IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 80

WCC No. 9903-8174

STANDARD FIRE INSURANCE COMPANY/
SISTERS OF CHARITY OF LEAVENWORTH HEALTH SERVICES CORPORATION,

Appellants

vs.

VICTORIA AUSTIN

Respondent.

ORDER ON APPEAL

¶1This is an appeal from a decision of the Department of Labor and Industry (Department) finding that respondent (claimant) suffers from an occupational disease (OD).

Record on Appeal

¶2 The record on appeal consists of the transcript of a hearing conducted on May 12, 1998, and the Department file, including the exhibits and depositions admitted at the hearing.

The Claim

¶3 Claimant alleges she suffers from an occupational disease as the result of toxic exposures in her work as a registered nurse. Her claim for compensation, dated May 2, 1995, states [she] was exposed to toxins or poisons on 6 floor Ross Tower at St. Vincents Hospital in Billings, Mt. over a 3 year period that I was employed there. (Ex. A.) The evidence produced at hearing emphasizes exposure to Dursban, a pesticide, on one particular occasion (August 25, 1993), but includes testimony about intermittent, ongoing exposure to pesticides, helicopter exhaust fumes, and various other fumes arising from remodeling at the hospital.

¶4 On April 1, 1996, the Department referred the claimant to Dr. Dana Headapohl for a medical panel exam under section 39-72-602, MCA. Dr. Headapohl examined claimant and concluded her symptoms of incoordination, slurred speech, sensory disturbance and urinary retention are all consistent with organophosphate poisoning. (Ex. C at 7.) Dr. Headapohl noted: Organophosphates are widely used as insecticides in buildings

because of their short environmental half-life, compared to organochlorine pesticides. While relatively safer compared to previously used pesticides, however, they are toxic to humans. (Id.) Based on Dr. Headapohls report, the Department issued an Order finding that claimant suffered from an OD. (order referring copy of medical reports to parties issued July 1, 1996.)

¶5 The insurer then requested a hearing before the Department. The matter was heard in May of 1998.

¶6 Shortly after the insurer filed its final brief arguing the case to the hearing officer, it moved to delay the decision and then requested the case be reopened for additional evidence. The new evidence concerned deposition testimony of Dr. Headapohl in a products liability case filed by claimant. The hearing officer denied the request to reopen, explaining:

> According to the insurer, Dr. Headapohl changed her mind after reviewing information about claimants symptoms as she reported them to Dr. Roger Williams, a neurologist, in November of 1997, some six months prior to this contested case hearing. The insurer has not shown any justification for its failure to obtain and present the same information to Dr. Headapohl in May of 1998.

(Final Agency Decision at 4 n.1.)

¶7 Following the filing of its appeal, the insurer moved this Court for leave to present the additional evidence, making the same argument it made to the hearing officer. I denied the motion, finding that the insurer had sufficient information prior to the hearing to obtain the evidence it now sought to introduce. (Transcript of Proceedings -- Oral Argument, dated May 27, 1999, at 18-19.)

The Decision Below

¶8 The hearing officers findings of fact are specific and supported by references to testimony and documentary evidence. The hearing officer credited the testimony of claimant that she came into contact with a pesticide (Dursban) on August 25, 1993, that she was exposed to pesticides on other occasions, and that her most serious symptoms developed after the August 25, 1993 exposure. (Final Agency Decision at 1-2; Tr. 55-56, 60, 62-63.) The hearing officer similarly credited the testimony of claimant that she came into contact with a number of other environmental irritants, including helicopter exhaust fumes, and various fumes and airborne particles from remodeling at the hospital, which at times made her symptoms worse. (Final Agency Decision at 1-2.) In crediting claimant, the hearing officer noted her testimony was supported, to varying degrees, by the testimony of six coworkers. (*Id.*)

