IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 20

WCC No. 9802-7932

WADE H. McKAY, SR.

Appellant

vs.

CITY OF CHOTEAU

Respondent.

ORDER ON APPEAL

Summary: Police officer whose occupational disease claim was denied by a DOL hearing officer appealed. Appellant had previously moved for a new trial on the ground that he and his attorney had not heard some of the telephonic testimony at the hearing. He also asked for leave to introduce new evidence after being examined by a toxicologist. On the merits, he argued the hearing officer's decision was not supported by sufficient evidence.

Held: Review of the transcript and tape-recording of the hearing indicates that claimant and his attorney were afforded the chance to hear the testimony in question; moreover, no objection was made at the hearing to missed evidence although claimant and counsel were aware of the break in hearing testimony. The request to present new evidence was denied where claimant did not argue good reasons for failure to present the evidence at the hearing, as required by section 2-4-703, MCA. The appeal is denied on its merits where substantial evidence supports the hearing officer's determination, including the decision to credit the conclusions of the physician with specific expertise in carbon monoxide poisoning over those of other physicians. Further, the weight of additional evidence sides with the hearing officer's determination.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 2-4-703, MCA.** Appellant's request to present additional evidence (testimony of a toxicologist by whom he wanted to be examined) was denied where claimant did not argue good reasons for failing to present that evidence at his hearing in the Department of Labor.

Medical Conditions: Chemical Exposures. Police officer appealed Department of Labor hearing officer's decision he did not suffer from occupational disease resulting from alleged exposure to carbon monoxide in patrol car. Substantial evidence supports the hearing officer's determination, including the decision to credit the conclusions of the physician with specific expertise in carbon monoxide poisoning over those of other physicians. Further, the weight of additional evidence sides with the hearing officer's determination.

Occupational Disease: Disease. Police officer appealed Department of Labor hearing officer's decision he did not suffer from occupational disease resulting from alleged exposure to carbon monoxide in patrol car. Substantial evidence supports the hearing officer's determination, including the decision to credit the conclusions of the physician with specific expertise in carbon monoxide poisoning over those of other physicians. Further, the weight of additional evidence sides with the hearing officer's determination.

Physicians: Conflicting Evidence. Police officer appealed Department of Labor hearing officer's decision he did not suffer from occupational disease resulting from alleged exposure to carbon monoxide in patrol car. Substantial evidence supports the hearing officer's determination, including the decision to credit the conclusions of the physician with specific expertise in carbon monoxide poisoning over those of other physicians.

Proof: Conflicting Evidence: Medical. Police officer appealed Department of Labor hearing officer's decision he did not suffer from occupational disease resulting from alleged exposure to carbon monoxide in patrol car. Substantial evidence supports the hearing officer's determination, including the decision to credit the conclusions of the physician with specific expertise in carbon monoxide poisoning over those of other physicians.

¶1 This is an appeal of a Department of Labor and Industry (Department) decision finding that the appellant (claimant) does not suffer from an occupational disease (OD). Claimant was represented by an attorney in the proceedings below. However, he is prosecuting this appeal pro sé. He alleges that the Department's hearing officer failed to properly consider and weigh the evidence presented at hearing.

May 22nd Motion for New Hearing

¶2 On May 22, 1998, the claimant filed a motion requesting a new hearing. (Motion to Request for New Hearing [sic].) In the motion the claimant states that a portion of the telephonic testimony of Dr. Bardana was not heard by him and his attorney. Claimant also argues that he should be examined by a toxicologist, who might then provide testimony in support of his claim.

¶3 On June 10, 1998, the Court denied the motion because it raised factual issues which should be resolved only after review of the transcript and, if necessary, the tape recordings of the hearings. (Order Denying Motion for New Hearing and Motion to Overturn.) The Court ordered that the parties address the matter in their briefs on the merits of the appeal. (*Id*.)

¶4 The claimant has not addressed the matter further. Nevertheless, the Court has reviewed the hearing transcript and determined that the telephone testimony of Douglas Wilhelm, not Dr. Bardana, was interrupted. (Tr. at 100-101.) The record shows that the situation was discussed with claimant's attorney and that the tape recording of the testimony was replayed for the parties. Upon hearing the replay of the tape-recorded testimony given while disconnected, claimant's attorney was satisfied and indicated that she had no objection to the testimony. (*Id*. at 101.)

¶5 At oral argument held March 1, 1999, the Court asked the claimant about the interrupted testimony. He indicated that he recalled the interruption as occurring during Dr. Bardana's testimony, but he also recalled that he and his attorney were aware of the interruption and that the testimony which was given while they were disconnected was replayed for them. Thus it appears that any interruption did not prejudice claimant.

¶6 In any event, it is plain that the claimant and his attorney were aware of the telephonic cutoff. It was incumbent upon them to lodge an objection to the disrupted testimony when it occurred. An objection cannot be raised for the first time upon appeal. *Estate of Hill*, 281 Mont. 142, 151, 931 P.2d 1320, 1326 (1997).

