but pointed out that the right ventricle of claimant was within normal, albeit upper normal, limits, and that the hypertrophy of Bowers' heart was of the left ventricle, a finding not associated with RAD. (*Id.* at 271.)

¶30 Mrs. Bowers makes much of the fact that Dr. Knapp was unfamiliar with the chemicals present at claimant's workplace and the degree to which he was exposed to them. However, the burden was on her to show an occupational connection to Bowers' death. Dr. Peterson provided that connection only if Bowers died of RAD. He did not provide any testimony relating death from myocarditis and pulmonary sclerosis to workplace chemicals.

¶31 Mrs. Bowers also relies on a toxicology report listing isopropyl alcohol in Bowers' blood. She then refers to material data sheets in an attempt to link isopropyl alcohol to RAD and thus to claimant's death. The problem with her argument is that neither Dr. Knapp nor Dr. Peterson addressed the significance of isopropyl alcohol. Moreover, the toxicology report states:

Isopropyl alcohol detected in the blood samples, but not in vitreous and urine, therefore it appears to be a contaminant and will not be quantitated.

(Pet'r's Exhibit 1 at 124.) On the face of the report, it appears that the absence of isopropyl alcohol in vitreous and urine was significant to the toxicologist's determination that the isopropyl alcohol was a contaminant. It is beyond the expertise of the hearing officer or this Court to second guess the toxicologist.

II. Consideration of Dr. Gabster's Report

¶132 Mrs. Bowers argues that the hearing officer improperly considered Dr. Gabster's report since it was not in evidence. She is simply wrong in her assertion that the report was not in evidence.⁽⁵⁾ It was admitted as a part of Respondent's Exhibit 18. Mrs. Bowers did not object to the admission of the exhibit (Tr. at 3), and she cannot raise an objection for the first time on appeal, *State ex rel. State Compensation Mut. Ins. Fund v. Berg*, 279 Mont. 161, 174, 927 P.2d 975, 983 (1996).

III. Failure to Make Findings Regarding Aggravation

¶133 In *Polk v. Planet Ins.*, 915 P.2d 1015, 54 St. Rep. 1508, (Mont. 1997), the Montana Supreme Court reversed a decision of a hearing officer because the hearing officer had failed to consider whether an OD "aggravated" or "contributed" to claimant's lung condition. In light of the apportionment statute, § 39-72-706(1), MCA, the Court held that a claimant need not show that occupational factors are a "major" or primary cause of his condition. Similarly, in *Erickson v. Champion Int'l*, WCC No. 9506-7336, Order on Appeal (March 12, 1996), this Court reversed a hearing officer's decision denying OD compensation where the only medical evidence presented at hearing was that of a medical panel doctor and the doctor failed to consider whether occupational factors aggravated a claimant's knee condition.

¶134 Mrs. Bowers argues that the hearing officer erred by failing to address aggravation in this case. The Court agrees.

¶135 In his conclusions of law the hearing officer states the issue before him as follows:

The issue for the Hearing Officer to determine is whether Claimant's death was a result from an occupational disease that arises out of his employment.

(Findings of Fact; Conclusion of Law; and Final Order at 10.) That statement is simply wrong, or at best incomplete. Under *Polk*, as well as decisions of this Court,⁽⁶⁾ the hearing officer, as well as panel doctors, should have considered whether occupational factors contributed to Bowers' death. Even a small percentage contribution would entitle Mrs. Bowers to compensation proportionate to the contribution.

¶136 Nowhere in his conclusions of law does the hearing officer acknowledge aggravation as a basis for compensation. Nowhere does he mention Dr. Peterson's testimony that occupational factors contributed to death on a 60% basis and that Mrs. Bowers was seeking compensation on an aggravation theory. Compounding that oversight, the questions submitted by the Department to Dr. Knapp do not ask him to consider the possibility that occupational factors contributed to Bowers' death. The questions were in terms of causation, not contribution. They were as follows:

Was the deceased's death caused from a disease that was a result of his employment (an occupational disease)? . . .

Could the deceased's employment be traced as the proximate cause of death? . . .

