IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 47

WCC No. 9905-8211

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Petitioner/Insurer

and

CASCADE COUNTY SCHOOL DISTRICT 1

Employer

vs.

ROBERT ELLINGTON

Respondent/Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of case: Claimant, a janitor for over 25 years, alleges he suffers from fatigue, headaches, memory loss, confusion, dizziness, depression and other symptoms because of his exposure to chemicals at his workplace. He suffers from numerous other medical conditions, including hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis. Some of his symptoms occurred periodically over the past 20 years. Two doctors - one a specialist in occupational disease, but not board certified and without a residency in that specialty, and the other a neurologist - testified that claimant's multiple symptoms were caused by his exposure to cleaning chemicals at work. Both felt that he was exposed to trimellitic anhydride and toluene di-isocyanate; the neurologist specifically attributed his deficits to those chemicals. The workplace cleaners listed neither chemical. While the two physicians surmised that the chemicals were present, they did not know that for fact. The occupational disease specialist said the lack of those chemicals did not change his opinion, since he attributed claimant's symptoms to exposure to multiple chemicals. The third physician who testified is board certified in allergy, immunology, and internal medicine. He is a professor at a medical school, has done original medical research, has authored and edited hundreds of medical articles and textbook chapters, serves as a peer reviewer for several medical journals, authored the position statement of the American Academy of Allergy and Immunology concerning multiple chemical sensitivities, and has received numerous honors and awards. He testified emphatically and

positively that neither trimellitic anhydride nor toluene di-isocyanate were present in the workplace chemicals and that the chemicals that were present in the cleansers did not and could not cause claimant's symptoms. Moreover, he said that claimant's other conditions fully accounted for his symptoms.

Held: Claimant does not suffer from an occupational disease. The claimant failed to prove he was exposed to either trimellitic anhydride or di-isocyanate at the workplace. His witnesses' belief that these chemicals were present was speculation. Multiple chemical sensitivities, which was what the first physician in essence described, is not an accepted diagnosis among most medical practitioners, is unproven and has been discredited. The credibility of the second physician was undermined by his lack of candor in response to at least two questions, especially a question regarding his research prior to formulating his opinion, and his identification of medical literature as supporting his opinions when in fact it did not. The third physician's testimony was by far the more persuasive. He had better medical credentials, was more familiar with medical standards and research, and provided better explanations. Moreover, many of claimant's continuing problems may be due to his failure to take prescribed medications and treatment.

Topic:

Evidence: Expert Testimony: Physicians. Testimony by two doctors – one a specialist in occupational disease, but not board certified and without a residency in that speciality, and the other a neurologist – that OD claimant's alleged fatigue, headaches, memory loss, confusion, dizziness, depression and other symptoms resulted from workplace exposure to chemicals not found persuasive by WCC where (1) both doctors believed claimant was exposed to trimellitic anhydride and toluene di-isocyanate, but evidence did not show those chemicals were present in cleaning supplies used by claimant; (2) one doctor's credibility was undermined by his lack of candor; (3) and third medical witness, who was board certified specialist in allergy, immunology, and internal medicine, a medical school professor with numerous relevant publications, and a recognized expert in immunology concerning multiple chemical sensitivity, testified more credibly that multiple chemical sensitivity as a diagnoses was discredited and that claimant's symptoms were explicable in terms of his other medical conditions, which included hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis.

Medical Conditions: Chemical Expposures: Toulene Disocyanate. Testimony by two doctors – one a specialist in occupational disease, but not board certified and without a residency in that speciality, and the other a neurologist – that OD claimant's alleged fatigue, headaches, memory loss, confusion, dizziness,

depression and other symptoms resulted from workplace exposure to chemicals not found persuasive by WCC where (1) both doctors believed claimant was exposed to trimellitic anhydride and toluene di-isocyanate, but evidence did not show those chemicals were present in cleaning supplies used by claimant; (2) one doctor's credibility was undermined by his lack of candor; (3) and third medical witness, who was board certified specialist in allergy, immunology, and internal medicine, a medical school professor with numerous relevant publications, and a recognized expert in immunology concerning multiple chemical sensitivity, testified more credibly that multiple chemical sensitivity as a diagnoses was discredited and that claimant's symptoms were explicable in terms of his other medical conditions, which included hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis.

Medical Conditions: Chemical Expposures:Trimellitic Anyhdride. Testimony by two doctors – one a specialist in occupational disease, but not board certified and without a residency in that speciality, and the other a neurologist – that OD claimant's alleged fatigue, headaches, memory loss, confusion, dizziness, depression and other symptoms resulted from workplace exposure to chemicals not found persuasive by WCC where (1) both doctors believed claimant was exposed to trimellitic anhydride and toluene di-isocyanate, but evidence did not show those chemicals were present in cleaning supplies used by claimant; (2) one doctor's credibility was undermined by his lack of candor; (3) and third medical witness, who was board certified specialist in allergy, immunology, and internal medicine, a medical school professor with numerous relevant publications, and a recognized expert in immunology concerning multiple chemical sensitivity, testified more credibly that multiple chemical sensitivity as a diagnoses was discredited and that claimant's symptoms were explicable in terms of his other medical conditions, which included hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis.

Medical Conditions: Chemical Expposures:Hypothroidism. Testimony by two doctors – one a specialist in occupational disease, but not board certified and without a residency in that speciality, and the other a neurologist – that OD claimant's alleged fatigue, headaches, memory loss, confusion, dizziness, depression and other symptoms resulted from workplace exposure to chemicals not found persuasive by WCC where (1) both doctors believed claimant was exposed to trimellitic anhydride and toluene di-isocyanate, but evidence did not show those chemicals were present in cleaning supplies used by claimant; (2) one doctor's credibility was undermined by his lack of candor; (3) and third medical witness, who was board certified specialist in allergy, immunology, and internal medicine, a medical school professor with numerous relevant publications, and a

recognized expert in immunology concerning multiple chemical sensitivity, testified more credibly that multiple chemical sensitivity as a diagnoses was discredited and that claimant's symptoms were explicable in terms of his other medical conditions, which included hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis.