¶9 The hearing officer heard a great deal of evidence from the insurer in support of its argument that the application of Dursban, and the presence of other fumes at work, could not have been the cause of claimants illness. This evidence included testimony about the customary pesticide application procedures, the hospitals ventilation system, and the results of testing for airborne irritants. The hearing officer, however, was not persuaded by that evidence. He noted that no direct evidence was presented by the

insurer regarding the one specific application of Dursban that most immediately preceded claimants acute symptoms. Rather than crediting the picture of hospital conditions the insurer sought to portray, the hearing officer relied upon the testimony of the lay witnesses that they experienced Dursban levels they could smell and see (as moisture) more than once. (*Id*. at 5.) He noted that claimants testimony about the presence of chemical smells, which ran counter to the hospitals contentions, was supported by the testimony of coworkers Kim Hoeckelberg and Janyth Rasmussen. (Hoeckelberg Dep. at 9-10, 17; Rasmussen Dep. at 11.)

¶10 The testimony of three doctors was presented at the hearing. The hearing officer reviewed the expertise and conclusions of each doctor. He credited the testimony of Dr. Headapohl, a specialist in occupational medicine, including toxicology, and that of Dr. Richard Nelson, a neurologist with expertise in damage resulting from toxic exposure. Both doctors opined that claimants illness resulted from her exposure to toxins at work. The hearing officer was explicit in his reasons for not crediting the contrary opinion rendered by Dr. Patricia Sparks, a physician specializing in consultations regarding occupational medicine, environmental medicine, and clinical toxicology. This included Dr. Sparks tendency to attribute symptoms to psychiatric causes, a tendency that claimant contended was demonstrated in other cases about which Dr. Sparks had written or testified. In addition, the hearing officer was unpersuaded by Dr. Sparks testimony that Dursban, properly applied, could not cause harm to even a hypersensitive human being.

¶11 In the proceeding below, the insurer contended that claimants entire case rested on a post hoc logical fallacy, i.e., that it rested solely on the fact that claimant experienced symptoms following exposure to Dursban, without actual proof of a causal connection. The hearing officer disagreed, noting, among other things, that he considered Drs. Headapohl and Nelson credible in describing how the particular symptoms and problems fit the aftermath of toxic exposures. (Final Agency Decision at 5.) Relying upon the medical evidence and the record as a whole, the hearing officer concluded that claimants symptoms resulted from toxic exposures at work. (*Id*.)

Standard of Review

¶12 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.

Discussion

¶13 On appeal the appellants argue (1) that the hearing officers findings of fact were not supported by substantial credible evidence based on the record as a whole and (2) that the hearing officer erred in denying appellants motion to reopen the case for submission of additional evidence.

¶14 The substance of the second ground was already argued to this Court pursuant to appellants motion for leave to present additional evidence, which the Court denied. The Court incorporates its conclusions in denying that motion (*see* attached Transcript of Proceedings -- Oral Argument, May 27, 1999, pp. 8-19) and affirms the decision of the hearing officer not to reopen the case. Like the hearing officer, the Court concludes that the insurer had sufficient information prior to the hearing to lead it to and to use the evidence at the hearing. Dr. Williams report was available in November 1997, some six months prior to the hearing and appellants could have discovered it, shown it to Dr. Headapohl, and questioned her concerning its effect on her opinions.

¶15 The issue remaining for decision is whether the hearing officers findings were clearly erroneous under the standard set forth in section 39-72-612(2)(3), MCA. Under that standard, the hearing officer's findings of fact may be overturned on judicial review if 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 officers assessment of witnesses credibility. *McKay v. City of Choteau*, 1999 MTWCC 20, ¶ 18.

¶16 Based upon review of the record as a whole, the Court finds substantial evidence supporting the hearing officers findings and conclusions. The claimants testimony provides evidence of her exposure to pesticide on August 25, 1993, the date the insurer concedes Dursban was used. She recalled there were bugs coming in around the windows in hospital rooms 612 and 614, and that someone from Echo Lab sprayed around the windows in both rooms. (Tr. at 291.) She testified: I asked him what he was spraying, because it smelled so bad. It smelled like diesel . . . . (*Id.* at 292.) Claimant testified that she was near enough to the room being sprayed to see inside, and that she thinks she probably inhaled Dursban through the mouth. She testified that her immediate symptoms were a burning in my eyes and nose and excess palpation and headache. (*Id*. at 60.) She also began having difficulty remembering. (*Id*.) Approximately two weeks after this exposure she began to experience difficulty in gait and balance. (*Id*. at 63.) Her symptoms continued, and eventually led to her inability to work.