Was the deceased's death caused from an occupational disease? Was there any nonoccupational factor which contributed to the deceased's cause of death?⁽⁷⁾

(Resp't's Exhibit 18.) Thus, Dr. Knapp was never asked to determine whether Bowers' occupational exposure contributed to any degree to his death.

¶37 In both *Polk* and *Erickson* there was medical testimony that some measure of occupational aggravation was present. The same is true in this case. Dr. Peterson testified that occupational factors were 60% responsible for Bowers' death. Although his testimony was tied to his RAD's theory of death, Dr. Peterson's testimony will have to be reconsidered in light of this Court's finding, hereinafter, that the hearing officer improperly relied on the presumption afforded the medical panel's opinions because the presumption is unconstitutional.

IV. Other Procedural Irregularities

¶38 Mrs. Bowers alleges other procedural irregularities. First, she alleges that a hearing was required before the medical panel report issued. Second, she contends that the entire panel process was prejudiced by the Department furnishing the medical panel physicians with investigative reports of the insurer and by its failure to furnish them with other available information concerning Bowers' exposure to workplace chemicals. Finally, she alleges that the information furnished the doctors with regard to OSHA workplace monitoring was false and misleading since the monitoring did not take place under typical workplace conditions and was not comprehensive with respect to all chemicals at the workplace.

¶39 The first argument is without merit. A hearing was provided by the Department in accordance with the ODA, which expressly provides for a medical panel examination, a preliminary Department Order based on the medical panel report, and **then** a contested case hearing. §§ 39-72-601 to 612, MCA.

¶40 The second argument is based on the prohibition against *ex parte* communications in contested case hearings. The prohibition is inapplicable since the matter does not become contested until *after* the panel makes its report and the Department issues its preliminary Order.

¶41 For the same reasons, the third argument is without merit. The medical panel evaluation is not a contested case proceeding and the ODA provides no procedural guarantees with respect to the information submitted to the panel physicians.

V. Constitutional Issues

¶42 Mrs. Bowers urges three constitutional errors. First, she asserts that the presumption afforded the medical panel report violates her right to due process of law. Second, she contends that the administrative rule providing for ODA cases to be heard before a Department hearing officer violates her right to equal protection of the laws. Finally, she contends that the hearing officer's consideration of Dr. Gabster's report violated her right to due process of law. I find her first argument persuasive and dismiss the others.

A. The Presumption

¶43 The ODA expressly provides that in any contested case hearing before a Department hearing officer or before the Court, the medical panel report is presumed correct. Section 39-72-610 (1), MCA, provides:

(1) At a hearing held before the department or the workers' compensation judge, 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.

¶44 The statutory presumption played a prominent role in the decision below. In his second conclusion of law, the hearing officer specifically held that Mrs. Bowers is required to prove that the medical facts found by the panel were wrong. (Findings of Fact; Conclusions of Law; and Final Order at 9.) He went on to state that "being the petitioner and aggrieved party, [she] is faced with overcoming, by a preponderance of the evidence, the report of the medical Panel [sic] examiner, who here concluded there was not enough evidence to support claim of occupational disease." (*Id.* at 10.) In his third conclusion of law the hearing officer cited Dr. Knapp's and Dr. Gabster's opinions without referring to Dr. Peterson's testimony. In the fourth and last conclusion of law, he determined that Mrs. Bowers failed to satisfy her burden of proof.

¶45 In *Polk v. Planet Ins. Co.*, WCC No. 9603-7525, Order and Judgment (February 26, 1997), I discussed the effect of the statutory presumption afforded medical panel reports. Noting that a claimant bears the burden of persuasion in an OD case, I found that "the presumption did nothing more than require claimant to meet his usual burden of proof." *Polk*, WCC No. 9603-7525, at 28. I relied on Rule 301(2), Mont. R. Evid., which provides that a presumption may be overcome or rebutted by "a preponderance of evidence contrary to the presumption." I held that "by satisfying his initial burden of persuasion, the claimant would have at the same time rebutted the presumption afforded the panel report."

