

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 77

WCC No. 9903-8168

STATE COMPENSATION INSURANCE FUND

Appellant

vs.

WILLARD E. VANNETT

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

Summary: State Fund asked for reconsideration of WCC decision affirming hearing officer's finding claimant suffered from occupational disease. Decision was based on Court's finding physician had conflict of interest.

Held: Discarding particular physician's opinion and relying on other physician's opinion, which was more reliable than contrary opinion on which hearing officer relied, was not an option Court favored where physician's conflict of interest poisoned handling of entire case.

Topics:

Evidence: Expert Testimony: Generally. Where particular physician's conflict of interest had poisoned the handling of the entire occupational disease medical review process, Court declined to reconsider ruling affirming hearing officer's decision that claimant suffered from an occupational disease.

Judicial Review: Appeal. Where particular physician's conflict of interest had poisoned the handling of the entire occupational disease medical review process, Court declined to reconsider ruling affirming hearing officer's decision that claimant suffered from an occupational disease.

Occupational Disease. Medical Panels. Where particular physician's conflict of interest had poisoned the handling of the entire occupational disease medical review process, Court declined to reconsider ruling affirming hearing officer's decision that claimant suffered from an occupational disease.

Physicians: Conflict of Interest. Where particular physician's conflict of interest had poisoned the handling of the entire occupational disease medical review process, Court declined to reconsider ruling affirming hearing officer's decision that claimant suffered from an occupational disease.

¶1 On October 29, 1999, the Court entered its Decision on Appeal, 1999 MTWCC 66, affirming a Department of Labor and Industry decision finding that respondent suffers from an occupational disease. The Court did so despite its determination that the medical evidence clearly preponderates in favor of the appellant (State Fund). It based its decision on a clear conflict of interest of a physician (Dr. Gary Rapaport) who was employed by the State Fund as a consultant in the case and who then served as chair of the occupational disease panel reviewing the respondent's claim.

¶2 The appellant asks the Court to reconsider. It argues that even if I cast out Dr. Rapaport's opinion the medical evidence still preponderates in favor of the State Fund. More specifically, it argues that Dr. Dana Headapohl's opinion that claimant does not suffer from an occupational disease is more reasoned and persuasive than Dr. Ronald Peterson's opinion that claimant suffers from an occupational disease.

¶3 I agree with the State Fund's analysis of the evidence. Dr. Headapohl's opinions are in fact more persuasive than are Dr. Peterson's. As noted in my decision, Dr. Headapohl had more information about the claim than did Dr. Peterson and also researched medical literature pertinent to claimant's condition, which Dr. Peterson did not do. Thus, even if Dr. Rapaport's opinion is disregarded, the medical evidence preponderates against a finding of an occupational disease.

¶4 The State Fund's argument is nonetheless flawed.

¶5 The medical panel provisions in effect at the time of respondent's evaluation called for an initial evaluation by a single panel physician. If either party disagreed with that initial evaluation, then either party could request an examination by a second panel member. The State Fund made such a request, resulting in the designation of Dr. Headapohl to perform a second evaluation. That second evaluation automatically triggered the appointment of a third panel member to act as the "presiding officer." The "presiding officer," Dr. Rapaport in this case, was required to consult with the first two physicians and then issue the final panel opinion. § 39-71-602, MCA (1997).

¶6 Since Dr. Rapaport's conflict of interest disqualified him from serving as panel chair, the proper legal remedy was **not** to merely disregard his opinion and weigh the remaining two opinions; rather, the remedy was to remand the matter to the Department for either an entirely new panel evaluation, starting from scratch, or for it to appoint a new presiding officer to evaluate the matter and issue a new, final panel report. In either event, the party

on the unfavorable end of the new panel finding would be entitled to request a new evidentiary hearing.

¶7 In my Decision on Appeal I did not order either remedy and instead affirmed the Department's decision. In doing so, I explained:

The State Fund's use of Dr. Rapaport in this case poisoned the well. I decline to drink water from the well.

1999 MTWCC 66 at ¶ 30. While my imagery is poignant, the State Fund deserves a further explanation of my rationale for affirming the Department's decision rather than remanding the case for a further evaluation and hearing.

¶8 While the State Fund properly notes that Dr. Headapohl's opinion pre-dated Dr. Rapaport's appointment as panel chair, Dr. Rapaport played a key role in the State Fund's decision to request a second panel evaluation: In fact he recommended the second evaluation. Thus, Dr. Headapohl's opinions are a consequence of his advice. He "poisoned the well" not only by acting as panel chair but also by giving the State Fund the advice which led to Dr. Headapohl's opinions.

¶9 It can be argued that at the time Dr. Rapaport recommended the second evaluation he did not have a conflict of interest since he had not yet been appointed the panel chair. But, at the time of his advice to the State Fund he was aware that he was a member of the Department's occupational disease panel. Given the limited number of Montana physicians with expertise in occupational disease cases,⁽¹⁾ he was surely aware he might be asked by the Department to serve as a panel physician in reviewing respondent's claim, and when subsequently asked to participate in the panel he agreed. It was, and is, my view that the State Fund, which employed Dr. Rapaport, was and is responsible for his actions in this case. Dr. Rapaport should have known when he advised the State Fund to request a second panel evaluation that he would be in a position to influence the ultimate outcome of the case. Nonetheless, he set in motion the very process which ultimately benefitted the State Fund. Under these circumstances it would be manifestly unfair and unjust to subject the respondent to a second panel procedure.

¶10 The motion for reconsideration is **denied**.

DATED in Helena, Montana, this 2nd day of December, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David A. Hawkins

Mr. Willard E. Vannett - Certified Mail

Submitted: November 30, 1999

1. The Court has extensive experience with physician testimony in occupational disease cases. Based on its experience, it is aware of approximately a half-dozen physicians in Montana who specialize in occupational medicine.