Medical Conditions: Multiple Chemical Sensitivity. Testimony by two doctors – one a specialist in occupational disease, but not board certified and without a residency in that speciality, and the other a neurologist – that OD claimant's alleged fatigue, headaches, memory loss, confusion, dizziness, depression and other symptoms resulted from workplace exposure to chemicals not found persuasive by WCC where (1) both doctors believed claimant was exposed to trimellitic anhydride and toluene di-isocyanate, but evidence did not show those chemicals were present in cleaning supplies used by claimant; (2) one doctor's credibility was undermined by his lack of candor; (3) and third medical witness, who was board certified specialist in allergy, immunology, and internal medicine, a medical school professor with numerous relevant publications, and a recognized expert in immunology concerning multiple chemical sensitivity, testified more credibly that multiple chemical sensitivity as a diagnoses was discredited and that claimant's symptoms were explicable in terms of his other medical conditions, which included hypo-gonadism, hypothyroid, sleep apnea, preexisting depression, and rhinitis.

¶1 The trial in this matter began on April 5, 2000, in Great Falls, Montana, and reconvened on April 6, 2000, in Helena, Montana. Petitioner, Montana Schools Group Insurance Authority (MSGIA), was represented by Mr. Leo S. Ward. Respondent/claimant, Robert Ellington (claimant), was present and represented by Mr. Thomas J. Murphy. A partial trial transcript, consisting of the testimony of Dr. Richard A. Nelson, has been prepared.

¶2 Exhibits: Exhibits 1 through 25 were admitted without objection.

¶3 Witnesses and Depositions: Claimant, Dr. Emil J. Bardana, Dr. Ronald M. Peterson, and Dr. Richard A. Nelson were sworn and testified. The depositions of the claimant, Joe Murphy, and Dr. Emil J. Bardana, Jr. were submitted for the Court's consideration.

¶4 Issues Presented: As set forth in the Final Pretrial Order, the issues to be determined are:

1. Whether respondent is entitled to acceptance of his claim as an occupational disease or as an aggravation of a preexisting condition or disease.

2. Whether respondent is entitled to temporary total disability benefits.

3. Whether respondent is entitled to costs.

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

Claimant

¶6 Claimant is 56 years of age. He completed 11th grade and obtained a GED. He reported his high school grades as C's and D's. (*See* Ex. 23 at 30.)

¶7 Claimant began working as a janitor for the Cascade County School District in 1972, and worked steadily for 26 years, until July 1998. Prior to 1972 he worked as a laborer for various contractors in the Great Falls area, for his father in a landscaping endeavor, and doing janitorial work.

¶8 During his years as a janitor for the Cascade County schools, the claimant used numerous cleaning products. His claim alleges he suffers from an occupational disease and is unable to work on account of his workplace exposure to cleaning agents. The Court does not have his actual claim, but from other facts I infer that it was filed in 1997 or 1998. The parties agree that the 1997 version of the Montana Workers' Compensation Act applies. (*See* Final Pretrial Order, Uncontested Fact 3.)

¶9 At the time his claim was filed, the Cascade County School District was insured by MSGIA, which denied liability for the claim.

¶10 Following the filing of the claim, the matter was referred to the Department of Labor and Industry (Department). On November 16, 1998, the Department issued its initial determination finding that claimant suffers from an occupational disease. (Uncontested Fact 2.) MSGIA requested a contested case hearing. Meanwhile, the 1999 legislature amended the Occupational Disease Act, transferring original jurisdiction over all occupational disease disputes to the Workers' Compensation Court. In light of the amendment, the controversy was transferred to the Court for trial.

Workplace Exposure

¶11 Claimant's duties throughout his 26 years of employment as a janitor for the Great Falls School District were generally the same. During the school year he cleaned classrooms, hallways, offices, the stage and auditorium, and at times the toilets. (Ellington Dep. at 50-56.) His cleaning tasks included cleaning the chalk boards, emptying the garbage, dust mopping floors, dusting, changing lights, and moving supplies. A copy of a complete list of the claimant's assigned duties was posted in the janitor's closet. (Ex. 1.) One assignment not on the list, that of dust mopping the main hallway, was assigned in 1996 or 1997. During the summers he helped strip and rewax floors. He did not paint or work with glue. (Trial Test.; Ellington Dep. at 58-61.)

¶12 Claimant worked with a variety of cleaning products. On a daily basis he used ammonia or bleach, mop oil, and liquid soap. Some days he used a toilet bowl cleaner and Ajax. He used other products on an as-needed basis, but not daily. Claimant, with the assistance of Matt Rebich, prepared a list identifying all the products which he used in his janitorial work. The products were:

> Ammonia, Bleach, Mop Oil or Dustway, Dispatch Air Freshener; Magic toilet Bowl Cleaner; Nasheen Stainless Steel Cleaner, Enhance Liquid Soap, Ajax, Emerel PTU Soft Scrub Cleaner, Triad Disinfectant Soap, W.D.- 40, Step Off Stripper, Over & Under Sealer, Complete, Plaza, Traffic Coat, and Snapback Spraybiff.

(Ex. 2, spelling as in the original.)

¶13 The claimant believes his current condition is the result of using these products generally, and in particular by his use of Dustaway, which he used on a daily basis. After being assigned the duty of mopping the main hall in 1996 or 1997, his use of Dustaway increased. He sprayed the Dustaway on a large six-foot mop inside a janitor's closet, which measured between 8 or 10 feet by 6 feet. He usually sprayed the mop at the end of his shift in preparation for the following day. At times he reapplied the product during his regular shift. He also cleaned the mop daily with a hair brush. He did not use a mask or gloves. He said that Dustaway caused him to sneeze and his eyes to water.

Claimant's Symptoms

¶14 It is difficult to ascertain when the claimant first began to experience the symptoms which he attributes to his alleged chemical exposure at work. At trial he testified that his symptoms began in January/February of 1997, when he was assigned the additional duty of mopping the main halls.

¶15 During his deposition he stated that as early as March or April of 1996, he experienced forgetfulness, fatigue, and sleepiness at work. (Ellington Dep. at 63 and 65.) But he also indicated that as early as four or five years after starting to work as a janitor he experienced some of his symptoms. (*Id.* at 69.) He reported that his symptoms were not as bad then as now, but he was "really tired and weak" and the symptoms might last two months, then he would feel good. (*Id.*)

¶16 Claimant described his symptoms as: drowsiness to the extent he would sit down and sleep; an inability to think; faintness; flu-like feelings; hallucinations of spots before his eyes; aching in back of his knees, legs and arms; and an overall, continuing tired and fatigued feeling. He testified that in October of 1997, he discontinued driving for a number of weeks because he was afraid he would fall asleep at the wheel. (Trial Test.) In May 1998, claimant was reprimanded for sleeping on the job (Ex. 3), which he attributed to being sick. (Trial Test.) Ultimately he took sick leave in June 1998. (Ex. 23 at 31.) He has never returned to work. He testified that while his condition has improved somewhat since leaving work he

still gets fatigued, sees spots on occasion, has memory problems, is still nervous and anxious, often aches, and sometimes feels faint.