¶17 Appellants argue that the August 25, 1993 exposure was claimants sole exposure to Dursban and that the exposure was insufficient to cause her illness. Based primarily upon the records of pest control at St. Vincents by an exterminator hired by the hospital (*see* Tr. at 239, and Ex. 2), appellants argue claimant did not come into contact with pesticide at the hospital on any occasion other than August 25th. It then argues that

Drs. Headapohl and Nelson based their opinions on incorrect information regarding additional exposures and that their opinions should therefore be disregarded. The argument, however, fails to take into consideration other evidence supporting the inference claimant was exposed to pesticides on occasions other than August 25, 1993.

¶18 Claimant testified she smelled the strong odor she associated with pest control, like diesel, on other occasions, and believes they sprayed more than they recorded. (Tr. at 56, 292.) In addition, claimant testified that she worked all over the hospital, including ICU. Karen Anderson, a licensed practical nurse for St. Vincents, recalled that the hospital had ongoing problems with insects in what she remembered as Room 612, lasting what seemed like for two or three years. (Anderson Dep. at 28.) (Room 612 was one of the rooms sprayed on August 25, 1993.) Anderson believed that the hospital sprayed more in those rooms than in other rooms on the floor. (*Id*.) Janyth Rasmussen, a charge nurse, recalled the housekeeping people (in contrast to the exterminator hired by the hospital) spraying in the empty rooms occasionally. (Rasmussen Dep. at 11.) In addition, licensed practical nurse Irene Aure testified to her recollection that hospital personnel at times sprayed for insects on the sixth floor. (Aure Dep. at 9-10.) Such evidence contradicts the appellants insistence that the records of an outside exterminating company records every use of Dursban and other pesticides in the hospital.

¶19 Kim Hoeckelberg, a certified nursing assistant who acknowledged a personality clash with claimant, provided the strongest support for an inference that pesticide use was ongoing. (Hoeckelberg Dep. at 14.) She testified to persistent attempts to solve the insect problem: There were problems with flies in the room, terrible flies. I mean they tried and tried and tried to get rid of them. They would spray. I dont know necessarily who it was, if it was a company or somebody from the hospital or the construction or what . . . . (*Id.* at 8-9.) Ms. Hoeckelberg indicated the spraying was ongoing and the insect problem lasted for months. (*Id*. at 17-18.) Her testimony also supports the inference, contrary to the argument of the insurer, that spraying involved fumes reaching employees or patients. When asked whether anyone other than claimant reported physical problems associated with pest control, Ms. Hoeckelberg referenced just the basic complaints of it, you know it did, it stunk. (*Id.* at 22.)

¶20 The record contains substantial evidence supporting the hearing officers further finding that claimant was exposed to other environmental irritants which exacerbated claimants symptoms. Claimant testified that exposure to cleaning solvents increased symptoms of [n]ot being able to think straight, creating a [k]ind of brain fog and eye and nose irritation and a taste in [my] mouth, a funny taste. (Tr. at 34.) She testified that her symptoms were worse when the helicopter transporting patients to and from the hospital landed. (*Id*. at 69-70.) When asked about the impact of dust from remodeling, claimant testified that all of the exposures on the floor made my symptoms worse, and that is why I eventually could not walk at all without hanging on to walls. (*Id*. at 36.)

¶21 Again, claimants testimony is supported by that of coworkers. Ms. Anderson recalled smelling exhaust fumes from the helicopter on occasion, and heard fellow employees complaining that the fumes caused them to have headaches. (Anderson Dep. at 12.) Carol Van Aitken, a ward clerk at the hospital, testified that she was annoyed at times by exhaust fumes from the helicopter pad. (Van Aitken Dep. at 10.)

