

IN THE MATTER OF
CARTER PRODUCTS, INC.

Docket 4970. Order and opinion, Sept. 20, 1955

Order denying respondent's motion for an order disqualifying hearing examiner from making report on additional evidence and vacating and terminating the proceedings.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.
Breed, Abbott & Morgan, of New York City, for respondent.

ORDER DENYING RESPONDENT'S MOTION FOR DISQUALIFICATION
OF THE HEARING EXAMINER

This matter having come on to be heard upon the motion and affidavit filed by counsel for the respondent on March 28, 1955, as supplemented by the motion and affidavit filed on April 18, 1955, requesting that the hearing examiner be disqualified for alleged bias and the proceedings terminated; and

The Commission having determined, for reasons set forth in the accompanying opinion, that said motion should be denied:

It is ordered, That respondent's motion be, and it hereby is, denied.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Respondent's motion and supplement thereto, with accompanying affidavits is filed under the Commission Rules which permit such a procedure whenever any party shall deem the hearing examiner disqualified, for any reason, to continue to preside in any hearing. Respondent charges the hearing examiner with personal bias and animosity toward respondent and its counsel and with partiality and bias in the conduct of the rehearing. The motion asks that an order issue disqualifying the hearing examiner from making and filing his report upon the additional evidence in this case and vacating and terminating the proceedings.

Complaint was issued on May 28, 1943, and charged respondent with false and deceptive advertising of its product, Carter's Little Liver Pills. After extensive hearings involving over 10,000 pages of testimony and 2,200 exhibits, the hearing examiner on July 22, 1946, filed his report, as required by the procedure in effect at that time. In March, 1951 the Commission made findings and issued its order to

cease and desist.¹ Upon appeal, the Circuit Court of Appeals set aside the Commission's order² on the ground that the hearing examiner had unduly restricted the cross-examination of certain expert witnesses of counsel supporting the complaint, namely, Drs. Bollman, Lockwood and Case. Thereafter, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case with instructions that the proceeding be reopened for further evidence and order consistent with the opinion of the Court of Appeals.³ Further hearings were then held before the same examiner who had heard the case from the beginning. Drs. Bollman and Case were further examined. Dr. Lockwood had died in the meantime and his testimony and the exhibits supporting the same were stricken from the record.

The charges made by respondent will be considered in the order presented in its brief.

POINT I

The examiner accused respondent and its counsel of abuse of process in the following particulars

- A. Referring to "counsel with great financial backing in a paramount and demonstrated desire to block and frustrate the remedial processes vested by law in the Commission"

This has reference to the ruling of the hearing examiner on certain motions and offers of proof made by respondent. The complete statement at this point is as follows:

"*Fifth Motion*: This motion is but another effort to introduce into the present record the testimony of Dr. Twiss, coupled with supporting testimony of others, on the ground, primarily, that such new studies, experiments, methods, statistical analyses, new theories on the therapeutic value of cholagogues and cholaretics in increasing the formation or flow of bile, and the many kindred scientific points which respondent would inject anew into this case, are all superior to the tests and results obtained by certain of Commission witnesses, although respondent's counsel discreetly refrains from any like criticism of comparable tests made at his behest and testified by his witnesses. Such additional testimony, if permitted, would, as hereinabove pointed out, result in a trial *de novo* with concomitant further delay and great expense. The record now existing herein is eloquent demonstration of the vast and practically limitless reaches of scientific ramifications which may be inquired into by counsel with great financial backing and a paramount and demonstrated desire to block

¹ 47 F. T. C. 1137.

² 201 F. 2d 446; 5 S. & D. 478.

³ 346 U. S. 327; 5 S. & D. 581.

and frustrate the remedial processes vested by law in this Commission. It is, accordingly,

Ordered, That respondent's Fifth Motion, in its entirety, be denied."