Overview of Expert Evidence

¶17 Both parties presented expert testimony. Claimant supported his claim with testimony by Drs. Ronald Peterson and Richard A. Nelson, both of whom testified that he is suffering from an occupational disease caused by his exposure to cleaning agents. Dr. Peterson concluded that whatever chemicals Dustaway may contain, the Dustaway caused claimant's multiple symptoms. Dr. Nelson concluded that the Dustaway contained trimellitic anhydride and touluene di-isocyanate, and that those two chemicals caused claimant's symptoms. Petitioner/Insurer supported its opposition to the claim with the opinions of Dr. Emil J. Bardana, who testified that claimant's multiple symptoms were caused by other preexisting conditions unrelated to his work, and that the chemicals at claimant's workplace did not contain trimellitic anhydride or touluene di-isocyanate, or any other chemicals that could have caused his complaints.

¶18 In evaluating the medical evidence, I have paid particular attention not only to the qualifications of each of the testifying physicians but also their reliance on medical literature and peer opinions, their reasoning, the objective evidence they mustered to support their opinions, and their consideration of claimant's prior medical history. As will be seen through the findings of fact that follow, neither Dr. Peterson nor Dr. Nelson have the qualifications or background of Dr. Bardana. Moreover, they were not as familiar with medical literature as was Dr. Bardana; they were out of step with a majority of the medical community in some of their opinions; and they failed to review and take into account claimant's prior medical history when initially formulating their opinions. Their opinions were unpersuasive.

Claimant's Medical History

¶19 Because of the importance of claimant's medical history to the resolution of this case, I begin by summarizing that history.

¶20 Claimant has suffered at least two, and perhaps three, concussions in his life. The first occurred when another child jumped on him and he fell, striking his head on an icy sidewalk. He was hospitalized for this incident. (Ex. 23 at 31.) At age 15 or 16 he was struck in the temple by another boy, lost consciousness and was hospitalized. Lastly, at age 17 he was hit in the face by his brother. He had to lay down and was nauseated but was not hospitalized.

¶21 For many years prior to his extensive use of Dustaway, the claimant reported having many of the symptoms he now attributes to his exposure to Dustaway, including fatigue, thinking problems, and dizziness.

- In 1993 he was treated by Dr. Susan H. Avery, M.D. for "Fatigue/weight loss; we have to rule out depression." (Ex. 18.) The claimant returned and Dr. Avery noted he was "complaining of vague dizziness, something isn't right in his mind." (*Id*.) She specifically noted he was not hyperthyroid, and indicated "[p]robable depression." (*Id*.) A CT scan was done. It was normal and the episode apparently ended by September 22, 1993. (*Id*.)
- In August 1996, claimant was seen by Dr. Terrance J. Sweeney at the Great Falls Immediate Care Center, reporting:

headache, sore neck, back ache, legs aching, has difficulty at times seeing, gets nervous a lot, feels fatigued, and catches himself like he is off balance. His left ear is sore at times. It feels like there is pressure in his head. He cannot think straight. **This has occurred approximately six times in the last 15 years.** [Emphasis added.]

(Ex. 15 at 4.)

- Dr. Mona A. Morstein, a holistic practitioner, saw claimant in September 1997, and recorded claimant's complaints of feeling tired, weak, groggy, unable to think clearly, and lack of balance, **which he reported as occuring over the previous 25 years** and typically lasting one to two months. (Ex. 20 at 1.)
- At trial claimant confirmed that for many years he has suffered such episodes of fatigue and confusion on an almost annual basis.

¶22 Claimant has been treated by numerous doctors in addition to those listed in the previous paragraph. Their records show that claimant has been diagnosed as suffering from hypogonadism, depression, anxiety, somatization, hypothyroidism, chronic allergic rhinitis/sinusitis, chronic fatigue; and left otitis media. (*See generally* Ex. 16 and 21.) He has also been treated for sleep apnea. (Ellington Dep. at 44.) Further details are set forth in the paragraphs that follow.

¶23 Dr. John W. Mahan began treating the claimant at least by September 1996.[(1)] (Ex. 21 at 1.) Sometime prior to September 19, 1996, Dr. Mahan referred claimant to Dr. J. A. Greer "for evaluation of decreased libido and hypogonadism." (*Id*.) Dr. Greer examined claimant on September 19th and recorded:

> The patient notes increasing lethargy with a recently diagnosed hypothyroidism. Testosterone panel also reveals low levels of free and total testosterone.

(*Id*.) Dr. Greer prescribed additional tests and indicated "we will most likely begin him on testosterone replacement." (*Id*.) Claimant then saw Dr. Mahan on September 24, 1996, at which time the doctor noted he was being followed for "depression and hypogonadism with decreased testosterone levels." (*Id*. at 1.) He prescribed desipramine, which is a tricyclic antidepressant. Physicians' Desk Reference (54th ed. 2000) at 1371.

¶24 In December 1996, Dr. Mahan noted that claimant appeared to be developing hypothyroidism; he prescribed .05 mg. Synthroid every day. (*Id*. at 3.)

¶25 In July 1997, Dr. Mahan noted claimant was feeling tired, weak, and faint, and was experiencing decreased memory, a dull headache, and blurred vision. (*Id*. at 6.) The doctor noted claimant was "non-compliant with his medications," having stopped taking the Synthroid and desipramine. Dr. Mahan expanded his assessment to include "[d]iffuse constitutional symptoms most likely somatization due to return of depression due to patient non-compliant with his medications." (*Id*.) He wrote that he would refer claimant "to psychiatry ASAP for further evaluation and treatment since I am no longer feeling comfortable with this situation." (*Id*.)

¶26 On September 8, 1997, Dr. Mahan noted "decreased energy level, occasional light headedness, occasional paresthesias of his extremities . . . [l]eft frontal headache, occasional blurred vision, occasional selective hearing, dysuria 6 months ago . . . nocturia on occasion x1, myalgias. Rest of ROS negative." (*Id*. at 8.) Dr. Mahan reported that claimant had "s**topped all of his medicines for the most part.** He had been on desipramine . . . he stopped this more than a month ago, he says it didn't help. Synthroid he stopped . . . about 3-4 days ago, he said it made him too tired and groggy. Nasacort he takes . . . and Ativan he does say does help his nerves. . . He stopped getting testosterone shots . . . he said these were not helping." (*Id*.) Claimant was referred to psychiatry and given information about panic disorders and thyroid disease.

