

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 66

WCC No. 9903-8168

STATE COMPENSATION INSURANCE FUND

Appellant

vs.

WILLARD E. VANNETT

Respondent.

DECISION ON APPEAL

Summary: Hearing Officer for DOL found claimant entitled to OD benefits based on claimant's testimony and physician's conclusion that claimant's liver disease was caused by workplace chemicals. State Fund appealed, arguing that second physician considered medical literature and opined that claimant's specific liver problems were not caused by specific chemicals in his workplace, and that third physician agreed with second. On consideration of the appeal, WCC noted that third physician, Dr. Gary Rappaport, was the same physician who had advised State Fund not to accept first physician's opinion and to invoke further OD panel proceedings.

Held: Although Court was ready to reverse hearing officer's determination in light of the more reasoned and credible evidence in the record, the Court was very disturbed by the conflict of interest presented by Dr. Rappaport's work for State Fund in providing advice followed by his acceptance of panel appointment, which should have been held by a neutral party. Given this conflict, WCC refuses to accept Dr. Rapport's opinion or direction in the case and affirms Hearing Officer's finding in favor of claimant.

Topics:

Evidence: Expert Testimony: Generally. WCC refused to consider evidence from physician who was hired by State Fund to provide advice during evaluation of whether to challenge one physician's opinion that claimant suffered from OD, then accepted appointment to OD panel on same case.

Judicial Review: Appeal. On appeal from decision of DOL, WCC refused to consider evidence from physician who was hired by State Fund to provide advice

during evaluation of whether to challenge one physician's opinion that claimant suffered from OD, then accepted appointment to OD panel on same case.

Occupational Disease: Medical Panels. On appeal from decision of DOL, WCC refused to consider evidence from physician who was hired by State Fund to provide advice during evaluation of whether to challenge one physician's opinion that claimant suffered from OD, then accepted appointment to OD panel on same case.

Physicians: Conflict of Interest. On appeal from decision of DOL, WCC refused to consider evidence from physician who was hired by State Fund to provide advice during evaluation of whether to challenge one physician's opinion that claimant suffered from OD, then accepted appointment to OD panel on same case.

Pro Se. Pro se claimant who was respondent on appeal from decision of DOL hearing officer in OD case did not raise issue of expert doctor's conflict of interest, but Court would consider issue because claimant was unrepresented by counsel and not sophisticated in these sort of legal matters. Recent amendments to the WCA and OD Act are calculated to make benefits more certain and to reduce the reliance of injured workers upon attorneys.

¶1 This is an appeal from a Department of Labor and Industry (Department) decision finding that Willard E. Vannett (claimant) is entitled to occupational disease benefits. Respondent, State Compensation Insurance Fund (State Fund), argues that the hearing officer's decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . [and] is also arbitrary and capricious." (Brief on Appeal at 1.)

Record Below

¶2 Claimant testified briefly at the hearing below. (Tr.⁽¹⁾) Neither he nor the State Fund presented any other witnesses at the hearing or by way of deposition. Medical information and opinions were presented by way of medical records.

Motion to Present Additional Evidence

¶3 After filing its Notice of Appeal, the State Fund filed a motion to present additional evidence. The motion was denied on July 23, 1999, and the Court's Order speaks for itself, however, in his Brief on Appeal the claimant attached the records proffered by the State Fund in its motion. The Court queried the parties by letter dated August 23, 1999, whether they agreed that the evidence should be considered. The Court's letter advised the parties that if the evidence were to be considered the case would have be remanded to the Department in accordance with the Court's rules, ARM 24.5.350.⁽²⁾ Counsel for the State Fund asked that the matter be remanded. The claimant requested that the records not be considered and that the Court decide the case based upon the record presented to the

Department hearing officer. In light of claimant's response, the Court then advised the parties by letter dated September 1, 1999, that it would decide the case based on the existing record below.

