

## [Ninth Circuit Clarifies Application of Abuse of Discretion Review When Insurer Has a Conflict of Interest](#)

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The Ninth Circuit Court of Appeals in *Montour v. Hartford Life & Accident*, \_\_\_ F.3d \_\_\_, 2009 WL 2914516 (9th Cir. Sept. 14, 2009), adopted a new standard of reviewing ERISA abuse of discretion cases where the insurer has a conflict of interest. The court held that a “modicum of evidence in the record supporting the administrator’s decision will not alone suffice in the face of such a conflict, since this more traditional application of the abuse of discretion standard allowed no room for weighing the extent to which the administrator’s decision may have been motivated by improper considerations.”

Robert Montour was a telecommunications manager for Conexant Systems, Inc. His employer provided him with a group long-term disability plan governed by ERISA. Hartford was both the insurer and claims administrator of the plan. The plan granted Hartford discretionary authority to interpret plan terms and to determine eligibility for benefits.

Montour applied for and received disability benefits, initially for an acute stress disorder, in 2003. In 2004, Montour consulted an orthopedic surgeon, Dr. Kenneth Kengla, about knee and back pain and subsequently underwent surgery. Dr. Kengla diagnosed Montour with degenerative changes in both areas and notified Hartford that Montour was suffering from physical disability which prevented him from returning to the labor force. Dr. Kengla listed numerous restrictions on Montour’s physical activities.

In November and December 2005 Hartford conducted surveillance on Montour over the course of four days. Video footage from this surveillance depicted Montour driving his car along with other activities. Shortly thereafter, a Hartford investigator conducted a personal interview with Montour at his home, during which Montour listed a “bad back, [an] arthritic right knee, and sleep apnea” as the “disabling medical condition(s)” preventing him from returning to work. He also described an inability to concentrate, which he attributed to the medication he must take to treat his “constant pain.” Montour acknowledged that the surveillance video footage accurately depicted his level of functionality.

In May 2006 a Hartford nurse case manager submitted a letter to Dr. Kengla indicating that Montour was capable of performing “sedentary to light” work and soliciting their agreement. Dr. Kengla indicated that he disagreed with Hartford’s conclusions, citing Montour’s persistent orthopedic symptoms and physical restrictions.

In July 2006 Hartford hired a consulting physician, Dr. Gale Brown, to conduct a file review. Dr. Brown concluded that medical evidence supported the existence of a lower back condition but that Dr. Kengla’s offered restrictions were excessive. He acknowledged that the medical evidence supported Montour’s chronic pain but found that Montour was nevertheless capable of working full-time with modest restrictions, such as changing positions every thirty to forty-five minutes.

After Hartford enlisted a vocational rehabilitation expert to compile an Employability Analysis Report which concluded that Montour was capable of working in a high-level managerial

capacity in five different fields, in August 2006 Hartford denied his claim. Montour appealed this decision and included a vocational appraisal report which concluded that Montour was “not employable in any setting” and that Hartford’s decision was based on numerous mistakes, including a disregard for the fact that the Social Security Administration (SSA) considered Montour to be “totally disabled.”

In response, Hartford hired a physician to conduct a second file review. The physician reviewed Montour’s records for evidence of a physical condition that would preclude sedentary work and, like Dr. Brown, found none. He noted in particular a lack of objective, clinical data demonstrating the extent to which Montour’s pain impacted his functionality. He also noted that Montour’s activities depicted on the surveillance videos exceeded the activity requirements of a “sedentary” job.

In light of concerns raised in the vocational appraisal report, Hartford requested a vocational specialist to conduct an Employability Analysis Report addendum, which reached the same conclusion as the initial Employability Analysis Report regarding the sedentary nature and thus the feasibility of the five proposed managerial positions. In February 2007, a Hartford appeal specialist affirmed the company’s previous decision to terminate Montour’s benefits. In a bench trial, the district court rendered its decision in favor of Hartford, upholding its denial.

In reversing the district court, the Ninth Circuit first explained that when an ERISA plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the court reviews the decision for abuse of discretion. The court agreed with the district court that the abuse of discretion standard applied and that Hartford had a conflict of interest. However, the appeals court criticized the district court’s application of the “clear error” test, explaining that a reviewing court must also take into account the administrator’s conflict of interest as a factor in the abuse of discretion analysis. The appeals court concluded that the district court’s decision did not adequately balance the conflict factors. Accordingly, the appeals court proceeded to do so.

The appeals court gave a comprehensive description of the “signs of bias” it found were exhibited by Hartford throughout the decision-making process. These included overstatement of and excessive reliance upon Montour’s activities in the surveillance videos Hartford’s decision to conduct a paper review rather than an “in-person medical evaluation;” Hartford’s insistence that Montour produce objective proof of his pain level; and Hartford’s failure to deal with and distinguish the Social Security Administration’s contrary disability decision. The appeals court also noted Hartford’s “failure to present extrinsic evidence of any effort on its part to ‘assure accurate claims assessment.’”

The appeals court concluded that Hartford’s bias had infiltrated the entire administrative decision-making process, leading the court to accord significant weight to the conflict of interest. Weighing all of the factors together, the court concluded that Hartford’s conflict of interest improperly motivated its decision to terminate Montour’s benefits. The court reversed and remanded the matter for entry of judgment in favor of Montour and for reinstatement of long-term disability benefits.