¶27 A month later, on October 9, 1997, Dr. Mahan again described claimant as being "non-compliant," writing, "[d]ue to patient's non-compliance I really can't help him much if he refuses to take any medications that are prescribed or see other consultants . . . ." (*Id*. at 9.)

¶28 In February and March of 1998, claimant was treated for rhinitis. (Ex. 21 at 11-12.) Dr. Mahan recommended that he continue taking his prescribed medications but did not know how compliant claimant was. (*Id*. at 11, 12.)

¶29 In April 1998 Dr. Mahan recommended a sleep study. (*Id*. at 12-13.) By May 1998 claimant was reporting to the doctor that he was "worried that he has been poisoned through the chemical he has used at work." (*Id*. at 13; Ex. 16 at 1.)

¶30 While the medical records for the sleep study are not available to the Court, claimant acknowledged he was diagnosed as suffering sleep apnea and was prescribed a mask to wear at night. He tried the mask off and on for two weeks but stopped wearing it because he felt it made things worse.

¶31 In a June 7, 1999 office note, Dr. Mahan wrote:

> SUBJECTIVE: Patient is a 54-year-old white male who I follow with history of hypothyroidism, hypogonadism, depression with somatization, chronic fatigue, etc.

> He comes in. He is really somatizing a lot today. He has got a numb right foot on occasion and head pressure, he is asking about his liver and whether he could have water on his brain and how the herpes 6 virus that came up positive for 1gG in the past how that relates and whether it can cause an infection in his brain. He complains of spells when he gets groggy and almost passes out. . . . He is status post root canal and the tooth still hurts, etc., etc., etc.

(Ex. 16 at 20.) The doctor went on to discuss further testing and treatment.

> I really don't know what else to do for this patient. I spent 3 years trying to improve his condition to no avail. We have diagnosed him with hypothyroid, hypogonadism and have attempted to treat those things. However, it doesn't seem to have been helpful. Also trying to treat depression but he has not been compliant with medications and has had frequent side effects. Basically I am at a loss as to what else to do or who else to refer this patient to. I really think that all of his symptoms are psychosomatic. I do not feel that doing a million dollar work-up which I think he probably already has had is indicated. . . .

(*Id*.)

¶32 On September 8, 1999, Dr. Mahan performed an annual checkup which revealed no abnormalities. He noted that claimant had sinus surgery in November of 1998, and that he had been off work for 14 months. (*Id.* at 23.) The Court does not have records of the surgery.

¶33 Upon referral from Dr. Mahan, claimant was evaluated and treated by Dr. Donald E. Engstrom, M.D., a psychiatrist. Dr. Engstrom first saw claimant on September 12, 1997. (Ex. 17 at 1.) At the second appointment Dr. Engstrom prescribed a trial of Paxil (*id*. at 4), which is an antidepressant. Within a week the claimant reported he felt nauseated and oversedated. (*Id*.) Other medications were thereafter tried. (*Id.* at 5.)

¶34 On November 14, 1997, at the "insistence of Dr. Krezowski," who was treating the claimant's thyroid condition, claimant returned to Dr. Engstrom. (*Id.* at 6.) Dr. Engstrom prescribed a low dose of Zoloft and urged the claimant to "return to work as soon as he feels even a little bit better." (*Id*.) Interestingly, the doctor specifically made note that:

> I did not discuss side effects and did not give him a PMI purposely. He is so impressionable that I am afraid that given [sic] him a description of side effects would guarantee his developing all of them.

(*Id*. at 6.) Claimant reported on December 4, 1997, that he was feeling better on the Zoloft, and the prescription was renewed, as was a prescription for Lorazepam, which was given for anxiety and/or insomnia. (*Id*. at 7.) Dr. Engstrom continued treating claimant, primarily prescribing medication. (*Id* at 12-20.)

¶35 The medical records are replete with evidence of claimant's failure to take the medications prescribed for him. (*See* Ex. 21 at 4, 6, 8, 9, 14, 16; Ex. 17 at 9, 14.)

¶36 Dr. Mahan also referred claimant to Dr. Jon H. Walz, who specializes in occupational medicine. (Ex. 16 at 1.) Dr. Walz first saw claimant on May 22, 1998, at which time claimant was given a release to return to work without restrictions. Dr. Walz reviewed the MSDS work sheets provided by claimant for the chemicals he used at work. Dr. Waltz commented that "all indicate low toxicity and low potential for contamination with heavy metals. All represent mucous membrane irritants and no protective equipment other than routine clothing and proper ventilation as limiting factors for exposure." (Ex. 16 at 4.) Only one follow-up appointment occurred, at which time the doctor stated he needed more complete information regarding the substances the claimant used at work, and that he would like to visit the work site. (*Id.* at 7.) No further follow-up is reflected in the record before the Court.

Qualifications of the testifying Physicians

¶37 Dr. Ronald M. Peterson is a medical school graduate and completed an internship, however, he has not completed a residency program in any specialty. He is board certified in emergency medicine but not in occupational medicine. He initially practiced emergency room medicine, then he began an occupational medicine practice in 1993. His formal training in occupational medicine consists of a "mini-fellowship" in occupational and environmental medicine in San Francisco in 1991 and 1992. He made three separate trips to San Francisco for course work during those years. The courses totaled eight weeks. He has no special training in chemical sensitivity aside from what he may have received during the mini-fellowship. He does not specialize in either allergy or immunology. As to matters in those specialties, he testified he would defer to physicians specializing in those fields.

¶38 Dr. Peterson subscribes to and reads a journal on occupational and environmental medicine and the Journal of the American Medical Association. He sometimes reviews a synopsis of the Journal of Rheumatology. He has listened to tape-recorded articles concerning general symptomatology, allergy, physical medicine and occupational medicine.

¶39 Dr. Richard Nelson is a board certified neurologist. He had a two-year fellowship in neuro-psychology. More than 25 years ago he was chief of neurology at Jersey Shore Medical Center for approximately 4 years and was an instructor for approximately 10 years. For the past 25 years he has practiced in Montana.

¶40 Dr. Nelson wrote one medical article for the Journal of Neurology in 1951 but has not published an article since then. He has never been an officer in a professional organization, never received any honors.

