IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 44

WCC No. 9903-8168

STATE COMPENSATION INSURANCE FUND

Appellant

vs.

WILLARD E. VANNETT

Respondent.

ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

Summary: During appeal from decision of DOL finding claimant to suffer from an OD, State Fund moved to present additional medical evidence, to wit, an independent medical examination conducted more than three months after the hearing officer's decision and two months after the appeal was filed. Pro se claimant did not object to introduction of report. Reason offered by State Fund for offering post-hearing IME was its reliance on statutory presumption in favor of panel report which had only been struck down by WCC nine days prior to hearing below.

Held: State Fund did not present good reasons for failing to present IME in proceeding before DOL. Statutory presumption was not conclusive and did not relieve parties of obligation to present evidence or defend against other party's evidence.

Topics:

> **Administrative Procedure: Contested Case Hearing: Evidence.** Where State Fund did not present good reasons for failing to present IME in proceeding before DOL, motion to present additional evidence denied.

¶1 This is an appeal by the State Compensation Insurance Fund (State Fund) from a decision of the Department of Labor and Industry finding that Willard E. Vannett (claimant) suffers from an occupational disease. The matter presently before the Court is the State Fund's motion to present additional medical evidence.

¶2 The claimant initially did not respond to the motion. Because he is appearing pro sé and might have been unaware that he could respond, on July 13, 1999, the Court wrote a letter asking if he wished to reply to the motion. On July 14, 1999, he wrote back that he did not

"object to the filing of the said motion" and desired "that all parties and all evidence be admitted before the Court for the purpose of resolving the matter . . . in a fair and just conclusion."

DISCUSSION

¶3 This occupational disease case was heard by a Department hearing officer on September 11, 1998. The claimant alleged, and the hearing officer found, that he suffers from liver disease aggravated or accelerated by his exposure to industrial chemicals at work. The hearing officer rendered his decision on February 4, 1999. This appeal by the State Fund followed on March 5, 1999.

¶4 State Fund moves for leave to present additional medical evidence in the form of a report of an independent medical evaluation by Dr. Patricia J. Sparks. The report is dated May 14, 1999, more than three months after the hearing officer's decision and more than two months after the State Fund's appeal of the decision.

¶5 Irrespective of the claimant's apparent acquiescence to admitting the IME report, the State Fund must still satisfy Court Rule ARM 24.5.350(5), which provides:

> (5) A motion for leave to present additional evidence must be filed no later than the time set for the last brief or, if oral argument is timely requested, then no later than the day before the argument. If it is shown to the satisfaction of the court that the additional evidence is material **and that there were good reasons for failure to present it in the proceeding before the department,** then the court may remand the matter to the department and order that the additional evidence be taken before the department upon conditions determined by the court. The department may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court. [Emphasis added.]

The motion is timely and the IME report appears to be material. But the State Fund must still demonstrate that "there were good reasons" for its failure to present Dr. Sparks' report during the proceeding below.

¶6 In arguing good cause, the State Fund says:

> [T]he State Fund is required to show good reason for the failure to present this evidence in the proceeding before the Department. The State Fund asks the court to take judicial notice of its decision in *Bowers v. State Fund,* 1998 MTWCC 64, WCC No. 9708-7802 (Sept. 2, 1998). In the *Bowers* case the Workers Compensation Court struck down as unconstitutional the statutory presumption of correctness for panel physician reports and opinions. In the case at hand, the panel physicians rendered favorable opinions to the State Fund. Prior to the *Bowers* decision the result in this

> case was a foregone conclusion. The statutory presumption required preference for Dr. Rapaport's last-in-time opinion, which was favorable to the State Fund. Therefore by statute the Department of Labor and Industry was required to rule in favor of the State Fund. The hearing in this case was held on September 11, nine days after the *Bowers* decision was issued.

Prior to the *Bowers* decision there was no reason for the State Fund to garner additional medical evidence. After the *Bowers* decision there was no time for the State Fund to garner additional evidence. The State Fund submits that the foregoing constitutes "good reason" for failure to present this additional evidence at the time of hearing.

(Motion for Leave to Present Additional Evidence at 2.)

¶7 The contention that prior to *Bowers* a decision in its favor "was a forgone conclusion" is simply wrong. While the statute considered in *Bowers* gives rise to a presumption favoring the final panel report, the statute does not on its face establish a conclusive presumption or require the hearing officer to ignore the merits of conflicting opinions. The vice of the statute was that it allowed the fact finder to arbitrarily decide what weight to give the final report. The presumption might be applied to require the party resisting it to merely prove its case by a usual preponderance of the evidence, but it might also be applied to require the party to present overwhelming evidence contradicting the panel's final conclusion. In the face of the conflicting opinions of the panel members in this case, any assumption by the State Fund that the majority report would automatically prevail was untenable. It should have been aware that the hearing officer, after weighing the merits of the conflicting opinions, might side with claimant.

¶8 The State Fund's argument that it had no time to gather additional evidence after the *Bowers'* decision is similarly unconvincing. *Bowers* was decided and disseminated nine days prior to hearing. It might be unreasonable to expect that State Fund attorneys should have read, absorbed, and responded to *Bowers* within nine days. But it is not unreasonable to expect that they should have done so during the almost five month period between the hearing and the hearing officer's decision. If the *Bowers'* decision raised a significant concern, the State Fund could and should have (1) promptly sought additional medical evidence and (2) petitioned the hearing officer for leave to present the additional evidence before he made his decision. *Compare Pryor School Dist. Nos. 2 & 3 v. Superintendent of Public Instruction,* 218 Mont. 73, 707 P.2d 1094 (1985) (wherein the request to present additional evidence was first made at the administrative level, then renewed during judicial review). Instead, the State Fund waited until after an adverse determination to pursue the matter.

¶9 The motion is **denied**.

DATED in Helena, Montana, this 23rd day of July, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David A. Hawkins
Mr. Willard E. Vannett - Certified Mail
Submitted: July 19, 1999