¶46 In so holding, I followed the most widely followed American theory of presumptions, often referred to as the "Bursting Bubble" theory. 2 McCormick, Evidence (4th ed. 1992), § 344 at 462. McCormick describes the theory and its application as follows:

The theory. The most widely followed theory of presumptions in American law has been that they are "like bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts." Put less poetically, under what has become known as the

Thayer or "bursting bubble" theory, the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears. In practical terms, the theory means that, although a presumption is available to permit the party relying upon it to survive a motion for directed verdict at the close of its own case, it has no other value in the trial. The view is derived from Thayer, sanctioned by Wigmore, adopted in the Model Code of Evidence, and seemingly been made a part of the Federal Rules of Evidence. It has been adopted, at least verbally, in countless modern decisions.

The theory is simple to state, and if religiously followed, not at all difficult to apply. The trial judge need only determine that the evidence introduced in rebuttal is sufficient to support a finding contrary to the presumed fact. If that determination is made, certainly there is no need to instruct the jury with regard to the presumption. The opponent of the presumption may still not be entitled to a directed verdict, but if its motion is denied, the ruling will have nothing to do with the existence of a presumption.

Id. (footnotes with citations omitted).

¶47 Under the bursting bubble theory, the due process concerns advanced by Mrs. Bowers disappear just as the presumption does. Once she produced medical testimony creating a factual controversy, the presumption disappeared and the panel physicians' opinions were entitled to no preference or special consideration, rather the hearing officer was required to give equal consideration to all of the medical evidence and decide, on the merits, which was the more persuasive evidence. Plainly, the hearing officer in this case did not properly apply a bursting bubble theory. He specifically relied on the presumption in his conclusions of law, finding that it had not been overcome. If by his holding he intended to say that Mrs. Bowers' evidence was insufficient to present a triable issue of fact and thereby burst the bubble, he was wrong because Mrs. Bowers' evidence plainly presented a triable issue of fact and thereby satisfied her burden of producing evidence. If the hearing officer intended to give the presumption greater effect than the bursting bubble theory permits, which is how the Court reads his decision, then he disregarded the theory entirely. In either event, under a bursting bubble theory the hearing officer erred and his decision would have to be reversed.

¶48 However, Mrs. Bowers' citation of Montana cases concerning the effect of presumptions caused me to undertake a further review of the matter. Upon that further review, I have determined that Montana does not follow the bursting bubble theory of presumptions. Thus, the due process issue raised by Mrs. Bowers is properly joined and must be addressed.

¶49 The Montana Rules of Evidence are applicable to the Workers' Compensation Court. § 39-71-2903, MCA. Rule 301, Mont. R. Evid., which governs presumptions, provides:

RULE 301. PRESUMPTIONS IN GENERAL

(a) Presumption Defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) Classification and Effect of Presumptions.

(1) Conclusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

(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.

(c) Inconsistent Presumptions. If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public policy. If considerations of public policy are of equal weight the court shall disregard both presumptions.

Since the adoption of Rule 301 in 1977, there have been no Supreme Court cases addressing the effect of presumptions in civil cases.

Where the presumption relates to the ultimate issue, as in this case, the rule on its face would appear to require no more than the usual burden of persuasion. However, the Commission which drafted the rule,⁽⁸⁾ as well as prior Montana case law, indicate otherwise.

¶50 The Commission comments point out that prior Montana law was inconsistent with a rule which merely shifted the burden of producing evidence. The Commission further stated its intent that the new rule gives presumptions the same effect as under prior Montana law. In relevant part, it said:

Commission Comments

...

(b) Classification and effect of presumptions. This subdivision is original and therefore entirely different from both Federal and Uniform Rules (1974) Rule 301; both state the effect, but neither contains a classification of presumptions. The effect given presumptions under the rule differs from either approach followed by

the Federal or Uniform rule. The Federal rule gives presumptions the sole effect of shifting the burden of producing evidence to rebut or meet the presumption and does not shift the burden of persuasion. The Uniform rule gives presumptions the effect of shifting the burden of persuasion to rebut or meet the presumption.