¶41 Dr. Nelson has not had hospital privileges since 1988, although he has not had privileges denied or terminated. He testified that he resigned his hospital privileges at the Billings Deaconess Hospital in 1988 because hospital bylaws required he live within 25 miles of the hospital and he had moved to a ranch more than 25 miles away. He conceded there is a hospital in Columbus, which is only 10 to 12 miles from his home. When asked if he could apply for privileges, he initially replied "No." (Tr. at 107.) But when pressed on the matter, he testified as follows:

> Q. Could you apply for privileges there [in Columbus]?
>
> A. No.
>
> Q.You couldn't?
>
> A.I have not.
>
> Q. Oh, you have not. Why not?
>
> A. I think that there's really no purpose for me trying to practice out of Columbus because any case that would come in there that would be neurological and call me to an emergency room would be taken out of there quickly on the helicopter in any case. There's no facility there.

(*Id.*) Dr. Nelson maintains a rural office practice.

¶42 With respect to his medical reading, Dr. Nelson testified he does not "take a special chemical journal" but reads "one on immunology which deals with it" and also reads the Journal of Neurology and Archives of Neurology. (*Id.* at 108.)

¶43 Dr. Emil Bardana's Curriculum Vitae is found at Exhibit 12. He is board certified in Allergy and Immunology and in Internal Medicine. Since 1980 he has been a full professor of medicine at the Oregon Health Sciences University in Portland, Oregon. He is head of the Division of Allergy and Clinical Immunology in the Department of Medicine at the University. Over the years he has averaged 50% to 65% of his time actively practicing medicine. He has done medical research. Approximately 10% to 15% of his time has involved writing scholarly medical articles. He has authored approximately 200 published articles on immunology, asthma and other lung conditions, antibodies, cystic fibrosis, lupus, hypersensitivity, and other topics. He has written chapters for medical textbooks, edited two texts, and is a peer reviewer for 14 to 15 medical journals. He is or has been a member of the board of directors of the American Board of Allergy and Immunology and president of the College of Immunology. He has lectured on chemical exposure and authored a position statement by the American Academy of Allergy, Asthma and Immunology on *Idiopathic Environmental Intolerances* (Ex. 13), which deals with "environmental intolerances and multiple chemical sensitivities." (*Id.*, especially Summary at 3.) He is editor-in-chief of *Allergy Watch*, a journal that synopsizes medical articles from

17 publications in the field. He reads the journals which are synopsized. He has hospital privileges at several hospitals. He has received numerous honors and awards.

Opinions of Dr. Nelson

¶44 Dr. Nelson was the first physician to opine that claimant's various complaints were caused by his exposure to chemicals at work. Claimant sought out Dr. Nelson because a friend of his brother thought he might be suffering from exposure to chemicals and recommended Dr. Nelson.

¶45 So far as I can ascertain, Dr. Nelson saw claimant on only one occasion, that being June 10, 1998. His impressions included "[p]ossible cognitive impairment with depression and anxieties . . . ., [c]hronic fatigue immune system dysfunction,". . . an "[o]ld otitis, left side," . . . and the need to "[r]ule out toxic exposure. . . ." (Ex. 23 at 14.) He recommended an MRI of the brain, a chest x-ray, testing by a "Chemical Exposure Panel along with evaluation of the immune system," a neuropsychological exam, and blood studies for a chemical analysis. (*Id.*)

¶46 Blood studies were done by Antibody Assay Laboratories in Santa Ana, California. (Ex. 23 at 8.) The results disclosed trimellitic anhydride detected at a 1:8 titer, whereas expected range is 1:4 titer, and toluene di-isocyanate detected at a 1:32 titer, with the expected range being 1:4 titer. (*Id.*) Dr. Nelson, as well as Drs. Peterson and Bardana, agreed that this finding **only** indicates that at sometime in the past the claimant was exposed to the two chemicals and developed antibodies as a result. The results do not give any information regarding when the exposure occurred, or its duration, or the dose of the exposure.

¶47 Dr. Nelson referred the claimant to Marian F. Martin, Ph.D., for a neuropsychological exam. Dr. Martin did an extensive history and administered numerous tests. As relevant to Dr. Nelson's opinions in this case, she found that most of claimant's neuropsychological test results were within normal limits, although some indicated impairment. Specifically, she said:

> However, Mr. Ellington's performance is within the impaired range on some tests. His Perceptual Organization Index is within the borderline range and is significantly lower than the other WAIS-III Index scores. His performance indicates impairment in perceptual organizational abilities, such as nonverbal reasoning, attentiveness to detail, and visual-motor integration. Mr. Ellington's test results also indicate mild to moderate impairment in logical and abstract reasoning abilities and in verbal information processing. Mental flexibility is in the below average/borderline range. Mr. Ellington's performance on tests of simple motor functioning indicates that his fine motor speed and grip strength are within normal limits, but his performance is impaired on a test of manual dexterity, which requires complex motor functioning.

> Thus, the test result indicate impairment primarily in higher cognitive functioning, such as abstract reasoning, perceptual organization and information processing. Complex motor functioning is also impaired. This pattern of test results can be associated with impairment in the prefrontal area. It would be helpful to do a neuropsychological re-evaluation in one year to determine whether or not Mr. Ellington's neuropsychological status is stable.

(Ex. 23 at 38.)

¶48 At trial Dr. Nelson testified that claimant's exposure to chemicals at work caused cognitive impairment, a sort of "toxic encephalopathy" involving the frontal lobe of claimant's brain. (Tr. at 8.) He ordered the blood tests to look for traces of chemical capable of causing such impairment. According to Dr. Nelson, blood test results showing elevated CD3[(2)] and CD8[(3)] levels (*see* Ex. 23 at 10), indicated claimant's immune system was working at a high level and that some antigen[(4)] was triggering that response. He opined that the cognitive impairment was due to claimant's exposure to hydrocarbon distillates, specifically benzene, toluene, or xylene.

¶49 According to Dr. Nelson, all three hydrocarbon distillates are present in gasoline, while toluene and xylene are typically present in solvents. He opined that toluene and xylene were likely present in the Dustaway. He acknowledged trimellitic anhydride and toluene di-isocyanate are not per se petroleum distillates but are compounds made using petroleum distillates. He did not know what chemicals were in the Dustaway and conceded it would have been wise to have conducted a chemical analysis of Dustaway. He was unable to name a single product at claimant's workplace that in fact contained either trimellitic anhydride or toluene di-isocyanate. He did not know if toluene causes the same symptoms as toluene di-isocyanate. In cross examination he identified toluene di-isocyanate as the "probable" causative agent for claimant's cognitive impairment and said that any other agents were "only possibilities." He said he would look for toluene di-isocyanate in chemicals which had hydrocarbon distillates. He suspected it was added to one of the chemicals claimant worked with but did not know that for a fact.