She recalled several people on the floor complaining about the smell. (*Id.* at 20.) Irene Aure testified she smelled fumes from the helicopter once or twice a day. (Aure Dep. at 8, 20.) Ms. Rasmussen remembered smelling exhaust from the helicopters. (Rasmussen Dep. at 9, 24.) Ms. Hoeckelberg recalled smelling helicopter exhaust and said it was sometimes irritating. (Hoeckelberg Dep. at 12-13.) This evidence rebuts the appellants presentation that air studies indicated no significant fumes from helicopter exhaust.

¶22 Coworkers also corroborated claimants testimony about other fumes during construction at the hospital. Ms. Anderson recalled a glue smell during construction. (Anderson Dep. at 7.) Ms. Hoeckelberg testified that at one point it was really dusty from the construction, and that did give me a headache, and it did make me feel ill. (Hoeckelberg Dep. at 10.) She recalled that construction led to others complaining of the general smell and, you know, probably some people having a headache from the smell and such . . . . (*Id.* at 26.) Ms. Hoeckelberg also testified that claimant seemed more bothered by the various fumes than others and seemed ultra sensitive to smells. (*Id.* at 27.) Given this evidence, the record supports the hearing officers finding that claimant was exposed to environmental irritants contributing to her symptoms over an extended period of time.

¶23 The appellants argue there is insufficient medical evidence linking claimants illness to toxic exposure. However, as noted by the hearing officer, two doctors testified that claimant suffers from an occupational disease related to her exposures to fumes at the hospital. Moreover, the doctors provided specific reasons supporting their opinions.

¶24 While the appellants complain about the qualifications and methodology of Dr. Nelson, the record contains sufficient evidence to support the hearing officers reliance on Dr. Nelsons opinions. Dr. Nelson is board certified in neurology and psychiatry. (Tr. at 144.) His practice involves treatment of a wide range of neurological patients, including those exposed to toxic materials. (*Id.* at 145.) He provided a cogent and coherent explanation of claimants exposure and his reasons for linking her symptoms to the exposure. (*Id.* at 153-60). Significantly, he noted that exposure to different toxins can have a compounding effect clinically (Tr. at 163-64), that some people are more sensitive to chemicals than others, and that toxic exposure can cause permanent injury in some people but not in others. (Id. at 164-65.) In addition, Dr. Nelson addressed the possibility raised by other doctors that claimant suffered from an intrinsic cerebellar disease process. He opined that an intrinsic disease process would not reverse itself at all, indicating an intrinsic process was not likely the case with claimant, who at times showed some improvement in symptoms. (Id. at 168.)

¶25 Dr. Headapohl found claimants symptoms consistent with organophosphate poisoning. In her report, she stated that Ms. Austins symptoms of incoordination, slurred speech, sensory disturbance and urinary retention are all consistent with organophosphate poisoning. (Ex. C at 7.) She also noted: There may [be] delayed neurotoxic effects including ataxia and distal sensory and motor disturbances, anxiety and depression. (Id.) Ataxia, which is failure or irregularity of muscular coordination, was consistently found by the physicians examining claimant. (Ex. 3, at 6, 8, 21, 46-b.)

¶26 Dr. Headapohl testified that her opinion was based upon claimants exposure to Dursban, and that she did not consider the impact of exposure to other chemicals. (Tr. at 373.) Her report noted, however, that [c]erebellar ataxia can also be caused by toluene, mercury and certain medications but there is no clear evidence for such exposures. (Ex. C at 7.) Dr. Nelson, who did consider claimants report of exposure to other substances, noted that toluene is commonly used for preservation of carpets or draperies. (Tr. at 150). One of claimants complaints involved smells emanating from cleaning of carpets. (Id. at 34.) Thus, although Dr. Headapohl did not consider the impact of other exposures, her report supports the hearing officers reliance on Dr. Nelsons conclusion that claimants symptoms were worsened by contact with other environmental irritants.

