IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 54

WCC No. 9501-7214

STEVE KASTELLA

Petitioner

vs.

PLUM CREEK TIMBER COMPANY

Respondent.

DECISION AND JUDGMENT ON APPEAL

Summary: On appeal from decision of Department of Labor Hearing Examiner, claimant argued that the hearing examiner erred by apportioning 87% of his disability to non-occupational factors and denying his request for attorneys fees and costs. Claimant also challenged conduct of insurer's attorney in writing argumentative letter to physician assigned by Department of Labor to evaluate his condition.

Held: Where the medical opinion on which the hearing officer relied attributed 90% of the claimant's back condition to occupational factors, the hearing examiner erred by assigning respondent liability only for that portion of occupational exposure attributed to employment with respondent. While section 39-71-706(1), MCA (1987) allows apportionment between occupational and non-occupational factors, the statutes do not provide for apportionment between employers. Indeed, section 39-72-303(1), MCA (1987) liability for occupational exposure rests with "the employer in whose employment the employee was last injuriously exposed to the hazard of such disease." As the last employer, respondent is responsible for 90% of the claimant's occupational disease. Under 39-72-613(1), MCA (1987), claimant is entitled to attorneys fees and costs where he has prevailed, which he has in light of this Court's reversal of the decision below. Where medical panel provisions of the Occupational Disease Act clearly contemplate evaluation by an impartial medical panel, argumentative *ex parte* communication from respondent's counsel received by the physician without time for claimant to add his spin on the evidence may prejudice claimant. The Department of Labor and Industry is obligated to take steps to regulate such communications.

Topics:

Occupational Disease: Apportionment. Where the medical opinion on which the hearing officer relied attributed 90% of the claimant's back condition to occupational factors, the hearing examiner erred by assigning respondent liability only for that portion of occupational exposure attributed to employment with respondent. While section 39-71-706(1), MCA (1987) allows apportionment between occupational and non-occupational factors, the statutes do not provide for apportionment between employers. Indeed, section 39-72-303(1), MCA (1987) liability for occupational exposure rests with "the employer in whose employment the employee was last injuriously exposed to the hazard of such disease." As the last employer, respondent is responsible for 90% of the claimant's occupational disease. **Note:** in *Schmill v. Liberty Northwest*, 2003 MT 80, the Montana Supreme Court held the apportionment provisions of the Occupational Disease Act unconstitutional.

Occupational Disease: Medical Panel. Where the medical opinion on which the hearing officer relied attributed 90% of the claimant's back condition to occupational factors, the hearing examiner erred by assigning respondent liability only for that portion of occupational exposure attributed to employment with respondent. While section 39-71-706(1), MCA (1987) allows apportionment between occupational and non-occupational factors, the statutes do not provide for apportionment between employers. Indeed, section 39-72-303(1), MCA (1987) liability for occupational exposure rests with "the employer in whose employment the employee was last injuriously exposed to the hazard of such disease." As the last employer, respondent is responsible for 90% of the claimant's occupational disease. **Note:** in *Schmill v. Liberty Northwest*, 2003 MT 80, the Montana Supreme Court held the apportionment provisions of the Occupational Disease Act unconstitutional.

Occupational Disease: Medical Panel. Where medical panel provisions of the Occupational Disease Act clearly contemplate evaluation by an impartial medical panel, *ex parte* communication from respondent's counsel received by the physician without time for claimant to add his spin on the evidence may prejudice claimant. The Department of Labor and Industry is obligated to take steps to regulate such communications.

Occupational Disease: Last Injurious Exposure. Where the medical opinion on which the hearing officer relied attributed 90% of the claimant's back condition to occupational factors, the hearing examiner erred by assigning respondent liability only for that portion of occupational exposure attributed to employment with respondent. While section 39-71-706(1), MCA (1987) allows apportionment between occupational and non-occupational factors, the statutes do not provide for apportionment between employers. Indeed, section 39-72-303(1), MCA (1987)

liability for occupational exposure rests with "the employer in whose employment the employee was last injuriously exposed to the hazard of such disease." As the last employer, respondent is responsible for 90% of the claimant's occupational disease. **Note:** in *Schmill v. Liberty Northwest*, 2003 MT 80, the Montana Supreme Court held the apportionment provisions of the Occupational Disease Act unconstitutional.