Factual Record

I. Job and Medical History

¶4 Claimant began work for Intercontinental Truck Body (ITB) on September 27, 1994. He installed truck doors and wheels and cleaned truck bodies, windows, flatbeds, and wheels. He worked at these jobs for 14 months, from September 1994 until December 1995, at which time he moved into a supervisory position. (Finding of Fact 4; Tr. at 16-17.)

¶5 Claimant alleges that during his first 14 months of work for ITB he was exposed to chemicals which caused or aggravated liver disease. During the installation and cleaning, claimant worked with strong solvents and chemicals, including two silaprene adhesive sealants, a liquid acid cleaner, lacquer thinners, cleaning solvents, and Stoddard solvent. (Findings of Fact 11, 12; Ex. A, at 5-8, Ex. D, at 4-5.)

¶6 Claimant is a non-smoker and does not drink. There is no history of liver disease in his family. (Ex. 2; Tr.) Prior to working at ITB he described himself as being in good to excellent health. (Ex. A at 1; Tr. at 7.) In 1990 a blood chemical profile showed

he did have slightly above normal protein, Albumin, potassium, Calcium and GGTP. His other liver tests were not high.

(Ex. 1, July 8, 1998 letter of Dr. Gordon W. Franklin.) The context of Dr. Franklin's letter suggests that the above normal readings are associated in some way with liver function, but no other explanation is provided and the doctor ordering and interpreting the tests commented, "At no time did we suspect liver disease." (*Id.*)

¶7 Claimant testified that in the spring of 1995, he began to experience symptoms of dizziness, nausea, headaches, fatigue, tiredness, dry mouth, amber colored urine, periodic pain and swelling in the lower abdomen, dry eyes - vision trouble, and diarrhea. (Tr. at 17; Ex. A at 2.) There are no contemporaneous medical records confirming or disputing his report.

¶8 On June 3, 1995, claimant left work on account of dizziness, nausea, and headache. (Ex. 3.) He had been working with three chemicals: Stoddard Solvent, Fruehauf Aluminum Cleaner, and Silaprene. (*Id.*) There are no contemporaneous medical records for his illness nor evidence relating his symptoms on that day to his exposure to chemicals. The information regarding his illness and his contemporaneous exposure to chemicals was provided by his supervisor three years later. (*Id.*)

¶19 The earliest medical reports in the record are those of Dr. F.G. Miller, whose specialty, if any, is not indicated. On July 26, 1996, the claimant saw Dr. Miller for a check-up. His complaints were: feeling down, feeling tired and washed out, occasional sleep problems, and a gritty feeling in his eyes. (Ex H. at 2.) Dr. Miller reported on July 30, 1996, that he was concerned about the lab test results.⁽³⁾ (*Id.*) He was especially concerned about claimant's elevated calcium level and concerned about the possibility of pancreatic cancer. He ordered a CT of the pancreas and also referred claimant to Dr. Krezowski for a workup on hypercalcemia⁽⁴⁾ with alkaline phosphatase elevation. (*Id.*)

¶10 Thereafter claimant was referred to Dr. Gerald D. Spencer, a Great Falls physician, for "evaluation of chronic liver disease and hypercalcemia." (Ex. F at 4.) Dr. Spencer reviewed laboratory tests, concluded that "[t]he studies are most consistent with primary biliary cirrhosis," and ordered a liver biopsy.⁽⁵⁾ (*Id.* at 9.) The biopsy was performed on September 26, 1996. (*Id.* at 4.) Dr. Spencer reviewed the biopsy and confirmed a probable diagnosis of primary biliary cirrhosis (PBC). (*Id.* at 9.) Claimant thereafter enrolled in a University of Washington program for experimental treatment of PBC. (*Id.*)

II. Claim

¶11 Claimant filled in and signed a First Report on June 7, 1997. (Ex. A at 4.) Numerous documents were attached to this document. A second First Report signed by the employer was received by the State Fund on June 17, 1997. (Ex. B.) The State Fund disputed the claim.