¶27 Appellants argue the opinions of Drs. Nelson and Headapohl should be disregarded in light of evidence that claimants symptoms have worsened since she left her employment. Claimant did testify that her condition has worsened. (Id. at 284-85.) But she also testified that she improved markedly upon leaving the hospital, and that her condition changes: [s]ome days it would be better, and some days worse. (Id. at 294.) The record is not completely clear exactly which symptoms improved after claimant left work, but suggests that she showed improvement in the areas of headaches, blurred vision, and ability to hold things. (Id. at 396.) The record also indicates claimant obtained a walker following a visit to Dr. Roger Williams in November of 1997, suggesting coordination has remained a persistent problem. (Id. at 285.) Viewed as a whole, the record supports an inference that some symptoms associated with toxic exposure have resolved after she left employment, but others have continued and worsened. In any event, Drs. Nelson and Headapohl were subjected to cross-examination and adhered to their opinions that claimant suffers from an occupational disease caused by her exposure to chemical fumes while working at the hospital.

¶28 Appellants also argue that the hearing officer did not consider evidence regarding examination of claimant by other physicians. The record contains medical reports from Drs. Scott Callaghan and Roger Williams, both neurologists, and from Dr. J. R. Fulgham at the Mayo Clinic. Review of their records indicates these doctors could not determine the cause of claimants condition. In February of 1995, Dr. Callaghan wrote: Patient with progressive ataxia, most likely of a familial type?, but acknowledged there was no family history in regards to this other than the father had a tremor as he aged. (Ex. 3 at 6.) Unable to diagnose claimant, Dr. Callaghan referred her to Dr. Williams, who wrote, in April of 1995, that the etiology [of claimants condition] remains a mystery. (Id. at 29.) He did record, however, that her symptoms have improved substantially in the last four of five weeks. She has been off work during that time and this has made her suspicious that there may be some environmental toxin at work that is responsible for her symptoms. (Id.) Dr. Williams referred claimant to the Mayo Clinic. In April of 1995, Dr. Fulgham of the Mayo Clinic concluded claimant suffered from a cerebellar ataxia of uncertain etiology. (Id. at 23.) As the appellants suggest, the medical records show that other physicians were unable to ascertain the cause of claimants symptoms. However, those doctors did not testify. They were not cross-examined. It is unknown whether they had all of the information that Drs. Nelson and Headapohl considered. The hearing officer was justified in giving little weight to their inability to determine the cause of claimants condition.

¶29 Finally, the appellants contend that the hearing officer should have chosen the opinions of Dr. Sparks over those of Drs. Nelson and Headapohl. Review of the testimony and records of Dr. Sparks, however, fully supports the hearing officers decision rejecting her opinions in favor of those of Drs. Nelson and Headapohl. Dr. Sparks opinions rest in large part upon the hospitals contention that claimant was exposed to Dursban on a single day. As discussed previously, the record as a whole supports the hearing officers contrary finding. In addition, the hearing officer found Dr. Sparks willingness to lay an undefined problem at the feet of psychiatry lessens her credibility. (final agency decision at 5.) Dr. Sparks written report contains the following:

Ms. Austins presentation is that of a very sincere and likeable person. I would have some difficulty attributing her presentation and unusual beliefs to conscious malingering. It is more likely that there is an unconscious psychological and psychosocial process affecting her symptoms presentation and role dysfunction at the present time. Psychiatric and/or psychological evaluation is strongly recommended. . . .

Ms. Austin exhibits a number of symptoms that are actually suggestive of panic disorder, as well as depression. Weight loss, chronic fatigue, difficulty concentrating, episodes of dizziness or lightheadedness, and palpitations, suggest the possibility of an anxiety disorder as well as underlying depression.

(Ex. 3 at 110.) Psychological and psychosocial documentation supporting Dr. Sparks speculation was not provided.