The Commission rejects both of these rules because Montana has expressly rejected the approach contained in Federal Rule 301 (*Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 162, 124 P2d 579 (1942)) and goes further than the approach contained in Uniform Rule (1974) 301. **The Commission adopts this subdivision to retain, codify, and clarify existing Montana law on the effect of presumptions.** [Emphasis added.]

....

The comments go on to state the Commission's intent on the use of disputable presumptions:

Paragraph (2) contains the rules found in Section 93-1301-5, R.C.M. 1947 [superseded], that all presumptions not declared conclusive are disputable and may be controverted; and that unless a presumption is overcome, the trier of fact is bound to find in accordance with it. The Montana Supreme Court has interpreted this section as well as R.C.M. 1947, Sections 93-1301-1 [superseded] (classifying presumptions as indirect evidence) and 93-2001-1(2) [26-1-303] (inferring that presumptions are to be weighed as evidence) to mean that presumptions have the effect of evidence.

The Commission believes the procedure and rule followed in Montana concerning presumptions is as follows: If evidence is introduced which gives rise to a presumption, and the presumption is not controverted or disputed, the trier of fact must find in accordance with the presumption. In order to avoid this and overcome a presumption, the rule necessarily requires that the burden of persuasion shift to the party against whom the presumption operates. See *Holen v. Phelps*, 131 Mont. 146, 152, 308 P2d 624 (1957) and cases cited therein. **If evidence contrary to the presumption is introduced, the presumption is given the weight and effect of evidence and a question is raised for the trier of fact who may give the presumption such weight in the face of the contrary evidence as it thinks the presumption should have.** See *Lewis v. New York Life Ins. Co.*, supra; *Williams v. Swords*, 129 Mont. 165, 173, 284 P2d 674 (1955); *Roseneau Foods Inc. v. Kohlman*, 140 Mont. 572, 577, 374 P2d 87 (1962); *Crissey v. State Highway Comm'n.*, 147 Mont. 374, 379, 413 P2d 308 (1966). **An exception occurs when the contrary evidence is so overwhelmingly against the presumption as to lead to only one reasonable conclusion; then the matter becomes a question of law for the judge, not a question for the trier of fact.** *Welch v. All Persons*, 85 Mont. 114, 134,

278 P 110 (1929); *Nichols v. New York Life Ins. Co.*, 88 Mont. 132, 139, 292 P 203 (1930); *Renland v. First Nat'l Bank*, 90 Mont. 424, 4 P2d 488 (1931).

This subdivision may change existing Montana law by providing that a preponderance of evidence is required to overcome all disputable presumptions. Previously different amounts of evidence were apparently required to overcome different presumptions. For example: "slight proof", *Sommers v. Gould*, 53 Mont. 538, 545, 165 P 599 (1917); "substantial evidence", *State ex rel. Rankin v. Martin*, 68 Mont. 392, 404, 219 P 632 (1923); "preponderance of evidence", *In re Wray's Estate*, 93 Mont. 525, 535, 19 P2d 1051 (1933); "proof must be clear, satisfactory and convincing", *In re Colbert's Estate*, 31 Mont. 461, 468, 78 P 971 (1904); "conclusive evidence", *Gardiner v. Eclipse Grocery*, 72 Mont. 540, 550, 234 P 490 (1925); and "beyond a reasonable doubt", *Spratt v. Helena Power Transmission Co.*, 37 Mont. 60, 79, 94 P 631 (1908). However, the Commission feels that in the interest of obtaining a simple, practical rule, one amount of evidence should be required and that amount should be a preponderance of the evidence.

With one exception the Commission does not intend to alter the enumeration or effect of the disputable presumptions declared by statute or common law. (See Appendix, Table D for these presumptions [found at part compiler's comments, Title 26, ch. 1, part 6].) The exception arises with Section 93-1301-7(34), R.C.M. 1947 [26-1-602(34), deleted from section by 1983 amendment], which deals with ancient documents. This presumption is changed slightly by two proposed rules: Rule 803(16), dealing with the hearsay aspect of ancient documents, and Rule 901(b)(8), dealing with the authentication aspects of these documents. (See the Commission Comments to those rules for further explanation.) [Emphasis added.]