III. Occupational Disease Evaluations and Opinions

¶12 Pursuant to section 39-72-602, MCA, the Department ordered a medical panel examination by Dr. Ronald M. Peterson, M.D., of the Occupational and Sports Medicine Clinic in Great Falls. The examination took place on August 29, 1997. (Ex. J.)

Following examination Dr. Peterson reported:

DISCUSSION: We have requested multiple other documents for this evaluation, but to date have received no further substantiation of potential chemical exposures or time logs of such exposures. As such, I have no choice but to accept Mr. Vanett's [sic] history as stated. Exposures to naphtha and toluene both have the potential for causing liver cell injury, which could then lead to primary biliary cirrhosis. Mr. Vanett [sic] also describes less common exposures to thinners and solvents that could cause hepatic cell injury.

He also has had exposures to pulmonary irritants, as already described, as well as iron oxide fumes/dusts and aluminum alloy dusts.

1. With the available information to date, I believe that Mr. Vanett [sic] is suffering from an occupational disease.

- I believe that his employment can be traced as the proximate cause, and all five criteria are met.
- I do not believe that he is capable of returning to his previous work in any form. As stated, I do not believe that it is in his best interest to have even momentary exposure to the finishing environment.
- I believe that Mr. Vannett [sic] is capable of performing other types of work.
- I cannot find any nonoccupational disease or infirmity that would require apportionment. Therefore, I would apportion 100% of his liver and respiratory system symptoms to his occupation.

(Ex. G at 5-6.) There are no other reports from Dr. Peterson in the record.

¶13 Based on Dr. Peterson's report, on October 31, 1997, the Department issued an order referring copy of medical reports to parties. The Department concluded "the claimant is suffering from Liver & Respiratory System Problems which in fact arose out of and was contracted from their [sic] employment." (Ex. M at 2.)

¶14 Thereafter, a State Fund claims adjuster wrote its Medical Peer Review Panel and asked the question, "Do you concur with the OD panel's evaluation?" (Ex. C at 1.) The inquiry was addressed to Dr. Gary Rapaport, who responded by suggesting "additional diagnostic evaluation to include further occupational disease panel opinion would appear appropriate." (Ex. C at 2.) The doctor went on to suggest that Dr. Peterson be provided with the additional materials, including medical literature, material data sheets, and time logs.

¶15 Following Dr. Rapaport's response, the State Fund requested a second medical panel examination. (Ex. N.) The Department complied and requested Dr. Dana Headapohl to perform the second examination. (Ex. O at 2.) Dr. Headapohl specializes in occupational medicine. (Ex. D.)

¶16 Dr. Headapohl examined claimant on February 2, 1998. In her report of her examination and review of claimant's medical records, Dr. Headapohl discussed the various chemicals to which the claimant had been exposed. She discussed a medical article published in the November 21, 1996 issue of *New England Journal of Medicine*, by Marshall M. Kaplan, M.D. concerning PBC and two case studies referred to in Dr. Kaplan's article. Dr. Headapohl concluded:

Mr. Vannett is a [sic] suffering from primary biliary cirrhosis which is a disease of the liver which is characterized by progressive destruction of the biliary ducts. The disease has no known cause. . . . In susceptible individuals, chlorpromazine (Thorazine) may possibly trigger the disease. Mr. Vannett worked with polychloroprene adhesive, which sounds somewhat like chlorpromazine, but is entirely unrelated chemically and toxicologically. **While many of [the] chemicals**

which Mr. Vannett works with are hepatotoxins⁽⁶⁾, none of those chemicals are associated with primary biliary cirrhosis. They have different hepatotoxic effects. . . .

He is not suffering from an occupational disease, but should be protected from exposures to known hepatotoxins due to his non-work related liver disease.

(Ex. D at 8-9, emphasis and footnote added.)