ORDER ON APPEAL

¶30 1. The January 28, 1999 final agency decision of the Department of Labor and Industry is affirmed.

¶31 2. Petitioner is entitled to attorney fees and costs pursuant to section 39-72-613, MCA. The parties shall follow the procedures set forth in ARM 24.5.342 and 24.5.343.

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

¶33 4. 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 10th day of December, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Peter J. Stokstad
Mr. Norman H. Grosfield

Date Submitted: July 12, 1999
Attached: Transcript of Proceedings -- Oral Argument, May 27, 1999, pp. 8-19)

1 the time of trial, but certainly you've cited the

2 Rules of Civil Procedure which had been adopted

3 through the Attorney General's rules, and in turn

4 by the Department of Labor concerning

5 supplementation, and you've also cited -- what is

6 it, the Thibaudeau case?

7 MR. STOKSTAD: Thibaudeau case.

8 THE COURT: -- which indicates that

9 notice and a set of discovery requiring

10 supplementation on a continuing basis imposes some

11 sort of obligation to do so, and you've cited that

12 case. So I take it at the time of this hearing in

13 May, you just didn't think of those things?

14 MR. STOKSTAD: Well, again, we're

15 looking back in hindsight. Number one, I wasn't

16 aware of the significance of it until I saw Dr.

17 Headapohl's deposition in August where she was

18 shown that information showing that Ms. Austin's

19 condition from a doctor had -- the clinical

20 picture had changed, that her condition had

21 worsened. And so at that time -- and I asked her

22 about that. You have the record of the trial. I

23 certainly asked Ms. Austin about it, but I

24 certainly wasn't aware of the significance of that

25 note as it applied to Dr. Headapohl's testimony

1 later on. When I read the deposition, it seemed

2 to me that that was really the critical piece of

3 information that was shown to her in the August

4 deposition that caused her to take that step to

5 change her opinion.

6 THE COURT: I understand that. But on

7 the other hand, in May, if you would have asked

8 for that, and you would have seen it, then you

9 could have explored it at that time. Instead we

10 have another lapse here of about at least another

11 three months, three and a half months.

12 MR. STOKSTAD: When you say lapse, you

13 mean between the time of the trial and the time of

14 Headapohl's deposition, right? There's a three

15 month period of time.

16 THE COURT: And before you became aware

17 of the significance.

18 MR. STOKSTAD: Right.

19 THE COURT: Norm, let me hear from you

about -- I especially want you to talk about whether or not you think you had a duty to supplement. And I understand you didn't have the information, so I'm not indicating that it's anything personal on your part, but the duty would extend to your client as well.

MR. GROSFIELD: Let me address that, Your Honor. The rule specifically says I don't have a duty to supplement. The Thibaudeau case, as I recall -- I was trying to listen to Peter talking here -- it involved a statement that had been given to the insurance company almost right away after an automobile accident occurred, and when the Defendant answered discovery, they didn't include that. So they had already had this statement almost at the time of the accident, and the Court said that if they had the statement, they should have provided it; and when they figured out they had the statement, they certainly should have provided it. So it's a totally different situation than what we have here, Your

16 Honor.

17 THE COURT: Except we have a broad

18 statement in there that the --

19 MR. GROSFIELD: And that's a statement

20 that typically is put in Interrogatories, and the

21 way to resolve that, and if Peter had been so

22 concerned about that -- and Peter goes into great

23 detail with every physician about the condition

24 worsening, and Peter is the one that called Dr.

25 Headapohl. Dr. Headapohl was his witness.

1 THE COURT: I understand that. I

2 understand that, Norm. But I'm just trying to

3 find out what we do with this note. This note is

4 a significant note.

5 MR. GROSFIELD: What amazes me is that

6 Peter sits here and says, "I didn't know if I

7 could get it." He was introducing exhibits at

8 trial that he had just gotten faxed to him from

9 the insurance company for Dow Elanco. So to say,

10 "Well, I'm not sure I could have gotten that from

11 Dow Elanco" is nonsense. He was continuing to

introduce exhibits right at the date of the trial that had been faxed to him. So he was in communication with Dow Elanco continuously during this thing. I even got calls from Dow Elanco's attorney on this thing, and saying, "Well, Mr. Stokstad," or "Mr. Wills told me this," and this and this. They were in continuous contact.