¶50 Dr. Nelson also acknowledged that when he formulated his initial opinion that claimant was suffering a reaction from chemical exposure at work he did not know what chemicals claimant used at work and based his opinion upon his "general knowledge" of cleaning agents typically used.

¶51 Dr. Nelson testified that medical literature connects brain damage to chronic low- level exposures of toluene di-isocyanate. When asked for a citation to the literature he was relying upon, he identified Cassarette and Doull's Toxicology: The Basic Science of Poisons, Fourth Edition (1991). (Tr. at 85-86.) He then referred to page 305, however, the passage he identified failed to support his statement. (*Id.* at 86-89.) Ultimately, he agreed that the text

did not refer to the type of prefrontal lobe damage which he diagnosed in claimant. (*Id*. at 90.)

¶52 Dr. Nelson was asked about what literature he reviewed in this case prior to arriving at his opinions. His initial answer was at best misleading if not simply untrue. His testimony was as follows:

> Q. What specific publications did you review related to this case prior to arriving at your opinion in this case, Doctor?
>
> A. We've looked at as I mentioned Industrial Toxins it's called; there's two volumes to it.
>
> Q. When did you look at that?
>
> A. Those are the ones that I look at most often.
>
> Q. When did you look at that in this case?
>
> A. When?
>
> Q. Yes.
>
> A. I suppose I look at it from week to week. In this case we looked at those things in the time period when we're trying to formulate a diagnosis and go back and familiarize what kinds of sets of symptoms are associated with this chemical or that chemical and so on.
>
> Q.Is that what you did in this case?
>
> A. No, I didn't do it right away, because I've been through this long enough and often enough that I don't really need to do that, except for special research.

(Tr. at 108-109.)

¶53 Of significance in evaluating his opinions, Dr. Nelson also testified that Epstein Barr virus, to which claimant's blood assay indicated exposure, is related to chronic fatigue disorder. (*Id*. at 12-13.) In a letter to claimant, Dr. Nelson stated that claimant had been exposed to "Epstein Barr virus and it has been reactivated probably related to the chemical exposures which we have seen. The viral agent, probably being somewhat of an opportunist, sees a **suppressed immune system** and then is capable of escaping its normal control." (Ex. 23 at 7, emphasis added.) Dr. Bardana's comment on these statements is set out later, but I note that Dr. Nelson conceded at trial that claimant's immune system was not suppressed. Dr. Nelson, in the same letter, also states, "[Y]ou

have antibodies to Benzine which is Trimellitic Anhydride and Toluene Di-Isocyanate." As Dr. Bardana pointed out in his testimony, that statement is simply untrue since the three are different chemicals.

Opinions of Dr. Peterson

¶54 Dr. Peterson evaluated claimant on October 21, 1998, upon referral by the Department of Labor and Industry. His impressions were as follows:

> 1. **Chronic fatigue, mental changes, heightened physical responses consistent with multiple chemical sensitivities** (983.0).
>
> 2. Adjustment disorder with mixed emotional features, primarily anxiety and depression (309.28).
>
> 3. Sleep disruption (780.5).
>
> 4. Occupational disease evaluation (V70.3).

(Ex. 23 at 27-28, emphasis added.) In his response to Department questions concerning proximate cause and ability to work, he replied:

- I believe that Mr. Ellington is suffering from an occupational disease.

- I believe that his employment can be traced as the proximate cause, and all five criteria [of section 39-72-408, MCA] are met.

- I do not believe that he is capable of returning to his previous job as custodian, and further believe that this is a permanent restriction, unless the job can be modified.

I do not believe that Mr. Ellington is capable of returning to any work without a coordinated rehabilitation program.

- I do not find any non-occupational disease or infirmity that would require apportionment.

(*Id.* at 28.)

¶55 As of the date of Dr. Peterson's examination, claimant reported he had been off all anti-depressant medication for six months and had not worked since July of 1998. (*Id.* at 26.)

Claimant described his symptoms as including feeling tired all the time, confusion, difficulty remembering, difficulty completing tasks, headaches and mild nausea at the end of a work day, and dizziness. (*Id.*)

¶56 Dr. Peterson testified that the fact that claimant's symptoms did not respond to medications for hypothyroid, surgery on his sinus, and other treatments indicates there is some other underlying problem, which the doctor then attributed to claimant's exposure to chemicals. Dr. Peterson's opinion on this point is substantially undermined by claimant's failure to take his medication as prescribed and his failure to use the sleep mask prescribed for sleep apnea.

¶57 Based on claimant's self-described symptoms, and his failure to respond to treatment for his other conditions, Dr. Peterson opined at trial that claimant's symptoms resulted from his exposure to cleaning agents used on a regular basis. Dr. Peterson believed the organ system most affected was the central nervous system. While claimant reported having respiratory symptoms such as nasal congestion and a runny nose, Dr. Peterson was most concerned with claimant's reported concentration difficulties, memory difficulties, increased anxiety, decreased motivation, increased feelings of depression, and fatigue.

¶58 Based on history given by the claimant and the lab data from Dr. Nelson, Dr. Peterson concluded claimant had been exposed to trimellitic anhydride and toluene di-isocyanate at his job. In his opinion, this exposure, as described by the claimant, was the result of working with the various cleaning agents at his job. However, Dr. Peterson did not have independent knowledge of the chemical content of the cleaning agents. He acknowledged that the blood tests indicated only that claimant had been exposed to the chemicals and did not indicate by themselves that they were the cause of his problems, or provide any information regarding the duration and amount of his exposure. He also acknowledged that the workplace chemicals could have been tested using, for example, gas chromatography to determine whether they in fact contained trimellitic anhydride and toluene di-isocyanate.

¶59 Ultimately, Dr. Peterson testified that even if trimellitic anhydride and toluene di-isocyanate were not present in Dustaway or some other cleaning agent, he would not change his opinion that claimant is suffering from an occupational disease. Looking at the Material Safety Data Sheet (MSDS) for Dustaway, he noted the listed side effects were "headache, nasal and respiratory irritation, nausea, drowsiness, fatigue, peumonitis [sic], pulmonary edema, central nervous system depression" (Ex. 25 at 10), which were present in claimant with the exception of pneumonitis and pulmonary edema. Dr. Peterson had no specific diagnosis for claimant's conditions, defining claimant's occupational disease as intolerance to exposures to the solvents and cleaning agents he used at work. He characterized claimant's condition as a "symptom complex" resulting from being sensitized to chemicals at the workplace, which he agreed could be characterized as

"multiple chemical sensitivities." But he conceded that medical issues involving sensitization are within the specialized medical practice of allergy and immunization, fields in which he is not qualified.