B. Charging counsel with being desirous of "patching up Morrison's testimony and, perhaps, substituting therefor the testimony of Drs. Twiss and Arkin"

Morrison was a previous witness for respondent, in whose testimony the hearing examiner had apparently placed very little confidence. The complete sentence taken from the hearing examiner's ruling is:

"With ample opportunity to appraise the conduct, lack of candor and demeanor of the witness, as well also his questionable professional conduct, and having thus expressed himself concerning his utter lack of confidence in Morrison's testimony, based upon the latter's lack of objectivity in setting up and conducting his experiments, as also the truthfulness of his testimony concerning results procured by him, and having accorded such testimony no weight in arriving at his recommendations to the Commission, the Examiner must come to the inevitable conclusion that his lack of confidence as to Morrison must prove disturbing to respondent's counsel, hence gives rise to the quite understandable motive that counsel is desirous of patching up Morrison's testimony and, perhaps, *substituting* therefor the testimony of Twiss and Arkin rather than to rationalize and justify Morrison's testimony."

C. Characterizing certain offers of proof as "thinly veiled attempts, under the guise of offers of proof, to sit in appellate judgment on the findings and conclusions of the Commission"; insinuating that "other experts could be had for a price"; referring to witnesses as "every Tom, Dick and Harry who erupted with a new theory," and various other statements

POINT II

The hearing examiner filed his report before decision could be made by the Commission on the respondent's motion for disqualification

The record indicates that the evidence was closed on April 30, 1954. Thereafter, there were various motions, and a ruling thereon by the hearing examiner was filed on February 9, 1955. The supplemental report on additional evidence received on the remand was filed March 31, 1955. The motion to disqualify was filed on March 28, 1955.

POINT III

The hearing examiner suppressed in his rulings and supplemental report all reference to the admissions and self-contradictions of Commission's witness, Dr. Bollman

The record shows that Dr. Bollman was examined at some length. The attorneys and the hearing examiner devoted considerable atten-

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tion to what were claimed to be inconsistencies in the Doctor's testimony in the original hearing and his testimony in this hearing. In connection with this matter, and with reference to such testimony, the hearing examiner used the term "straighten out", to which words counsel for respondent takes exception. In his report the hearing examiner devotes considerable space to Dr. Bollman's testimony, assesses its value and gives his reasons therefor.

POINT IV

The hearing examiner attempted to circumvent the opinion of the Court of Appeals

This charge is based on the refusal of the hearing examiner to grant respondent's motion to offer the testimony of Dr. Arkin, a statistician.

During the original hearing, Dr. Morrison testified for respondent concerning certain tests he had made. In those same hearings Dr. Bollman undertook to discredit the findings of Dr. Morrison by means of a statistical document or chart which he had prepared and which he said was a method of his own for analyzing Dr. Morrison's experiments and tests. This document, Exhibit 202, was received in evidence. Respondent undertook to question Dr. Bollman as to his use of this document in connection with other matters. The refusal of the hearing examiner to permit this cross-examination was held by the Circuit Court of Appeals to be error.

In his supplemental report the hearing examiner sets out his views as to the value of Dr. Morrison's testimony and his reasons for not accepting the testimony of Dr. Arkin.

POINT V

The hearing examiner adopted verbatim the answering memorandum of counsel in support of the complaint

POINT VI

The hearing examiner made improper and prejudicial remarks in the presence of the witness, Dr. Bollman, and in connection with his testimony

In connection with the cross-examination of Dr. Bollman, counsel for respondent made frequent reference to various medical writings and questioned the witness in regard to them. There were frequent clashes in regard to this matter and in connection therewith the hear-

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ing examiner expressed his views as to the law. Respondent complains particularly of the following statements:

“that the less of that type of stuff that you read into this record the better off we will be”

and

“I feel that an extended cross-examination based upon that point would be more or less a waste of time and a tempest in a teapot”.

Respondent claims that the statements and the conduct of the hearing examiner in this regard indicated bias and that the influence on the witness prejudiced the rights of the respondent.