THE COURT: I'm putting this in two parts in my mind. The first part that I need to determine is what obligation your client had to supplement, if any; and the second part is whether or not his failure to request these records, at least at the time of trial or shortly after the time of the hearing, bars him from seeking a

reopening at this point in time. I think those are two separate things in my mind.

MR. GROSFIELD: My position is, Your Honor: I did not have an obligation to supplement pursuant to the rule, unless you have a situation like in Thibaudeau where you had the information at the time the Interrogatory was propounded, and you

neglected to submit it.

THE COURT: Well, what about the obligation under 26(e)(2)(b), which says you have an obligation to supplement where the party knows that the response, though correct when made, is no longer true, and that the circumstances are such that a failure to amend the responses in substance is --

MR. GROSFIELD: I didn't even know that she had gone there, Your Honor.

THE COURT: I understand that. But that duty would extend to her personally as well as to you if you had it.

MR. GROSFIELD: In fact, there was extensive testimony about her deteriorating condition at trial, so Mr. Stokstad and Mr. Wills knew all about that at trial. And certainly if they went through extensive examination of their

own witnesses and cross-examination of Dr. Nelson on this thing about a deteriorating condition, and they knew at that time that she had been to other

4 physicians, they certainly could have made an

5 inquiry of me or Dow Elanco to obtain whatever

6 updated medical they thought they needed to

7 support their arguments. And my client even

8 testified that she had deteriorated, and he got

9 testimony from Dr. Headapohl, and the IME doctor,

10 and Dr. Nelson regarding that very issue, so --

11 THE COURT: Were there other medical

12 records out there that weren't disclosed that came

13 out in --

14 MR. GROSFIELD: Not that I know of. No.

15 The answer is no.

16 THE COURT: So this is the only medical

17 record that we're --

18 MR. GROSFIELD: This is the only one.

19 THE COURT: Peter, what about that?

20 What about -- Obviously it sounds like you had

21 some information that her condition was

22 deteriorated. Some of that was put to Dr.

23 Headapohl, but Dr. Headapohl certainly didn't have

24 the smoking gun, so to speak, in the guise of Dr.

25 Williams' note. But you did have some information

that she was deteriorating.

MR. STOKSTAD: Well, I did, and that was from that discovery response that we received on May 6th indicating in an answer that she gave in the other lawsuit that she was getting worse, but --

And I want to just back off for just a minute. The point of raising this discovery question was not to cast aspersions on Mr. Grosfield. It was more to suggest we did what we were supposed to do under the rules to obtain the information that we're talking about today, so I wanted to make that clear, that this was not an attempt to cast any sort of aspersion on Mr. Grosfield. It was more -- Our point was to say to you that we exercised due diligence in trying to get the medical records that we received.

THE COURT: That's my question, is whether or not you did exercise due diligence, and if you had information that her condition was degenerating, and you knew that there was this other medical note, whether at that point you should have gone looking for them.

MR. GROSFIELD: They even cross-examined

25 her about that medical visit extensively. During

1 the trial, they cross-examined her about that,

2 that medical visit that she made.

3 THE COURT: I didn't see that part of it.

4 I'm not sure you cited that. I know you cited

5 where about the wheelchair -- not the wheelchair

6 -- the walker and that was --

7 MR. GROSFIELD: I cited it in my brief.

8 THE COURT: I'm just trying to remember

9 how extensive it was. Page 284 and 285. Actually

10 it's at 285 and 286. Norm, other than 285 and

11 286, is there other examination on the 1997 visit?

12 MR. GROSFIELD: No, but there's other

13 examination using Dow Chemical discovery

14 information that was never provided to me.