Attorney Fees: Occupational Disease Cases. Under 39-72-613(1), MCA (1987), claimant is entitled to attorneys fees and costs where he has prevailed in a hearing requested by the insurer before the Department of Labor, which he has in light of this Court's reversal of the decision below.

Attorneys: Correspondence. Where medical panel provisions of the Occupational Disease Act clearly contemplate evaluation by an impartial medical panel, argumentative *ex parte* communication from respondent's counsel received by the physician without time for claimant to add his spin on the evidence may prejudice claimant. The Department of Labor and Industry is obligated to take steps to regulate such communications.

Attorneys: Conduct and Tactics. Where medical panel provisions of the Occupational Disease Act clearly contemplate evaluation by an impartial medical panel, argumentative *ex parte* communication from respondent's counsel received by the physician without time for claimant to add his spin on the evidence may prejudice claimant. The Department of Labor and Industry is obligated to take steps to regulate such communications.

Claimant, Steve Kastella, appeals from Findings of Fact, Conclusions of Law, and Order entered by a hearing examiner of the Department of Labor and Industry (Department) on January 10, 1995. Respondent, Plum Creek Timber Company (Plum Creek), which is a self-insured employer does not cross-appeal.

The decision below determined that claimant is suffering from an occupational disease and apportioned thirteen (13%) percent of his disability to occupational factors and eighty-seven (87%) percent to non-occupational factors. The hearing examiner further denied claimant's request for attorney fees and costs. After considering the hearing examiner's findings and the parties' arguments, the Court finds that the decision below was based on fundamental errors of law and must therefore be reversed.

Conclusiveness of Findings of Fact

On appeal the claimant challenges only two of the hearing examiner's findings of fact. However, as discussed later in this decision, the alleged errors in those findings are errors of the law rather than factual errors. In its responsive brief, Plum Creek does not

take exception to any findings. Therefore, except for any legal conclusions set forth or inherent in the hearing examiner's findings of fact, those findings are controlling and are the basis for the discussion which follows.

Factual and Procedural Background

Claimant has been employed by Plum Creek since June 1971. (Finding 3.) He has worked as a dry chain puller, spreaderman, spec saw operator and patch line operator. (*Id.*)

He began experiencing back problems, primarily muscle cramps, aches and pains, while working on the spreaders prior to 1987. (Findings 4-6.) In 1989 claimant's back condition worsened and he was unable to continue working. (Finding 7.) On July 19, 1989, he filed a workers' compensation claim alleging that he had suffered a work-related injury on March 20, 1989. (*Id.*) Plum Creek denied the claim but settled with claimant on a **disputed liability** basis. (Finding 7 and Ex. 1.) The full and final compromise settlement, in the amount of $35,000, was approved by the Division on October 18, 1989. (*Id.*) The medical portion and all other aspects of the claim were closed. (*Id.*)

Claimant underwent a laminectomy and diskectomy in August 1989 and returned to work after six (6) months of recuperation. (Finding 8.) He continued working but in approximately December 1992 he began experiencing low-back pain and numbness in his left leg. (Finding 9.) In March 1993 he took time off from work and then returned to work in a light-duty position. On September 1, 1993, he filed a new claim for compensation based on "repetitive trauma." (Ex. 4) On October 18, 1993, he underwent additional surgery to fuse the L4 through S1 vertebrae. (Finding 9.)

Treating the new, September 1, 1993 claim as one for occupational disease, the Department referred claimant to Dr. Dana Headapohl for evaluation. (Ex. 7.) Dr. Headapohl specializes in occupational medicine and is a member of the Department's Occupational Disease Panel. (Headapohl Dep. at 5.)