¶151 While I have briefly surveyed the cases cited by the Commission, I need not rehash or reanalyze them. The Supreme Court adopted the rules in light of the comments and there is nothing in its order adopting the rules or in any subsequent cases contradicting the Commission's analysis. I therefore adopt the Commission analysis as the current law on the subject of presumptions.

¶152 As set forth in the Commission comment, a presumption does not disappear upon a party's introduction of evidence which, if believed, would rebut the presumption. Rather, the presumption is in itself deemed an item of evidence. The jury or other fact finder may give the presumption whatever weight it wishes, subject to review only "when the contrary evidence [to the presumption] is **so overwhelming against the presumption as to lead to only one reasonable conclusion.**" Commission Comment, *supra*, and cases cited therein.

¶153 The overwhelming evidence standard is the equivalent to evidence requiring a Court to direct a verdict in a jury case. A verdict must be directed when the Court determines that reasonable men cannot reasonably differ as to the result, conversely, it cannot be directed

where reasonable men can reasonably differ. *Dees v. American Nat. Fire Ins. Co.*, 260 Mont. 431, 442, 861 P.2d 141, 148 (1993). Thus, in cases where the presumption concerns the ultimate issue in the case, such as here, the party opposing the presumption is assured a favorable decision only if the party is entitled to a directed verdict.

¶54 The issue raised by Mrs. Bowers is whether, in light of the medical panel procedures specified by the ODA, the hearing officer's reliance on the presumption afforded medical panel opinions violated her right to due process of law.

¶55 In *Vlandis v. Kline*, 412 U.S. 442 (1973), the United States Supreme Court considered and struck down a conclusive presumption regarding residency for tuition purposes at Connecticut schools. Non-residents were charged higher fees than residents. The Connecticut presumption, which could not be rebutted, provided that if a single student resided out-of-state at any time during the preceding year, the student was conclusively deemed a non-resident. The presumption for married students was somewhat different, providing that if the address of the married student was an out-of-state one at the time of application, then the student was deemed a non-resident for tuition purposes. The Court held that the presumption denied the plaintiff students their right to due process of law because (1) the presumed fact was not universally or necessarily true, (2) the students were not provided with an opportunity to controvert the presumed fact, and (3) the State of Connecticut had alternative, narrower means to make a factual determination regarding residency.

¶56 While *Vlandis* concerned a conclusive presumption, the principle underlying the decision is somewhat broader. The Court reiterated a principle stated in a prior opinion that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." 412 U.S. at 446 (quoting from *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)). The question this Court must answer in the present case is whether the presumption afforded medical panel reports provides a fair opportunity for rebuttal. I find it does not.

¶57 The medical panel presumption is not a conclusive one, but as applied by the fact finder in any particular case it may create an almost insurmountable burden of persuasion on the party opposing the presumption. As in *Vlandis*, the assumed fact (the panel medical opinion) is not necessarily or universally true. Indeed, the assumed fact is simply a matter of expert opinion. For that reason, a fair opportunity to rebut the presumption is all the more important.

¶58 A requirement that the party opposing the presumption present evidence which would entitle the party to a directed verdict is hardly a fair opportunity to rebut the presumption. Moreover, the fact that the presumption can be given whatever weight the hearing officer wants to give it, creates an opportunity for arbitrary application of the presumption. On that basis alone, the presumption is unconstitutional.

¶159 That, however, is not the only basis for invalidating the presumption. In light of statutory deference given the medical panel report, the medical panel procedures are a critical stage of the process. Indeed, the medical panel acts as a fact finder, whose findings must then be disproved. At minimum, a fair opportunity for both insurer and claimant to present their cases to the panel is essential. Yet, there is nothing in the ODA or the implementing rules that guarantee such opportunity. In this case, the information submitted to the panel included investigative reports of the State Fund, the conclusions of which Mrs. Bowers disputed at hearing, incomplete material data sheets for the workplace, and selected statements of co-employees.⁽⁹⁾ No opportunity was provided to Mrs. Bowers to counter the submissions or submit other materials or evidence.