POINT VII

The examiner omitted in his rulings and in his supplemental report all reference to the effect of the recross-examination of the Commission's witness, Dr. Case, in discrediting such witness' testimony

POINT VIII

In the examination of Drs. Case and Bollman, there was a constant subtle effort by the examiner to suggest or supply answers or reasons for answers by the witnesses and to give previews of what their testimony should be

Several instances are cited, as follows:

On one occasion, the hearing examiner stated that certain testimony “had been gone into in detail yesterday”. He then stated his understanding of the testimony and asked the witness if the statement were correct. The witness agreed that it was correct.

Other instances were also cited where the hearing examiner purported to give his recollection of the testimony and there were frequent clashes with counsel and disagreement as to what the testimony was.

On another occasion, counsel for respondent stated that he was about to ask the witness “some crucial questions, and I don't like to be interrupted at this point”. He was interrupted by the hearing examiner and at the conclusion of the colloquy, the hearing examiner said “Now you can go ahead with your so-called crucial questions.”

POINT IX

The examiner's narrow and begrudging interpretation of the spirit and letter of the mandates of the Ninth Circuit Court of Appeals and the United States Supreme Court and of the Commission's order reopening this case for further evidence (not just for further cross examination) is erroneous, an affront to those courts and to this Commission, and constitutes the crowning badge of bias on the examiner's part

The above brief statement of the circumstances surrounding some of the charges is not meant to be complete. The detailed history of the whole matter could not be given in this opinion. Statements and conduct complained of must be viewed against the background of the entire case and must be examined in connection with the other statements and conduct of all the parties involved in the trial. The conclusions announced hereafter are based on a consideration of the entire record.

Many cases are cited by both parties in their respective briefs. The applicable rules of law are reasonably well settled, although their application to a particular set of facts is sometimes difficult. As was said in the Crown Zellerbach Corporation case, Docket No. 5421:

"* * * the 'personal bias or prejudice' which must be shown to disqualify [an examiner] must not only be 'personal' as against the party claiming it but must be of such a character as to overcome the presumption of the hearing officer's integrity and of the clearness of his perceptions and of such strength as to beget a mental or moral condition which renders the officer either willing to do wrong, although he sees the right, regarding the justiciable matters before him, or, else, incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties before him."

Coming to a consideration of specific charges, we do not see how the date of the filing of the hearing examiner's report has any effect on the ruling of this motion or on the ultimate decision of the case. The respondent's rights are not affected and it is difficult to find any evidence of bias or animosity under Point II.

Other charges are based on rulings claimed to have been incorrectly made or conclusions adopted which are contrary to the facts. See for example Points III, IV, V, VII and VIII. The question of the propriety of these rulings and conclusions may be presented to the Commission at the proper time. Bias and prejudice cannot be presumed simply from the fact that an error has been committed. The

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fact of the error is to be considered together with the other facts and circumstances which have a reasonable tendency to prove or disprove bias and prejudice. The error must not be one of judgment alone but must be of such a character as to indicate a wrong attitude toward a litigant, or a mental or moral condition which prevents a fair trial. We do not here pass on the correctness of any ruling or decision of the hearing examiner. Our conclusion simply is that, based on the entire record, bias and animosity has not been shown.

Respondent also complains of certain statements made by the hearing examiner during the course of the trial and claims that they indicate bias and prejudice.

This case has been in litigation for an unusually long period of time. The record is long and the questions involved are complicated and difficult. The case was vigorously tried by able counsel on both sides. They were diligent, and often persistent, in setting forth their views. The hearing examiner displayed a desire to prevent undue delays and to keep the record at the minimum required to present the facts. Given such a situation, it is understandable that periods of disagreement and irritation developed, which sometimes found expression in words that might better have been left unspoken. They too are to be considered against a background of the entire case and with due regard to what was said and done by all the parties to the litigation.

The appeal of respondent is denied and it is directed that an order issue accordingly.