Dr. Headapohl examined claimant on November 18, 1993. (Finding 14; Headapohl Dep. Ex. 2.) On the day of the examination, Plum Creek's attorney, Mr. Kelly M. Wills, wrote and hand delivered a letter to Dr. Headapohl in which he outlined claimant's medical history, or at least his version of that history. (Finding 15; Headapohl Dep. Ex. 1.) The letter also stated Plum Creek's position "that Mr. Kastella's recurrent disk is the natural consequences of his earlier problem and prior laminectomy and disk incision." (Headapohl Dep. Ex. 1 at 3.) A copy of the letter was mailed to claimant's attorney, Mr. David W. Lauridsen (*id.),* thus precluding him from responding to Mr. Will's letter prior to Dr. Headapohl's examination.

On January 2, 1994, Dr. Headapohl provided the Department with her report. (Headapohl Dep. Ex. 2.) In that report she stated that claimant was suffering from an occupational disease. Referring to claimant's alleged 1989 injury, she went on to say, "I believe that the original 'injury' was in fact an occupational disease. The disc protrusion recurrence is a natural progression of the original disease." (*Id*. at 8.) She attributed ten (10%) percent of claimant's disease to "non-occupational factors such as smoking history and genetic predisposition" and the remaining ninety (90%) percent to his occupation. (Headapohl Dep. Ex. 2 at 9; Headapohl Dep. at 44; Finding 21.)

On January 18, 1994, the Department forwarded its Order Referring Copy of Medical Reports to Parties, along with copies of Dr. Headapohl's reports, to the parties. (Ex. 5.) In its order, the Department stated that it was its "**preliminary determination concerning the claimant's claim for occupational disease benefits is 90% (NINETY PERCENT), of the claimant's DEGENERATIVE DISC DISEASE arose out of and was contracted from their [sic] employment**." (Ex. 5 at 1, bold, parentheses and capitals in original.)

Plum Creek disagreed with the finding and requested a hearing. (Ex. J-1.) A prehearing conference was held on April 14, 1994. (Ex. J-4.) The Prehearing Order filed on April 18, 1994, shows that Plum Creek continued to dispute the finding that claimant suffered from an occupational disease. It phrased the issue as follows: "Whether and to what extent Respondent's [claimant's] current disability qualifies as a new occupational disease is in dispute and should be decided by this administrative agency." (Ex. J-6 at 3.)

A hearing was scheduled for June 1, 1994. On May 20, 1994, eleven (11) days prior to hearing, Plum Creek for the first time indicated that it was accepting liability for the claim under the Occupational Disease Act but was disputing the ninety (90%) percent apportionment. (Ex. J-9.) Plum Creek contended that only thirteen (13%) percent of claimant's disease or condition was attributable to his occupational disease. The parties agreed that the hearing set for June 1, 1994, would be limited to the apportionment issue. (*Id.*)

The hearing was held as scheduled on June 1, 1994. The only witness at the hearing was claimant. However, the parties also submitted the depositions of claimant, Dr. Dana Headapohl and Dr. Randale C. Sechrest for consideration.

In her deposition, Dr. Headapohl confirmed her original opinion that claimant is suffering from a disease which is ninety (90%) percent attributable to occupational factors. When asked by Plum Creek's attorney to further apportion the occupational factors between claimant's work following his 1989 surgery and his work prior to that surgery, Dr. Headapohl testified that claimant's work following 1989 was only one-seventh of the occupational contribution to his condition. (Headapohl Dep. 44-46; Finding 24.) One-seventh of ninety (90%) percent, rounded off, is thirteen (13%) percent. Thus, this answer

became the basis for Plum Creek's thirteen (13%) percent solution. That thirteen (13%) percent solution was ultimately accepted by the hearing examiner, who concluded that "**only** 13% of Respondent's [claimant's] disability was attributable to the occupational disease which developed between 1989 and 1992." (Finding 24, emphasis in original.)

Dr. Sechrest, a general orthopedist who practices in Libby and who no longer does surgery because of the small size of the Libby hospital and a lack of support services, testified that claimant's work after his 1989 surgery "played a part" in the 1992 recurrence of his back condition. (Findings 11-12; Sechrest Dep. at 22-25.) When asked to allocate on a "percentage bases" the contribution of claimant's original 1989 condition, subsequent work activities, smoking and hereditary factors and whatever else might be in the equation, Dr. Sechrest responded that it was his "gut feeling based on no hard evidence" that thirty-three and one-third (33⅓ %) percent was related to his original [1989] injury, thirty-three and one-third (33⅓%) percent to his post-1989 work activities and thirty-three and one-third (33⅓%) percent to his recreational activities and predisposition. (Sechrest Dep. at 25-26.) Thus, his estimate of the contribution of claimant's post-1989 work was even higher than that of Dr. Headapohl.