¶17 The Department then referred the matter to Dr. Gary Rapaport, appointing him the chair of the medical panel. He was asked to review the evaluations and medical reports of Dr. Peterson and Dr. Headapohl and give his opinion concerning the claim. (Ex. R.) After reviewing medical records, claimant's work history, various medical articles, and the information provided regarding claimant's exposure to various chemicals, Dr. Rapaport concluded, as did Dr. Headapohl, that the literature and research regarding PBC did not support a finding that the chemicals to which claimant had been exposed were causally related to the onset of the disease:

. . . Mr. Vannett was working with a polychloroperene adhesive. The solvents and chemicals used in preparing the truck are identifiable as hepatotoxic, although **there is no specific report in the literature identifying these chemicals as provocative of primary biliary cirrhosis.**

The hepatotoxic and liver cell effects of the solvents are clearly established, although **there is no definitive relationship establishing the diagnosis and condition of primary biliary cirrhosis as secondary to solvent and polychloroperene materials.**

As Dr. Hedapohl [sic] noted in her report of February 2, 1998, the polychloroperene is chemically unrelated to the chlorpromazine compound, which has been identified as an etiologic precipitant of primary biliary cirrhosis. Although Mr. Vannett should refrain from continued exposure to solvent materials, given his primary biliary cirrhosis, there appears **inadequate documentation and basis for establishing the identification of an occupational disease, including the condition of primary biliary cirrhosis, as secondary to occupational activities.**

Although the solvents can be hepatotoxic, the specific diagnosis of primary biliary cirrhosis is characterized by a progressive disease of the biliary ducts, occurring in susceptible individuals or with a very specific chemical precipitant. In Mr. Vannett's case, it does not appear that proximate causation criteria exist, establishing a relationship identifying an occupational disease.

(Ex. C at 5, emphasis added.)

¶18 Following Dr. Rapaport's report, on April 28, 1998, the Department issued a second Order Referring Copy of Medical Reports to Parties. The second Order concluded that claimant was not entitled to benefits under the Occupational Disease Act. (Ex. S at 2.) Claimant then requested a hearing before the Department.

Decision Below

¶19 The hearing officer reviewed the medical records submitted by the parties and claimant's brief testimony. He was persuaded by Dr. Peterson's opinion, found that claimant's PBC was caused by his exposure to chemicals at work, and determined that claimant is entitled to occupational disease benefits.

Standard of Review

¶20 Section 39-72-612(2), MCA, provides for a direct appeal to the Workers' Compensation Court from the Department's final Order in an occupational disease 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.

¶21 Ordinarily, the hearing officer's findings of fact may 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 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.*

¶22 In this case, however, the question is a medical one and was submitted to the hearing officer solely based upon the medical records. In cases where the crucial evidence is submitted by way of deposition, the Supreme Court has held that it is in just as good a

position to consider the evidence as the court below and will therefore consider the evidence essentially *de novo*. "Where crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence." *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255-56, 746 P.2d 99, 101 (1987). The principle is equally applicable to judicial review of agency decisions by this Court. Therefore, this Court must evaluate the medical records and make its own determination concerning the claim.

Discussion

¶23 After evaluating the evidence, I determined that medical evidence clearly preponderates against claimant. Two of the three medical panel members found insufficient medical grounds to support a causal connection between claimants PBC and his chemical exposure. Moreover, Dr. Peterson did not have the benefit of all the information available to Drs. Headapohl and Rapaport. Nor is there evidence that he considered the medical literature.

¶24 In contrast, Dr. Headapohl researched medical literature and contradicted Dr. Peterson's statement, concluding that while the claimant did work with hepatotoxins (naphtha and toluene) none of the chemicals were associated with PBC. She stated, "They have different hepatotoxic effects." (Ex. D. at 8.) She observed that the research into primary biliary cirrhosis reveals that "although the cause of primary biliary cirrhosis is **unknown** it is **thought** that it is due to an inherited abnormality of immuno regulation." (Ex. D at 5, emphasis added.) She went on to say that while the additional factor of a "trigger" may become a factor in genetically susceptible persons, the two potential triggers identified to date are treatment with Interferon alpha and toxic effects on the liver from chlorpromazine. (*Id.* at 5, 8.) Neither trigger is involved in this case.