¶160 There is a final reason for striking down the presumption. Because of the deference provided to medical panel findings, the medical panel physicians are fact finders. Due process of law surely includes the right to have a dispute determined by duly appointed judges or by duly appointed executive branch commissions or hearing officers. If not encompassed per se within the right of due process, the right is encompassed within the constitutional powers assigned to the judiciary and/or executive branches of government, which powers may not be delegated to other branches of government or private individuals. See *Linder v. Smith*, 193 Mont. 20, 33, 629 P.2d 1187, 1194 (1981).

¶161 In *Linder* the Supreme Court considered arguments that the Medical Malpractice Panel Act was unconstitutional because it violated the separation of powers doctrine and unlawfully delegated judicial powers to a malpractice panel of physicians and attorneys. The Court rejected the contention but did so because the panel determination was not "binding in any way" and, in Montana, "is not even admissible at trial." *Id.* It said:

By terms of most panel acts, the decision of the panel is admissible in court, but it is not binding in any way. Thus many courts have found no violation of the doctrine of separation of powers, because the actions of the panel are at most advisory and the panel has no power to render an enforceable decision. The result has no more weight than an expert opinion. Prendergast, *supra*; Eastin, *supra*. The Arizona Supreme Court noted in Eastin, *supra*, that "(j)udicial power is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." The Montana Court recognizes the same definition of judicial power, and has upheld other administrative bodies against this challenge, where those bodies are unable to render enforceable judgments. *Shea v. North-Butte Min. Co. et al.* (1919), 55 Mont. 522, 536-37, 179 P.2d 499, 504.

The decision of the Montana panel is not enforceable, and unlike the panel decisions in most states, it is not even admissible at trial. Sections 27-6-606, 27-6-704(2), MCA.

Consequently, we find no merit in plaintiff's arguments. There are no constitutional violations under the Montana Act.

I am persuaded that a different result would have been reached had the malpractice panel findings been admissible and been afforded presumptive correctness. I am therefore persuaded that the panel procedure at issue in this case is unconstitutional as a violation of due process of law and an unlawful delegation of judicial or executive power.

¶162 My decision striking down the presumption does not favor claimants. The pernicious effect of the presumption extends equally to both parties. Where a medical panel determines that the claimant suffers from an OD, the insurer faces the same uphill and unfair battle as faced by Mrs. Bowers in this case.

B. Department Hearing Officer v. the Court

¶163 Mrs. Bowers argues that she has been denied her right to equal protection of the laws on account of ODA provisions requiring that her case be heard by a Department hearing officer rather than by the Workers' Compensation Court. She argues that she has been denied access to the courts and to equal protection of the laws.

¶164 Initially, Mrs. Bowers is mistaken in arguing that the requirement that OD cases be heard by a Department hearing officer is based on a rule of the Department rather than a statute. Sections 39-72-611 and -612, MCA, plainly require that in cases of contested liability under the ODA an evidentiary hearing is held by the Department, not the Court. Section 39-72-611, MCA, provides:

39-72-611. Hearing on determination -- when. Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the claimant's entitlement to occupational disease benefits, the department shall hold a hearing.

Section 39-72-612, MCA, limits the Court's role to judicial review and sets forth the specific grounds of review. This scheme is no different from that provided with respect to other statutory entitlements for which the legislature has empowered an agency to hold contested case hearings and limited the judiciary's function to judicial review.

¶165 Mrs. Bowers further argues that requiring her to try her case before a Department hearing officer violates her right to equal protection since workers' compensation claimants are entitled to have their cases heard by this Court. She notes significant differences between the proceedings. First, she notes the qualifications required of the workers' compensation judge are greater than that for a hearing officer and that the judge has more independence since the appointment is for a six year term. Second, the rules of evidence apply to the Court but not to Department proceedings. Third, a Department hearing may be conducted by telephone, which in fact occurred in this case with respect to

Dr. Knapp's testimony.⁽¹⁰⁾ The second and third grounds are advanced in support of Mrs. Bowers' constitutional challenge to the forum and are not tendered as separate issues. However, they are in fact separate issues since they pertain to procedural matters, not to the validity of the forum. I therefore do not consider them here.