JURISDICTION

Neither party has questioned the jurisdiction of the Workers' Compensation Court to determine this appeal. However, jurisdiction is an issue that may be raised at any time by any party, or by the Court sua sponte. *Estate of Stoian,* 138 Mont. 384, 394-95, 357 P.2d 41 (1960); *In re Marriage of Miller,* 259 Mont. 424, 426, 856 P.2d 1378 (1993). In light of a recent decision of this Court concerning jurisdiction in occupational disease cases, *John A. Gomez v. Montana Municipal Ins. Authority,* WCC No. 9411-7177 (Order Granting in Part/denying in Part the Motion to Dismiss, 1/27/95), the matter of jurisdiction must be addressed.

In *Gomez* this Court held that where an insurer concedes liability but disputes the amount of benefits due, the Court, rather than the Department, has original jurisdiction over the dispute. The decision was predicated on language in section 39-72-602, MCA, which triggers the Department's medical panel and hearing procedures in cases where"**an insurer has not accepted liability**." Based on that language, we held that the Department's original jurisdiction over occupational disease disputes is limited to cases where the insurer disputes liability and does not extend to an apportionment dispute where the insurer has accepted liability. Where the insurer has accepted liability, this Court has original jurisdiction over benefit disputes.

In this case Plum Creek accepted liability for the claim but disputed the initial determination apportioning ninety (90%) percent of claimant's disease to occupational factors. However, its acceptance of liability came long after the medical panel procedure

outlined in section 39-72-602, MCA, had commenced. It came after the Department's initial determination, after Plum Creek filed a request for hearing (Ex. J-1), after the prehearing conference, and only eleven (11) days before the hearing.

The Department had jurisdiction to hold a hearing when Plum Creek filed its hearing request. It clearly continued to have jurisdiction over the dispute until at least eleven (11) days prior to hearing, since until that time Plum Creek disputed liability. When the Department's jurisdiction attached, it acquired jurisdiction to determine matters ancillary to liability, *cf. State ex rel. Uninsured Employers' Fund v. Hunt,* 191 Mont. 514, 519, 625 P.2d 539, 542 (1981), including the percentage to be apportioned to Plum Creek. Once its jurisdiction was invoked it had exclusive jurisdiction to determine those matters to which its jurisdiction extends. *Cf. Chagnon v. Tilleman Motor Co.,* 259 Mont. 21, 29-30, 855 P.2d 1002, 1007 (1993).

In this case the jurisdictional prerequisites were met when the insurer requested a hearing. Section 39-72-611, MCA, provides:

> **39-72-611. Hearing on determination -- when.** Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the claimant's entitlement to occupational disease benefits, the department **shall** hold a hearing. [Emphasis added.]

The insurer disputed liability and requested a hearing, thus requiring the Department to hold one. I therefore conclude that Plum Creek's acceptance of liability eleven (11) days before hearing did not divest the Department of jurisdiction.

Section 39-72-612(2), MCA, provides that an appeal from a final determination of the Department in an occupational disease case must be made to the Workers' Compensation Court. Therefore, the appeal in the present case is proper.

STANDARD OF REVIEW

Section 39-72-612(2), MCA (1987), provides the standard of review applicable to this appeal. It provides in relevant part:

> The judge may overrule the division only on the basis that the division'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.

Under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact must be overturned on judicial review where they are ". . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 286, 289, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). The Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1 (1992). Conclusions of law, however, must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue,* 245 Mont. 470, 474-75, 803 P.2d 601 (1990).