¶25 Dr. Rapaport concurred with Dr. Headapohl (ex. C at 3-6) and I was prepared to reverse the hearing officer's determination.

¶26 However, in reviewing the medical evidence it struck me that Dr. Rapaport, who was the tie breaker in the medical panel determination, was serving two masters. Initially, he was serving as a consultant to the State Fund. It was his advice that caused the State Fund to invoke panel procedures for a second and third review. § 39-72-602, MCA (1995-97). Then, as a purported independent medical panel member appointed by the Department, he broke the tie in favor of the State Fund.

¶27 It requires no extended discussion or citation to state, **emphatically**, that the medical panel procedures of the Occupational Disease Act (§ 39-72-601 and -602, MCA (1995-97)) require the designation of independent and unbiased physicians to examine and evaluate a claimant who tenders an occupational disease claim. The Department, not the insurer nor claimant, must designate and appoint the examining physician from a list of qualified

physicians. (*Id.*) The pre-1999 provision that the panel determination is considered "prima facie evidence as to the matters contained in the report," § 39-72-609, MCA (1995-97), demonstrates the legislature's intent that the panel operate independently of the parties.

¶28 Dr. Rapaport cannot give medical advice to the State Fund and then serve as an independent medical evaluator in the same case. That Dr. Rapaport did not recognize the conflict astounds me. That the State Fund allowed him to serve as the third panel member after getting his advice on the case is even more astounding. I do not know whether, when it appointed Dr. Rapaport as the third panel member, the Department was aware he was also serving as a consultant to the State Fund. If it did, it would triply astound me.

¶29 Claimant has not raised the conflict-of-interest issue. However, he is unrepresented by counsel in this case and is unsophisticated in these sorts of legal matters. Recent amendments to the Workers' Compensation and Occupational Disease Acts are calculated to make benefits more certain and reduce the reliance of injured workers upon attorneys. Courts have a fundamental obligation to preserve basic principles of justice and the rights of the parties.

¶30 Whether or not Dr. Rapaport's conflict of interest is properly before the Court as an issue in itself, the conflict has obvious implications with respect to my evaluation of Dr. Rapaport's opinion. In light of the conflict, I must reject it. Moreover, since it was his opinion that led the additional evaluation contradicting Dr. Peterson's opinion, I find that Dr. Peterson's opinion should prevail. The State Fund's use of Dr. Rapaport in this case poisoned the well. I decline to drink water from the well.

ORDER

¶31 1. The Findings of Fact, Conclusions of Law, and Order issued by the Department hearing officer on February 4, 1999, are **affirmed**.

¶32 2. Claimant is entitled to costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.

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

¶34 4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Decision on Appeal.

DATED in Helena, Montana, this 29th day of October, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David A. Hawkins

Mr. Willard E. Vannett - Certified Mail

Mr. Daniel B. McGregor - Courtesy Copy FAXED

Date Submitted: September 1, 1999. The entire transcript is 23 pages.

2. The rule provides in relevant part:

(5) A motion for leave to present additional evidence must be filed no later than the time set for the last brief or, if oral argument is timely requested, then no later than the day before the argument. If 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 department, then the court may remand the matter to the department and order that the additional evidence be taken before the department upon conditions determined by the court. The department 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.

3. The doctor did not enumerate the abnormal test results or comment on their significance, other than for an elevated calcium level. The actual test results, which identify the abnormal levels, are found at Ex. H at 4-6.

4. Hypercalcemia is an excess of calcium in the blood. *Dorland's Illustrated Medical Dictionary, XXV ed.*, at 737.

5. Dr. Spencer found no obvious connection between claimant's elevated blood calcium level and his possible liver disease. (Ex. F at 9.)

6. Hepatotoxin is a toxin destructive to liver cells, especially one produced by injecting an animal with liver cells. *Dorland's Illustrated Medical Dictionary, XXV Edition*, at 704.