¶7 In reviewing the prior Order on this motion, I note that I did not address claimant's request that a new hearing be granted so he can be examined by a toxicologist, whose testimony might then be provided. Section 2-4-703, MCA, governs the introduction of additional evidence:

> **2-4-703. Receipt of additional evidence.** If, before the date set for hearing, application is made to the court for leave to present additional evidence **and it is shown to the satisfaction of the court** that the additional evidence is material and **that there were good reasons for failure to present it in the proceeding before the agency**, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court. [Emphasis added.]

Claimant has not shown why the examination could not have been done prior to hearing.

¶8 The claimant's May 22, 1998 motion requesting a new hearing and the opportunity to present additional evidence is **denied**.

Merits of Appeal

I. The Claim

¶9 Claimant alleges that he suffers from headaches, personality changes, depression, weakness, fatigue, leg changes, and chest discomfort as a result of carbon monoxide (CO) poisoning while working as a police officer for the City of Choteau, Montana.

¶10 Claimant first sought medical care on account of his symptoms on February 2, 1996, following a day of trudging door-to-door through snow to notify Choteau residents about a loss of natural gas to Choteau homes. On February 22, 1996, he filed a claim for OD benefits alleging that he had been exposed to excessive levels of CO while driving his patrol car. In the attachment to his claim (Ex. 8), he wrote that his symptoms began in the winter months of 1994-95. He described his symptoms:

> [B]ecame dizzy and weak quite often. My breathing became harder during any stressful activities. I was getting tired and completely wore out all of the time. I started getting spells where I would almost pass out and turn pail [sic]. My legs became dark brown from the ankles half way up to the knees through this period of time.

(*Id.*)

¶11 Pursuant to section 39-72-602, MCA, the Department referred the claimant to Dr. Dana Headapohl, who examined claimant and concluded that personality changes and depression were probably caused by CO exposure at work but that those symptoms were temporary and had wholly resolved. Based on the report, the Department issued an Order finding that claimant suffered from an OD. (Order Referring Copy of Medical Reports to Parties Issued January 27, 1997.)

¶12 The insurer then requested a hearing before the Department. A hearing was held and on January 30, 1998, the hearing officer found in favor of the insurer, rejecting the occupational disease claim. (Indings of Fact; Conclusions of Law; and Final Order ("findings").) This appeal followed.

II. The Decision Below

¶13 The hearing officer's Findings are extensive, well cited, and well reasoned. Presented with conflicting medical opinions, the hearing officer examined the specific testimony and opinions of each physician, considered the expertise of each physician in the area of CO poisoning, took into account testing that had been done on claimant's patrol car, and reviewed the history reported by claimant and his wife. The hearing officer found the opinion of Dr. Emil Bardana, who is board certified in allergy and immunology and in internal medicine, and whose specific medical expertise encompasses CO poisoning,

persuasive. Dr. Bardana determined that claimant's symptoms were not caused by CO exposure.

¶14 Arrayed against Dr. Bardana's opinions were the opinions of Dr. Michael Terry, an emergency room practitioner with no speciality certification, and Dr. Headapohl, who is board certified in occupational disease and has impressive medical credentials. Dr. Headapohl opined that claimant suffered from occupational exposure to CO but that the effects of the exposure were temporary and had resolved.

¶15 Claimant's history of symptoms was of significance to the hearing officer's decision. According to claimant, he smelled exhaust fumes in his car in the fall of 1995 but did not smell fumes after the exhaust was repaired in December 1995, nonetheless there was testimony, which the hearing officer found credible, that his symptoms worsened during the first three months of 1996. There was also evidence that other officers had used the same car and suffered no ill effects. The hearing officer also considered tests of claimant's patrol car, which indicated that under the worst mechanical scenario in January and February 1996, the CO levels were too low to produce claimant's symptoms. While claimant argues that the tests were not the worst scenario, he did not produce evidence to dispute the testing or to show how greater levels of CO could have been present in early 1996.

III. Standard of Review

¶16 Section 39-72-612(2), MCA, provides for a direct appeal to the Workers' Compensation Court from the Department's final Order in an OD case. The section further provides:

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

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

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

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IV. Discussion

¶17 While claimant has not identified the specific legal ground for his appeal, his written and oral arguments attack the sufficiency of the evidence supporting the hearing officer's

findings of fact. Thus, his appeal must be considered under the "clearly erroneous" standard set forth in section 39-72-612(2)(3), MCA.

¶18 Under the clearly erroneous standard, the hearing officer's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging,* 252 Mont. 97, 102, 827 P.2d 85, 88 (1992) (quoting section 2-4-704(2)(a)(v), MCA). If the findings are supported by substantial evidence, the Court may overturn them only if it is clear to the Court that the hearing officer "misapprehended the effect of the evidence" or if, upon review of the record as a whole, the Court reaches a "definite and firm conviction" that the hearing officer was mistaken. *Id*. **The clearly erroneous standard is not a license for the Court to reweigh the evidence or second guess the hearing officer's assessment of witnesses' credibility.**

¶19 At the time of his alleged exposure to CO, the claimant was working as a police officer for the City of Choteau. He testified that as far back as 1993 he smelled exhaust fumes in his patrol car. His testimony was disputed by two other police officers who testified that they used claimant's patrol car at various times in 1995 and did not smell exhaust fumes. As the hearing officer also noted, when on duty the claimant was in and out of his car and often drove with the windows down. (Findings at 16.)

