IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 28

WCC No. 2001-0325

WILLIAM LOOP

Petitioner

vs.

MID-CENTURY INSURANCE COMPANY and

STATE COMPENSATION INSURANCE COMPANY

Respondents/Insurers for

NORTHWEST TRUCK REPAIR, INCORPORATED

Employer.

ORDER RESCINDING EMERGENCY TRIAL SETTING

Case Summary: Based on allegations in the petition that claimant is in need of further neck surgery, the Court set the trial of this case on an emergency basis. One of the two insurers named as respondents moved for reconsideration, pointing out that there is no medical opinion supporting the claim for surgery and that claimant recently canceled his appointment with the surgeon who operated on him previously.

Held: The motion for reconsideration is granted and the matter is placed on the next regular trial calendar. Claimant has provided no substantial evidence supporting his allegation that he needs further surgery, much less evidence that he needs surgery on an urgent basis. His excuse for cancelling his doctor's appointment (too late in the afternoon) is insubstantial and is inconsistent with his claim of urgency.

Topics:

> **Procedure: Emergency Petition.** Mere allegation of need for surgery is not sufficient to set trial on emergency basis where medical records and recommendations tendered to the Court do not support either a need for surgery or the urgency of surgery.
>
> **Procedure: Emergency Petition.** Claimant's post-petition cancellation of an appointment with the surgeon he anticipates will do surgery because the

appointment is "too late in the afternoon" is inconsistent with his prosecution of his petition on an emergency basis.

¶1 At the request of the petitioner, this Court set the trial of this matter on an emergency basis. Mid-Century, which is one of the two insurers named as respondents, requests reconsideration of the emergency setting.

Factual Background

¶2 The petition alleges that claimant suffered neck injuries in both 1993 and 1999. The insurer at risk for the first injury (State Fund) accepted liability and claimant subsequently underwent neck surgery. The insurer at risk for the alleged second injury (Mid-Century) has denied liability for the second claim.

¶3 Medical records were provided by Mid-Century. Those records not only do not support an urgent need for surgery, they do not support a need for surgery at all.

¶4 As set forth in the narrative of the Brief in Support of Motion for Reconsideration and attached medical records, claimant underwent a C4-5 diskectomy and fusion in 1995. The surgery was done by Dr. Chriss Mack. The fusion failed and additional surgery was performed in 1996 by Dr. Peter Sorini. That surgery included a C5-6 level diskectomy and a two level fusion involving C4-5 and C5-6. Imaging done after the surgeries indicated that the fusion was solid at both levels but by December 1999, Dr. Martini, another physician treating claimant, opined that claimant had a "pseudoarthrosis" at C4-5 and recommended that he return to Dr. Sorini for a possible 3rd surgery. "Pseudoarthritis" is defined as "an abnormal union formed by fibrous tissue between parts of a bone that has fractured usually spontaneously due to congenital weakness -- called also *false joint*." 1997 Merriam-Webster Medical Dictionary, online at www.medscape.com. In the context of this case, it apparently refers to a non-solid fusion at the C4-5 level.

¶5 On April 4, 2000, at the request of Mid-Century, claimant was evaluated by Dr. Catherine Capps and Dr. Henry Gary, an orthopedic surgeon and neurosurgeon, respectively. They concluded that there was "never good evidence" for a solid fusion at the C4-5 level. They recommended against surgery and noted that claimant's smoking may have contributed to the failure of the fusion.

¶6 Mid-Century also points out that claimant canceled a May 22, 2001 appointment with Dr. Sorini because the appointment was "too late in the afternoon."

Discussion

¶7 In seeking an emergency setting, claimant alleges that he is in need of additional surgery. However, even in response to the motion for reconsideration, he has submitted no medical records indicating that need for or the urgency for any such surgery. The sole record he submits in support of his allegation is the January 1, 2001 office note of a

physician's assistant. The note does not recommend surgery. Even if it did, a physician's assistant is not qualified to make such recommendation.

¶8 In the face of claimant's allegation, Mid-Century has offered records disputing any need for surgery. The fact that claimant had two fusion attempts at the C4-5 level that have been unsuccessful should require pause when considering further, similar surgery. Lacking some better support for claimant's allegation that he needs surgery, and any evidence whatsoever of his need for surgery on an urgent basis, I am unpersuaded there is an emergency which requires an expedited trial setting.

¶9 Moreover, as Mid-Century points out, claimant's cancellation of his May 22nd appointment with Dr. Sorini makes it more difficult to prepare for trial within the abbreviated schedule issued by the Court. Claimant does not refute the fact of cancellation or the excuse he gave. His excuse is insubstantial. If there is indeed an emergency, it is not unreasonable to expect the claimant to be more diligent in keeping his medical appointments.

ORDER

¶10 The motion for reconsideration is **granted**. The Scheduling Order and trial setting issued May 16, 2001 is **vacated**. This matter shall be reset for the next regular Kalispell term of Court. A new Scheduling Order will issue accordingly.

DATED in Helena, Montana, this 30th day of May, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Paul D. Odegaard
Mr. David A. Hawkins
Submitted: May 25, 2001