¶66 In *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989), the Supreme Court considered an equal protection challenge to the ODA based on the fact that the Act provided less favorable benefits than the Workers' Compensation Act (WCA). The Court held that OD benefits are not a fundamental right and that the ODA must therefore be analyzed under the rational basis test. *Id.* at 338, 777 P.2d at 865. Based on historical distinctions between the treatment of workplace injuries and ODs, the Court held that the legislature had a rational basis for treating ODs differently from workplace injuries:

Historically workers' compensation was enacted to compensate victims of industrial accidents and injuries. It was not set up to respond to workers suffering occupational disease. That distinction was partially explained by the common law historical background which had allowed tort suits for injuries but generally had shown that the negligence of an employer was not a basis for a common law action. As stated in 1B Larson, Workmen's Compensation Law, Section 41.20 (1987):

To the extent that compensation acts were thought of as substituting nonfault liability for the kind of injuries that were potential subjects of fault liability, there was thought to be no place for occupational diseases, which (in the sense of a disease due to the "normal" conditions of the industry as distinguished from the negligence of the employer) had consistently been held incapable of supporting a common-law action.

As the incidence of devastating diseases of the work place increased, legislatures concluded that some system of compensation was needed. Gradually the law was expanded to provide benefits for the victims of occupational disease, notably silicosis and asbestosis. 32 Labor Law Journal (1981), 212, 213.

By 1978, every state had enacted statutes making occupational diseases compensable. 1B Larson, Workmen's Compensation Law, Section 41.00. Larson points out that this lag in coverage can be attributed [237 Mont. 339] to the heavy incidence of silicosis and asbestosis in certain industries, for which full coverage under workers' compensation would have created a difficult burden. 1B Larson, *supra*, Section 41.10.

Montana created a statutory remedy for work-related diseases in 1959 by the enactment of the Occupational Disease Act, Sec. 92-1301 RCM (1947) et seq., now Secs. 39-72-101 to 714, MCA. In the workers' compensation field, this Court upheld the power of the legislature to enact workers' compensation which replaced

common law remedies. *Shea v. North-Butte Mining Co.* (1919), 55 Mont. 522, 534, 179 P.2d 499, 503. We conclude that the same rationale properly can be applied to the Occupational Disease Act. We conclude there is a rational basis for the enactment of the Occupational Disease Act by the legislature.

237 Mont. at 338-39, 777 P.2d at 865-66.

¶167 *Eastman* has not been overruled. Provision for a Department hearing is part of an overall process prescribed by the legislature for determining the compensability of OD claims. *Eastman* holds that OD provisions do not have to match or track the WCA. The equal protection argument is without merit.

C. Dr. Gabster's Report

¶168 Finally, Mrs. Bowers argues that the admission of Dr. Gabster's report violated her right to due process of law since Dr. Gabster did not testify. She cites *Hert v. Newberry*, 178 Mont. 355, 364, 584 P.2d 656, 661 (1986), as well as a non-workers' compensation case, as authority for her argument.

¶169 In *Hert* the Workers' Compensation Court had announced at trial that it would take judicial notice of all materials in the file of the Division of Workers' Compensation, including medical reports and records. On appeal the Supreme Court held that the announcement did "not give the Workers' Compensation Court the authority to take judicial notice of the material contained in Dr. Dinapoli's letter, nor any other medical record, when the material is not presented for testimony at the trial, either by deposition or in person." *Hert v. J. J. Newberry Co.*, 178 Mont. 355, 365, 584 P.2d 656, 661 (1978).

¶170 However, in the subsequent case of *Miller v. Frasure*, 264 Mont. 354, 871 P.2d 1302 (1994), the Supreme Court expressly held that a medical report may be admitted in a workers' compensation case, even though the medical provider does not testify, so long as it is exchanged and made available to both parties prior to trial and there is an opportunity for the parties to depose the writer or subpoena the writer to testify at trial. The conditions for admission laid out in *Miller* were satisfied in this case. By fact of the presumption afforded the panel report, § 39-71-610(1), MCA, both parties are on notice that the medical panel report will be considered at hearing. The rules of the Department provided both parties with an opportunity to depose or subpoena Dr. Gabster. ARM 24.2.105. Admission of his report was not an error.