¶20 In any event, a new muffler was installed on June 8, 1995, along with head and tail pipes. On December 15, 1995, a mechanic discovered that the positive crankcase ventilation (PCV) valve was out of its rubber grommet and that the valve filter was clogged. He replaced the grommet and on December 17, 1995, he installed a new grommet.

¶21 On February 22, 1996, claimant filed an OD claim alleging illness due to CO exposure in his patrol car. On February 28, 1996, the mechanic installed a second, new muffler because it appeared pitted. Just prior to replacing the muffler the car was tested for CO. The testing disclosed no CO in the passenger compartment with the car idling. With the PCV valve out of the grommet, the level in the passenger compartment was 12 parts per million (PPM), which is well under the OSHA standard of 35 PPM.

¶22 Meanwhile, beginning on February 2, 1996, in reports to his physicians the claimant complained of dizziness, leg discoloration, weakness, headaches, skin color changes, memory loss, depression, mood swings, and chest pains. His wife described claimant as suffering from nausea, lethargy, and extreme mood swings as far back as 1994. She characterized his mood swings as being at "maximum" and uncontrollable in January and February 1996.

¶23 The only physical evidence of CO poisoning was a blood test done on claimant on February 26, 1996, showing a 2% carboxyhemoglobin level. That level was within normal or near normal limits. Uncontroverted testimony concerning the half-life of CO in the

bloodstream showed that the 2% level, even if considered elevated, could not have resulted from any exposure in the patrol car.

¶24 Dr. Bardana reviewed the claimant's medical records and history and opined that claimant's symptoms in early 1996 were not caused by CO poisoning. He found the CO levels documented in testing of the police car were insufficient to cause claimant's symptoms. He further testified that even had claimant been chronically exposed to CO prior to early 1996, the exposure would have had no lasting effect and did not cause claimant's symptoms in early 1996.

¶25 Ultimately, Dr. Bardana found that claimant's symptoms and the findings of his treating physicians were incompatible with CO poisoning:

> I think Mr. McKay's presentation defeats that particular [CO poisoning] diagnosis. He doesn't have a presentation that is compatible with it, nor findings by a physician that support it.

(Tr. at 141; quoted in Finding of Fact 15.) He also testified that claimant's complaints of fatigue, depression, and headaches could be due to a fifty pound weight gain claimant had experienced, deconditioning, and psycho-social stress. The hearing officer determined that Dr. Bardana was the best qualified of the physicians rendering opinions and found his opinions persuasive.

¶26 Claimant argues that Dr. Bardana's opinions should be disregarded or given less weight because he did not examine the claimant. The argument is unpersuasive. Like Dr. Bardana, Drs. Terry and Headapohl based their opinions on the history of exposure and symptoms related by claimant. The issue presented to all three doctors was not what symptoms he had but what caused those symptoms. The only physical evidence ever adduced of elevated CO levels in claimant was the 2% level measured on February 26, 1996, and that evidence is insignificant since it could not have possibly been caused by the patrol car and was in any event in the normal or near normal range and not of a level which could have possibly caused his complaints. Dr. Bardana was in as good a position to evaluate the cause of claimant's symptoms as were Drs. Terry and Headapohl.

¶27 After reviewing the record, I find that the hearing officer's findings are supported by substantial evidence. As he noted, Dr. Bardana had greater expertise in CO poisoning than either Dr. Terry or Dr. Headapohl. Dr. Bardana's opinions were also corroborated by other evidence. For example, claimant sought medical care *after* the patrol car exhaust system had been repaired and there was evidence that his symptoms worsened after the repair. That evidence is inconsistent with both Dr. Bardana's and Dr. Headapohl's testimony that CO has no lasting, long-term effects; in other words, claimant should have been getting better not worse. Testimony by other police officers driving the same car that they did not smell exhaust fumes also supported the decision. Also, Dr. Headapohl could not relate

some of claimant's symptoms to CO. Other factors -- e.g., weight gain, deconditioning, and marital problems -- were present that might explain many of claimant's symptoms.

¶28 After reviewing the record below, I find substantial evidence to support the hearing officer's decision. I cannot say that he either misapprehended the evidence or that he was plainly mistaken.

ORDER ON APPEAL

¶29 1. The January 30, 1998, Findings of Fact; Conclusions of Law; and Final Order of the Department of Labor and Industry are **affirmed.**

¶30 2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 4th day of March, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Wade H. McKay, Sr. - Certified Mail
Mr. Oliver H. Goe
Date Submitted: September 2, 1998