15 There's extensive examination of Vicki throughout

16 the testimony. Well, all of a sudden, he pulls

17 out Dow Chemical information, and starts

18 cross-examining her, and the stuff was never

19 provided to me. I didn't know anything about it.

20 And so there's extensive examination from Dow

Chemical discovery, and he specifically references the October visit to Dr. Williams because that information had been provided to Dow Elanco. And if they were so concerned about that -- I mean I asked for discovery of what

they have, and I think that's legitimate, because they were feeding information back and forth to each other continuously -- it was obvious -- and working hand in hand, and they could have had that faxed to them within five minutes if they were so concerned about updated medical information. And they cross-examined Vicki about that very visit.

THE COURT: Well, my concern is they could also have asked you for it.

MR. GROSFIELD: And they could have asked me for it.

THE COURT: At the time of the hearing.

MR. GROSFIELD: They had several months from the time that examination took place, and it's very common -- especially in a case that has gone on so long -- it's very common to send a

17 letter, to make a phone call and say, "Is there

18 updated medical? I need that before trial to

19 prepare for trial." It's done all the time, and

20 that's how you do it.

21 THE COURT: Peter.

22 MR. STOKSTAD: You have the record of --

23 I deny that we were in collusion with -- I've

24 never pretended, and I've indicated that in our

25 brief, that there was an exchange of written

1 information. There was no ongoing continuous

2 communications between us and Dow or Ecolab, for

3 what's that worth. I learned for the first time

4 in August that she had been deposed. I didn't

5 know what their plans were. I wasn't working with

6 them in that regard.

7 And I would just say that again, you

8 have the discovery information. I didn't

9 understand the significance of that medical note

10 until I saw Dr. Headapohl's testimony in August,

11 and that she was shown that information, and that

12 seemed to tip her -- I mean we did ask her about

13 that, and we asked her in the form of assumption,

"Assuming that her condition had gotten worse, would that be more consistent with organophosphate exposure or some sort of organic brain dysfunction?," and we asked those questions. But I again did not understand that it would be that significant to where she would split, she would go that extra step and say, "I'm willing to say now in August that her condition was not the result of this exposure."

THE COURT: But weren't you on notice that there was something out there that possibly could be of some significance?

MR. STOKSTAD: You have the discovery requests and the answers, and they do indicate on May -- as I said, on May 6th we did receive that.

THE COURT: One of my concerns is it's somewhat fortuitous that the deposition was taken at that time. If it had been taken later, for example, after this appeal, and I decided this appeal, you're stuck. So you would have never realized the significance of it unless you'd been

diligent in the first place, and gone and asked for it in May, or at the time of the hearing, shortly thereafter, saying, "Hey, there's medical information we don't have. It may be significant. Give it to me." I think that's where I'm going to end up.

The case has gone on a long time. If I send it back -- Terry Spear is a fairly diligent Hearing Examiner, and will probably give us some findings pretty quickly. But I think under the circumstances, I think there is an obligation to supplement. Norm's not personally culpable, but that obligation extends to his client.

On the other hand, I think, Peter, you should have -- You had enough information there to tell you that there might be something significant

there, and you should have asked for it then, and it was fortuitous that you got the information that it in fact was significant later down the road. So I'm going to deny the motion.

MR. GROSFIELD: Your Honor, I have a

whole outline here, but I guess I don't have to say it.

THE COURT: Where are we as far as other matters in this case?

MR. STOKSTAD: We just have to set a new date for the briefing, for the appellate brief.

THE COURT: What do we need?

MR. STOKSTAD: Let's see.

MR. GROSFIELD: Whatever --

MR. STOKSTAD: I understand Norm's concerns as far as time. I'm leaving the country for a couple of weeks by the 16th of June, so if I could have until maybe June 15th to get the appellate brief done.

THE COURT: So why don't you set June 15th as the deadline. And Norm, what do you need, two weeks?

MR. GROSFIELD: That's fine.

THE COURT: Two weeks after that, and then ten days after that for reply.