JUDGMENT

¶171 1. The presumption of correctness afforded medical panel reports under the ODA is unconstitutional. Since the hearing officer's decision was based on the presumption, the decision below is **reversed** and this matter is remanded for reconsideration. Upon reconsideration, the hearing officer shall treat the panel reports and testimony no

differently than other medical evidence. The reports and testimony shall not be presumed correct or afforded any special deference based on the fact that they are the reports and opinions of medical panel physicians. After reconsideration, the hearing officer shall issue new findings of fact and conclusions of law in which he considers and discusses Dr. Peterson's testimony and sets forth his reasons for finding one or the other doctors' opinions the more persuasive.

¶72 2. Upon reconsideration, the hearing officer shall determine whether Mr. Bowers' occupational exposure to chemicals and dust contributed to any degree to his death. If the hearing officer determines that it did, then he shall also determine the percentage of occupational contribution. If he cannot determine the percentage based on the evidence September 2, 1998 presented at the prior hearing, then he shall hold a further hearing to determine the percentage.

¶73 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration from this Decision on Appeal.

DATED in Helena, Montana, this 2nd day of September, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman L. Newhall

Mr. Thomas E. Martello

Mr. Charles G. Adams - Courtesy Copy

Date Submitted: March 11, 1998

1. One pack year is the equivalent to smoking one pack a day for one year or a half pack a day for two years. Similarly, a two pack year smoking history will result from smoking two packs a day for one year or one pack a day for two years, etc. Pack years are cumulative. Thus, a twenty pack year smoker may have smoked one pack a day for twenty years or two packs a day for ten years, etc.

2. "Emphysema" and "chronic obstructive pulmonary disease" were used interchangeably by Dr. Peterson. (Tr. at 66-67.)

3. Tr. at 227.

4. Hereinafter, I refer only to Dr. Knapp's opinions. Dr. Gabster did not testify. His report amounts to one page and even Dr. Knapp contradicted that part of his opinion ascribing the cause of death in part to COPD.

5. It is difficult to imagine that the hearing officer gave any weight to Dr. Gabster's report in light of the fact that his report in this complex and important matter amounts to a single

page and he did not testify either at trial or by deposition. Nonetheless, the hearing officer expressly cites Dr. Gabsters' report in his decision and apparently did rely on it.

6. *Erickson v. Champion Int'l*, WCC No. 9506-7336, Order on Appeal (March 12, 1996) and *Polk v. Planet Ins. Co.*, WCC No. 9603-7525, Order and Judgment (February 26, 1997).

7. These questions are taken from Dr. Knapp's report found at Respondent's Exhibit 18 and are Dr. Knapp's statement of the questions put to him. The Department's actual letters to Drs. Knapp and Gabster were not introduced as an exhibit at hearing, however, copies of the letter have been provided to the Court by way of an affidavit filed on appeal by Mrs. Bowers' Counsel. (Affidavit (October 30, 1997).) The differences are minor and do not affect the decision on appeal.

8. The Montana Rules of Evidence were drafted by the Supreme Court Commission on Evidence. The draft rules were submitted to the Supreme Court, with the Commission's comments, and adopted by the Court on December 29, 1976, Administrative Supreme Court Order 12-729. The rules were effective July 1, 1977. *Id.*

9. After he reviewed the materials sent him for review, Dr. Knapp sent the materials back for the Department and did not have them available when he testified. (Tr. at 240.) Subsequent to the hearing, Mrs. Bowers sought and obtained the materials from the Department and submitted them to the Court via an October 28, 1997 affidavit of her attorney. The materials are considered here for purposes of illustrating the lack of adequate procedural protections in the medical panel process.

10. The hearing officer heard Dr. Knapp's testimony by telephone, although the attorneys were personally present when examining Dr. Knapp.