DISCUSSION

I. Apportionment

The Department's hearing examiner adopted Dr. Headapohl's conclusions over those Dr. Sechrest based on the "prima facie" rule set forth in section 39-72-609, MCA, and the uncertain "gut feeling" of Dr. Sechrest, which contrasted with the more "convincing" opinion of Dr. Headapohl. (Conclusions 6 and 8.) However, the hearing examiner adopted Plum Creek's thirteen (13%) percent solution. His rationale for doing so is not as clearly stated as it could be, but becomes apparent in context. Discussing the apportionment statue, § 39-72-706, MCA, the hearing examiner stated in Conclusion of Law 10, "The aggravation statute is indeed a codification of the principle that an employer shall be responsible only for that portion of a disease which was caused by the occupational activities which contribute to the disease; and prior, present and the ongoing nature of the disease process cannot be ignored." Previously, in Conclusion of Law 7, the hearing examiner had said, "**As Claimant previously filed a claim in 1989 and received a disputed liability settlement in that matter,** it is the opinion of Dr. Headapohl that only 13% of Respondent's disease and resulting disability was caused by occupational factors." Carrying through on this theme, in Conclusion of Law 11, the hearing examiner concluded:

> The substantial reliable, credible and probative deposition testimony of Dr. Headapohl clarified her panel report opinion that Claimant's low back problems were only 13% due to a compensable occupational disease **which developed following Claimant's return to work during the years 1989-1993.** The remaining 87% is due to non-employment activities (10%), **and employment activities (77%) during and prior to 1989 which were resolved by settlement in 1989.** [Emphasis added.]

As can be gleaned from the foregoing, the hearing examiner concluded as a matter of law that the contribution of occupational factors prior to 1989 should be ignored. That conclusion was erroneous.

Plum Creek is the responsible employer with respect to claimant's occupational disease. Section 39-72-303(1), MCA (1987), provides:

> (1) Where compensation is payable for an occupational disease, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazard of such disease.

This provision is not at issue in this case since claimant's last hazardous occupational exposure occurred while claimant was working for Plum Creek. Indeed, it appears that his entire occupational exposure occurred while he was working for Plum Creek. (See Finding 3.)

Unlike the Workers' Compensation Act, the Occupational Disease Act permits apportionment between occupational and non-occupational factors. Section 39-72-706(1), MCA (1987), provides:

> **Aggravation.** (1) Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any wise contributed to by an occupational disease, the compensation payable under this chapter shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

This section is plain on its face and needs no interpretation: in occupational disease cases, the insurer is responsible in proportion to the percentage by which the claimant's occupation has contributed to his disability.

Plum Creek argues that the hearing examiner applied the section correctly because it considered "all factors which contribute to a claimant's disability, including those factors which arose before the occupational disease which culminated in the ultimate disability . . . ." (Respondent's Reply Brief at 6, emphasis in original.) The Court is mystified by the contention. Dr. Headapohl and Dr. Sechrest agreed that claimant's occupational disease

predates his alleged 1989 injury. Dr. Headapohl, whose testimony the hearing examiner found more persuasive, found that ninety (90%) percent of claimant's current condition is attributable to occupational factors.

What Plum Creek is really arguing is that the alleged 1989 injury, or, more probably, the compromise settlement of the claim made with respect for that injury, precludes consideration of the contribution the claimant's pre-1989 work had with respect to his disease. Section 39-72-706(1), MCA (1987), provides no support whatsoever for this argument. It simply distinguishes between occupational and non-occupational factors over the claimant's lifetime. It does not make distinctions based on time or on prior claims.

Plum Creek contends that if section 39-72-706(1), MCA, permits consideration of occupational factors prior to 1989, then multiple awards for the same disability would be permitted. That contention is unpersuasive under the facts of this case. Plum Creek never considered or settled any prior claim for occupational disease. While it settled a 1989 workers' compensation claim, it did so on a compromise and disputed liability basis which did not admit liability and which cut off any claim for future medical and compensation benefits. It cannot now assert that claimant has received full compensation for the occupational contribution of his pre-1989 work or that he released any claim with respect to such contribution.