¶60 Until the day prior to trial, Dr. Peterson did not have the MSDS for Dustaway or any other chemicals used by claimant. He did not review, and has never reviewed, claimant's medical records. The only information he had in addition to the history he took from claimant was the blood test results obtained from Dr. Nelson. He agreed that if claimant had symptoms similar to those he reported during his own examination of claimant, that history would be significant. He agreed that untreated hypothyroidism causes fatigue. He agreed that lack of sleep may cause tiredness, confusion and even dizziness, and that depression, stress, somatization, allergic rhinitis, sinusitis and antidepressant medication can cause fatigue. Nonetheless, he adhered to his opinion that claimant's symptoms were due to his exposure to chemicals at work.

¶61 On a final note regarding Dr. Peterson's testimony, the doctor rebutted Dr. Nelson's opinion linking elevated T-cells and Epstein Barr virus to chronic fatigue syndrome. Dr. Peterson noted this was "not accepted any more" in the medical community, thus indicating that some of Dr. Nelson's medical knowledge is out-of-date.

Opinions of Dr. Bardana

¶62 Dr. Bardana took issue with the concept of multiple chemical sensitivities described by Dr. Peterson. He labeled multiple chemical sensitivity a non-diagnosis, and nothing more than a self-declared group of symptoms having no explanation and no pathological basis anyone can find. He said that all sorts of symptoms have been ascribed to the syndrome. There are no valid double blind or controlled studies to support the diagnosis. Nothing in acceptable medical literature establishes any causal relationship of the identified symptoms to multiple chemical exposures. It has no biological markers and is not an accepted diagnosis in the general medical community. It is not taught in medical schools in the United States or for that matter, abroad. In his deposition, Dr. Bardana testified:

> Multiple chemical sensitivity, the way I think about it is a - - represents a symptom complex referred to by a variety of terms; environmental illness, chemical aids, 20th century allergy, universal allergy, et cetera, in which people **self-declare symptoms** to one or more constituents in the environment with a variety of symptoms for which there are no diagnostic criteria, nor treatments available.
>
> The condition is controversial. It's certainly not one that is accepted by the medical community.
>
> And recently a World Health Organization committee redefined it or renamed it as idiopathic chemical intolerance to emphasize the fact that any relationship between

chemicals and symptoms were purely speculative in nature.

(Bardana Dep. at 8, emphasis added.)

¶63 The position statement of the American Academy of Allergy, Asthma and Immunology, which Dr. Bardana drafted, states that:

IEI [idiopathic environmental intolerances]--also called environmental illness and multiple chemical sensitivities--has been postulated to be a disease unique to modern industrial society in which certain persons are said to acquire exquisite sensitivity to numerous chemically unrelated environmental substances. The patient experiences wide-ranging symptoms, but evidence of pathology or physiologic dysfunction in such patients has been lacking in studies to date. Because of the subjective nature of the illness, an objective case definition is not possible. Allergic, immunotoxic, neurotoxic, cytotoxic, psychologic, sociologic, and iatrogenic theories have been postulated for both etiology and production of symptoms, but there is an absence of any of scientific evidence to establish any of these mechanisms as definitive. Most studies to date, however, have found an excess of current and past psychopathology in patients with the diagnosis . . . A causal connection between environmental chemicals, foods, and/or drugs **and the patient's symptoms continues to be speculative and cannot be based on the results of currently published scientific studies.**

(Ex. 13 at 3.) The discussion, and Dr. Bardana's observations, were, of course, directed towards maladies attributed to "multiple" chemical exposures; they were not directed at the known toxic effects of specific chemicals. Dr. Bardana pointed out that specific chemicals are known to cause irritation, sensitization, allergic reaction and/or corrosion (chemical burns).

¶64 Dr. Bardana, who conducts extensive review of medical literature as part of his regular reading, research, editing, and peer review, made the following points with respect to claimant's exposure to chemicals at work:

1. Trimellitic anhydride is used in the manufacture of plastics, some paints, and adhesives but is not found in petroleum distillates as suggested by Dr. Nelson. Exposure and sensitization to the chemical will cause hay fever, rhinitis, and hypersensitivity pneumonitis.

2. Similarly, toluene di-isocyanate is not found in petroleum distillates. It is used in paints, especially metal paints.

3. Neither toluene di-isocyanate nor trimellitic anhydride is used in cleaning agents. Dr. Bardana said, "None of these chemicals has anything to do with Mr. Ellington's

work as a custodian at the high school. How they come up is totally uncomprehensible to me in this case because they don't have anything to do with it. None of them are actors in the cleaning business. They are actors in the painting business and other kinds of work but not in this business."

4. If present in a product, toluene di-isocyanate or trimellitic anhydride must be listed in the MSDS for the product. They are not listed in the Dustaway MSDS.

5. Dustaway may cause temporary irritation and annoyance. However, the potential effects of Dustaway[(5)] as listed in the MSDS require exposures to high levels of the product. He said, "I don't envision being in that room and using that mop oil that these levels [necessary to cause the side effects] would ever be attained. So I don't doubt that anyone using it might be put off and might be annoyed might be transiently irritated but they would not have a problem a disease. They would have what I would think about as an annoyance or an irritation at best." Short of "sniffing" the product, even long term exposure would not cause permanent harm.

6. Humans do not become sensitized to hydrocarbon (petroleum) distillates.

7. To his awareness, no medical literature links cognitive problems to these chemicals. Dr. Bardana testified that if there was such literature, he would be aware of it.

¶65 Although he did not physically examine claimant, Dr. Bardana did review claimant's available medical records, something not done by either Dr. Peterson or Dr. Nelson. He testified that claimant's symptoms were due to and totally explainable by his other medical conditions and not related to any chemical exposure at work. He identified claimant's sleep apnea and his preexisting depression as the most significant contributors to his symptoms. Sleep apnea causes loss of sleep, which in turn clouds memory and causes depression. He commented that claimant's chronic sinusitis may worsen his sleep apnea and that some of the drugs he takes, specifically Atavan and antihistamines, actually aggravate his problems. At trial Dr. Bardana testified that claimant's cognitive problems are attributable to his sleep apnea.

¶66 In his deposition, Dr. Bardana accounted for claimant's complaints of chronic fatigue, as follows:

The first and foremost is his own physician's diagnosis of depression. And depression is a diagnosis that is associated with poor sleep, nonrestorative sleep, and the development of chronic fatigue.

