IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 42

WCC No. 2000-0107

MARGERY LaFOURNAISE

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER REMANDING FOR FURTHER PROCEEDINGS

Summary: Claimant, who suffers from carpal tunnel syndrome and a cervical radiculopathy or radiculitis, alleged that her conditions are caused by her full-time work as an LPN at the Montana Developmental Center. One of her treating physicians opined that her conditions were related to her LPN work and part-time work as a cosmetologist. An occupational disease panel of three physicians were split on the issue, two opining that her work as an LPN did not proximately cause claimant's conditions, the third agreeing that it did. All opinions were set out in medical records and reports; the physicians were not deposed and did not testify. In resolving the conflict of opinions the hearing officer cited the treating physician's opinion as inadequately addressing statutory proximate cause criteria, and relied on the opinions of the two panel members who found no causation. He failed to consider the third panel member's opinion finding a causal connection.

Held: The hearing officer erred in failing to consider the third panel member's opinion, therefore the matter is remanded for reconsideration, specifically to consider the third member's opinion. When reconsidering, the hearing officer must consider the substance of the opinions, not the technical terms used by the doctors.

Topics:

Judicial Review: Error of Law. In an occupation disease case, the Department of Labor is required to consider all of the evidence presented at hearing and cannot arbitrarily ignore or disregard a medical opinion of one of its medical panel members.

Occupational Disease: Medical Panels. Department of Labor cannot arbitrarily ignore or disregard medical opinion of one of its medical panel members but must

consider the opinion in reaching a final determination as to whether a claimant suffers from an occupational disease.

Occupational Disease: Proximate Cause. In evaluating medical opinions concerning causation under the Occupational Disease Act, § 39-72-408, MCA (1997), the Department of Labor must consider the substance of the opinions rather than the use of precise, statutory language, and determine whether the substance of the opinions satisfy the statutory criteria even though not couched in the precise terms of the statute.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-72-408 (1997). In evaluating medical opinions concerning causation under the Occupational Disease Act, § 39-72-408, MCA (1997), the Department of Labor must consider the substance of the opinions rather than the use of precise, statutory language, and determine whether the substance of the opinions satisfy the statutory criteria even though not couched in the precise terms of the statute.

Evidence: Expert Testimony. Where expert physicians are split as to their opinions on a matter material to resolution of a dispute, submission of their written reports and records is an unsatisfactory basis for resolving the dispute, at least where the physicians are equally qualified on paper and their reports do not provide supporting citation or authority which would indicate which physician is more likely correct. The physicians should be deposed or should be called to testify.

¶1 This is an appeal from a determination by a Department of Labor and Industry hearing officer that claimant does not suffer from an occupational disease. The case was submitted to the hearing officer based on medical records of various physicians and claimant's testimony. The physicians were not deposed and did not testify at hearing, therefore, there was no opportunity to explore their conflicting opinions regarding the presence or absence of an occupational disease.

¶2 There is little question that claimant suffers from carpal tunnel syndrome and cervical radiculitis or radiculopathy affecting her right arm. The real question presented in the proceeding below was whether those conditions constitute occupational diseases attributable to claimant's employment as a licensed practical nurse (LPN) at the Montana Developmental Center (MDC), which is insured by the State Fund. Four physicians rendered written opinions. Two concluded that her conditions were occupationally related, specifically to her full-time work at MDC and her part-time work as a cosmetologist. The other two physicians opined that her conditions were not related to her employments.

¶3 Dr. Steven Speth, an orthopedic surgeon in Bozeman, Montana, who treated claimant found that her conditions were occupationally related, writing:

> She works at MDC 40 hours per week plus over time and then as a hair dresser 20 hours per week. In my opinion it is more likely than not that her symptoms are related to her work in that proportion 2/3 MDC, 1/3 hair dresser, as activities at both of her jobs contribute to her symptoms and because she is so busy at work she doesn't have time to particularly engage in any other activities that would aggravate her symptoms.

(Ex. F at 4.)

¶4 After the claimant filed her occupational disease claim, the Department designated Dr. Max Iverson, an Helena orthopedic surgeon, to perform a medical panel examination. (Ex. M at 29.) He personally examined claimant and reviewed her medical records, but concluded that her conditions did "not appear to have an occupational disease basis." He wrote:

> The patient's occupation full-time is that of a LPN at the Montana Developmental Center. On going over the work requirements with the patient, there does not appear to be any specific traumatic event nor are there any activities that would be seemingly predisposing to either cervical disc pathology, radiculitis into the upper extremity nor carpal-tunnel syndrome. This doees [sic] not appear to be an occupationally related disease problem in all medical probability based on the description of the patient's job at Montana Developmental Center.
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> She does, in addition, do cosmetology which involves hair styling primarily after hours at work at the Montana Developmental Center as well as somewhat on the week-ends. There is a certain amount of repetitive type activity involved in this profession as well but it does not appear that there is a strong enough history of repetitive type work that should produce the patient's symptoms.
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> The etiological factor, therefore, for the patient's findings and symptoms is not entirely clear but does not appear to have an occupational disease basis.