Claimant has tendered an alternative ground for reversal of the decision below. He argues that the subsequent injury rule, which is applicable in occupational disease cases, *Caekaert v. State Compensation Insurance Fund,* 268 Mont. 105, 885 P.2d 495 (1994), requires that compensation be based on his total occupational exposure, including his exposure prior to 1989. The subsequent injury or exposure rule, however, is employed to determine which of two or more insurers is liable for benefits. *See Belton v. Carlson Transport,* 202 Mont. 384, 389, 658 P.2d 405, 408 (1983) and *Caekaert*. Liability is not at issue in this case. Plum Creek concedes liability. The issue is apportionment, and that issue has been addressed herein.

II. Challenge to Findings of Fact

Claimant argues that Findings 23 and 24 are erroneous. Notwithstanding his argument, the findings accurately summarize Dr. Headapohl's testimony that ninety (90%) percent of claimant's disease is due to occupational factors but only thirteen (13%) percent is due to post-1989 occupational factors. It was not the findings which were erroneous, it was the application of law to those findings which was erroneous.

III. Attorney Fees and Costs.

Attorney fees and costs in occupational disease cases heard by the Department are governed by section 39-72-613, MCA (1987), which provides:

> **Costs and attorney fees.** (1) If an insurer requests that a hearing be held before the division and the claim is determined compensable by the division after the hearing and the insurer does not appeal the division's decision to the workers' compensation judge, reasonable costs and attorney fees, as determined by the division shall be paid to the claimant's attorney by the insurer.
>
> (2) If an insurer appeals a decision of the division to the workers' compensation judge or from the judge to the supreme court and the claim is determined compensable, reasonable costs and attorney fees, as determined by the workers' compensation judge, shall be paid to the claimant's attorney by the insurer for proceedings before the division, the workers' compensation judge, and the supreme court.

The hearing examiner declined to award claimant attorney fees and costs because Plum Creek prevailed in its argument that its liability was limited to thirteen (13%) percent. The liability decision, however, was erroneous. Claimant was, and is, entitled to judgment on the merits, and is therefore the prevailing party in the proceeding below. On remand the hearing examiner shall determine and award claimant attorney fees and costs.

Subsection (2) permits the Court to make the award of attorney fees and costs where the **insurer** appeals from an adverse determination. Since this appeal was by claimant, the subsection does not apply.

IV. Plum Creek's Letter to Dr. Headapohl

Claimant's final assignment of error is to Conclusion of Law 13, which concerns Mr. Will's letter to Dr. Headapohl. That conclusion was as follows:

> 13. Claimant further urges the Hearing Examiner to admonish Petitioner for what he alleges to be ex parte communication between Petitioner and Dr. Headapohl. Claimant contends Petitioner's November 18, 1993 letter to Dr. Headapohl in anticipation of the occupational disease evaluation ordered by the Department compels the Hearing Officer to take action because the communication somehow "poisoned the well." It is noted, however, that Claimant failed to identify any statute or rule violated by Petitioner wherein jurisdiction rests with the Hearing Officer to specifically "admonish" a party or invoke punitive measures under such circumstances.

> The communication may have been inappropriate, however, there is nothing in the record showing Claimant to have objected to or responded to the letter, although he apparently received a timely copy of the letter. Moreover, there was opportunity for Claimant to object to the admission of Dr. Headapohl's panel report, however, review of the record reveals that the panel report was admitted without objection from either party. More importantly, this Hearing Officer finds Dr. Headapohl's report to be credible, reliable, probative and detects no "poison in the water."

Claimant takes exception to the conclusion, although he does not specifically state what the Court should do to cure it.

The medical panel procedure established by the Occupational Disease Act is calculated to provide specialized, impartial medical opinion regarding occupational disease claims. Section 39-72-601(1), MCA (1993), requires the Department to "develop a list of physicians to serve on the occupational disease medical panel." Medical panel members must be board certified or board eligible in a specialty area. *Id.* Neither the claimant nor the insurer designate the panel member who is to examine the claimant: the Department does. §§ 39-72-601(2) and -602(2)(a), MCA (1993). The panel physician designated by the Department must specialize in the area of medicine which is "appropriate to the claimant's condition." § 39-72-601(1), MCA (1993). If either the claimant or insurer is dissatisfied with the opinion of the first examining physician, then the Department is required to appoint a second physician to examine claimant. § 39-72-602(b), MCA (1993). That appointment triggers a further review by a three member panel of physicians, who must then submit a final, joint report as to whether the claimant is suffering from an occupational disease. *Id.* The panel report is then deemed "prima facie evidence as to the matters contained in the report." § 39-72-609, MCA (1993).