The second is that this man has bona fide desaturation during the evening as a result of an

obstructive sleep apnea. He has been tested minimally and then maximally and this has been found and it's been recommended that he be on treatment in the form of pressurized oxygen during the evening hours.

By the way, this man generally rejects all medical treatment, but at least it's been recommended.

So chronic sleep apnea is another condition which results in fragmented, poorly restorative sleep, frequently hypersomnolence during the day, people falling asleep at the wheel, et cetera, et cetera. . . . And so it would be a good explanation for him to have chronic fatigue.

And then he has two other conditions, hypogonadism and hypothyroidism, both of which can be associated with poor muscular tone, poor self-worth. He has problems with his rectal function. He has difficulties in - - from the thyroid point of view of being sluggish and so forth.

So these are four major reasons for him to have chronic fatigue. And there are also other areas that are ancillary to this, one of which you already picked out, and that's the fact that he may have chronic allergic rhinitis and allergic rhinitis may be associated itself with fatigue.

And he is known to use sleeping pills, his mother's sleepers, to help him sleep and so that would be yet another one.

So there are a number of obvious physiologic reasons for this man to have the problems that he's having. It's clearly explained in these records. It's clearly his own physician's feelings.

And, unfortunately, for whatever reason, I'm not able to figure it out, he has not been very compliant with the efforts of either his primary care physician or the consultants who have seen him. He's generally rejected almost all forms of therapy. After a month or two, he generally says it doesn't help him and he stops.

(Bardana Dep. at 60-62.)

¶67 Dr. Bardana agreed with Dr. Nelson's suggestion that testing was appropriate to determine whether claimant's Cortisol and Prolactin levels are normal. In light of claimant's deficiencies of two glandular systems (testes and thyroid), Dr. Bardana suggested looking at other potential glandular problems, but testified that such deficiencies have nothing to do with any chemical exposure.

¶68 Reviewing Dr. Nelson's report concerning claimant (Ex. 23 at 7), Dr. Bardana had the following comments:

> 1. Dr. Nelson's statement that benzine is trimellitic anhydride is wrong, benzine **is not** a trimellitic anhydride.
>
> 2. Dr. Nelson's statement that the Epstein Barr virus had been reactivated by chemical exposure does not make sense since claimant is not immunosuppressed.
>
> 3. Dr. Nelson was wrong in concluding that trimellitic anhydride and di-isocyanate were probably present in the cleaning agents.

Resolution

¶69 I am unpersuaded that claimant is suffering from an occupational disease as a result of exposure to chemicals while working as a janitor for the Great Falls School District. Dr. Bardana provided the most persuasive testimony in the case. By far, he was the most familiar with chemical exposure and was most familiar with current literature on the topic. He is a respected clinician, teacher, researcher, and writer. While I am convinced that Dr. Peterson's opinion concerning claimant's chemical exposure was sincere, he does not have the training, experience and qualifications that Dr. Bardana does. Moreover, he was unfamiliar with claimant's history of other major medical problems and is out of synch with mainstream medical opinion. Similarly, Dr. Nelson does not read widely on the subject and seems out of touch with at least some current medical thought, as shown by his discredited opinion relating Epstein Barr virus to chronic fatigue. As noted in paragraphs 51 and 39, he was less than candid in his initial answers regarding hospital privileges and the literature he consulted in formulating his opinion. He also claimed that a treatise he brought to Court supported his opinion linking claimant's cognitive difficulties to chemical exposure, yet, the passage from the text he identified did not support his statement. I was wholly unimpressed by his testimony.

¶70 Moreover, claimant failed to establish that he was exposed to either trimellitic anhydride and toluene di-isocyanate. The cleaning products could have been tested for the presence of those chemicals but were not. Against the speculation of Dr. Nelson and Dr. Peterson, Dr. Bardana testified firmly and positively that cleaning products do not contain the chemicals.

¶71 Finally, Dr. Bardana's testimony that claimant's symptoms can all be explained by other conditions was convincing. I have previously noted claimant's non-compliance in taking his medications or complying with other treatment recommendations. His sleep apnea remains virtually untreated as he has declined to wear a sleep mask. He starts, then stops taking medication for his hypothyroidism and depression. It is not surprising he is fatigued, particularly when trying to work, or that he is at times confused and has poor

memory. Of particular significance, many of the symptoms which claimant attributes to chemical exposure have been present off and on for fifteen to twenty years.

CONCLUSIONS OF LAW

¶72 Claimant's entitlement to benefits is governed by the 1997 version of the Occupational Disease Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶73 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

¶74 Title 39, ch. 72 provides for benefits for workers suffering from occupational diseases. Claimant must first establish that he suffers from an occupational disease. Section 39-72-102(1), MCA (1997), defines occupational disease as:

"Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

Claimant has failed to persuade me that his symptoms and medical conditions were caused by his exposure to chemicals at the workplace. He is not entitled to benefits under the Occupational Disease Act.

JUDGMENT

¶75 1. Claimant does not suffer from an occupational disease as a result of exposure to various chemicals allegedly found in his workplace and is not entitled to occupational disease benefits.

¶76 2. Claimant is not entitled to costs.

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

¶78 4. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 9th day of August, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Leo S. Ward
Mr. Thomas J. Murphy
Date Submitted: April 21, 2000

1. Dr. Mahan is with the Great Falls Clinic. Clinic records furnished to the Court begin with a note of September 12, 1996, but the manner of the note, and absence of other information indicating claimant was a new patient, suggests that claimant was previously seen by Dr. Mahan or other physicians at the Clinic.

2. "CD" is "used with an integer to denote any of numerous antigenic proteins on the surface of thymocytes and especially Tcells." 1997 Merriam-Webster Medical Dictionary on line at www.medscape.com.

3. CD8 is "a glycoprotein found especially on the surface of killer T cells that usually functions to facilitate recognition by killer T cell receptors of antigens

complexed with molecules of a class that are found on the surface of most nucleated cells and are the product of genes of the major histo compatibility complex." 1997 Merriam-Webster Medical Dictionary on line at www.medscape.com.

4. An antigen is a substance, usually a protein or carbohydrate, capable of triggering an immune response. 1997 Merriam-Webster Medical Dictionary on line at www.medscape.com.

5. Those being "headache, nasal and respiratory irritation, nausea, drowsiness, fatigue, peumonitis [sic], pulmonary edema, central nervous system depression." *See* ¶ 59.