(Ex. B at 4.)

¶5 Claimant then requested a second examination and the Department designated Dr. Patrick Galvas, who specializes in occupational medicine and physical and rehabilitation medicine, to examine claimant. (Ex. M at 15.) He personally examined claimant and reviewed her medical records. He found that claimant's conditions constituted an occupational disease, writing:

> **OCCUPATIONAL DISEASE DETERMINATION** I do believe that the patient is suffering from a disease that is as a result of the employment (occupational disease). The occupational disease can be traced as proximate cause to the patient's suffering. The patient is currently performing her work but I believe that it is

probably exacerbating her condition. She does have a nonoccupational disease that is contributing to her condition in that of her hair dressing position. I would apportion that as being 7% due to her hair dressing position and 93% due to her job as an LPN at Montana Developmental Center.

(Ex. E at 2.)

¶6 The Department then designated Dr. Thomas L. Schumann, a Billings physician specializing in occupational disease, as the third panel member. (Ex. M at 18.) It does not appear that he discussed the case with the other two panel members (Drs. Iverson and Galvas.) (Ex. H.) He did not examine claimant but he did perform a records review and concluded that claimant is not suffering from occupational diseases. He wrote:

In terms of the occupational disease panel questions to be addressed

- I would agree with Dr. Iverson that the proximate criteria for an occupational disease as defined under 39-72-408 are not met in this case for either degenerative cervical disk disease with radiculopathy or radiculitis nor for carpal tunnel syndrome.
- I would not conclude that her employment can be traced as the proximate cause. The medical records do not reflect direct causal connection between specific work conditions and either symptoms referable to cervical radiculitis or carpal tunnel syndrome. B) Given the variety of tasks that she was involved in I would not conclude that either of these conditions can be seen to have followed as a natural incident of the work occasioned by the nature of the exposure nor that it can be fairly traced to employment as the proximate cause. Both these conditions occur frequently among those in the general population without specific occupational exposure and cannot be seen to be necessarily incidental to the character of the business rather than independent of the relation of the employer and the employee.

(Ex. H at 1-2.)

¶7 The hearing officer determined that the opinions of Drs. Iverson and Schumann were more persuasive than Dr. Speth's opinion because "Dr. Speth did not adequately address the issue of causation." Findings of Fact; Conclusions of Law; and Order at 6. However, in reaching his conclusion he failed to consider or discuss Dr. Galvas' opinion. Dr. Galvas, as a member of the medical panel, is presumed to be familiar with causation standards. His opinion was entitled to consideration, especially since he was a member of the medical panel and was therefore independent of either party. Upon judicial review, the Court may reverse and remand for further proceedings where a decision is affected by an error of law. § 2-4-704(2)(iv), MCA. While the hearing officer must determine the ultimate weight to be given evidence, he cannot arbitrarily ignore or disregard evidence, and must prepare

adequate findings "so that the reviewing court does not have to speculate as to the reasoning" of the fact finder. *In Re U.S. Currency,* 273 Mont. 474, 483, 905 P.2d 148, 154 (1995).

¶8 Where, as in this case, the causation opinions are rendered in general terms rather than in lock-step with the five, largely redundant statutory criteria set out in section 39-72-408, MCA (1997), the hearing officer must consider the substance of the opinions and whether they are sufficient to satisfy the criteria even though not couched in the precise terms of the statute. The fact that opinions do not exactly track the statutory criteria is insufficient to disregard them. Upon remand the hearing officer shall evaluate the substance of the opinions.

¶9 Ultimately, resolution of a case of this kind based solely on medical records and reports is unsatisfactory. How is a fact finder to decide which opinion is more persuasive where the doctors, at least on paper, appear equally qualified, and the reports do not provide supporting citation or authority which would indicate which physician is more likely correct? The parties, particularly the claimant, who bears the burden of proof, should have called the doctors to testify in more detail regarding the basis of their opinions and thereby provide the hearing officer with a better basis for resolving the conflict in opinions. That was not done here, so the decision must be made based on the records presented.

ORDER

¶10 The decision below is **reversed** and the matter remanded to the Department for reconsideration. Upon remand, the Department's hearing officer shall specifically consider Dr. Galvas' opinion, along with the opinions of Drs. Speth, Iverson, and Schumann, in determining whether claimant suffers from an occupational disease. Further, the hearing officer shall look to the substance of the causation opinions, rather than specific words used by the doctors, to determine if the statutory causation criteria are met.

¶11 This decision is otherwise certified as final for purposes of appeal. ARM 24.5.348.

¶12 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Order Remanding for Further Proceedings.

DATED in Helena, Montana, this 13th day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Margery LaFournaise
Mr. Thomas E. Martello

Ms. Sandra M. Duncan
Submitted: March 27, 2001