By putting the medical panel under the control of the Department, the Legislature clearly contemplated an impartial medical panel free from the control or direction of either of the parties. That impartiality may be undermined where *ex parte* communications aimed at influencing panel opinions are permitted. While it may be assumed that physicians will disregard attempts to influence their opinions, the same might be said with regard to *ex parte* communications to judges, but the Rules of Professional Conduct nonetheless prohibit such *ex parte* communications. Rule 3.5(b), Rules of Professional Conduct. *Ex parte* communications may subtly and unconsciously influence a judge's or a physician's determination, and even if they do not, they diminish the appearance of impartiality.

In this case, Mr. Will's letter was not purely informational: it was clearly calculated to influence Dr. Headapohl's approach to and opinion in this case. Among other things, it said:

> A dispute exists concerning the cause of Mr. Kastella's recurrent herniated disk and its possible relationship to his employment activities. As noted, Mr. Kastella claims that his recurrent disk problem is a result of his day-to-day employment activities and, therefore, qualifies as an occupational disease.
>
> In contrast, it is our belief that Mr. Kastella's recurrent disk is the natural consequences of his earlier problem and prior laminectomy and disk incision. Our conclusion is based upon the opinion which we received from orthopedic surgeon, Randale C. Sechrest, M.D. Dr. Sechrest performed an evaluation of Mr. Kastella and was asked to render an opinion on the issue of whether Mr. Kastella's recurrent herniated disk was caused by his occupational activities or merely a natural consequence of his earlier problems and surgery. It is Dr. Sechrest's opinion that it is more probable than not that Mr. Kastella's recurrent disk is a consequence of the original herniation and surgery rather than his employment activities. A copy of Dr. Sechrest's report and correspondence is enclosed for your review.

(Headapohl Dep. Ex. 1 at 2-3.)

The letter was delivered on the day of Dr. Headapohl's examination of claimant, but sent via mail to claimant's attorney, thus thwarting claimant's attorney from providing Dr. Headapohl, prior to her examination of claimant, with information he thought important or with his position regarding the occupational disease issue. While in fact it may not have influenced Dr. Headapohl's impartiality, it had the potential of doing so.

The medical panel report and opinion is not just "another" medical opinion. It has special significance in occupational disease cases since the panel members are specialists in occupational disease and their reports are given "prima facie" status in any contested case proceeding. It is therefore important that panel members' impartiality and independence be preserved.

An agency has not only those express powers granted to it by statute but "has by implication such powers as are necessary for the due and efficient exercise of those expressly granted . . . ." *Guillot v. State Highway Commission,* 102 Mont. 149, 154, 56 P.2d 1072 (1936). In giving the Department responsibility for administering the medical panel procedures, the Legislature vested it with the authority and the obligation to preserve the integrity and impartiality of that process. The hearing examiner's suggestion that the Department is powerless to regulate *ex parte* communications with panel members is erroneous. The Department not only has the authority but the obligation to do so. Since the opinions of the medical panel are especially significant in determining the existence or absence of occupational disease, failure to insure the independence and impartiality of

panel members may require a new evaluation by a new panel if the claimant or insurer is prejudiced by *ex parte* or improper communications.

What specific steps the Department may take to ensure that the panel process is fair is not at issue in this case. This discussion should not be read as requiring the Department to prohibit all direct communication with panel members, although it might do so. But, at minimum, the Department must assure that if one party communicates to a panel member the opposing party has a fair and *timely* opportunity to reply.

JUDGMENT

1. The Department's January 10, 1995, Findings of Fact, Conclusions of Law, and Order are **reversed.** This matter is remanded with instructions that the Department enter an order finding that ninety (90%) percent of claimant's occupational disease is attributable to his occupational exposure and awarding claimant attorney fees and costs in an amount to be determined by the Department.

2. This Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

3. Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment on Appeal.

Dated in Helena, Montana, this 30th day of June, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Kelly M. Wills
Ms. Melanie A. Symons