IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 1

WCC No. 9802-7932

WADE H. MCKAY, SR.

Appellant

vs.

CITY OF CHOTEAU

Respondent.

ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

Summary of Case: On appeal from the decision of a DOL hearing officer denying his OD claim, pro se claimant filed a Motion to Submit New Evidence. The proffered evidence was a letter from the owner of a company claimant (a police officer) said worked on his patrol car, omissions from which were the subject of his OD claim.

Held: Under ARM 24.5.350(5), claimant's motion was timely filed where it was received prior to the time set for the last brief. Under section 2-4-703, MCA, new evidence is allowed only if it is material and there were good reasons for failure to present it before the agency. Upon such a showing, the remedy is remand to the agency for receipt of the evidence and reconsideration of the decision. Here, record shows claimant knew about and presented evidence on the issue of repair of the vehicle; he has not shown that the proffered witness was unavailable at the hearing or that he was prevented from obtaining and presenting the information at the hearing. Motion denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.350(5). Claimant's motion for leave to present additional evidence following DOL decision was timely filed where it was received prior to the time set for the last brief on appeal in the WCC.

Constitutions, Statutes, Regulations and Rules: Montana Code: 2-4-703, MCA. Applying section 2-4-703, MCA, once a hearing has been held on an OD claim in the DOL, new evidence is allowed on appeal only if it is material and there were good reasons for failure to present it before the agency. Upon such a showing, the remedy is remand to the agency for receipt of the evidence and reconsideration of the

decision. Here, record shows claimant knew about and presented evidence on the issue of repair of the patrol car he drove as a police officer, omissions from which were the subject of his OD claim. Motion denied where claimant did not show that the proffered witness was unavailable at the hearing or that he was prevented from obtaining and presenting the information at the hearing.

Judicial Review: Additional Evidence. Under section 2-4-703, MCA, once a hearing has been held on an OD claim in the DOL, new evidence is allowed on appeal only if it is material and there were good reasons for failure to present it before the agency. Upon such a showing, the remedy is remand to the agency for receipt of the evidence and reconsideration of the decision. Here, record shows claimant knew about and presented evidence on the issue of repair of the patrol car he drove as a police officer, omissions from which were the subject of his OD claim. Motion denied where claimant did not show that the proffered witness was unavailable at the hearing or that he was prevented from obtaining and presenting the information at the hearing.

¶1 This is an appeal from a decision of the Department of Labor and Industry (Department). Appellant (claimant) moves for leave to present additional evidence.

Factual Background

¶2 The claimant, a police officer, suffers from cognitive changes, headaches, personality changes and depression. He relates his symptoms to alleged exposure to carbon monoxide while driving his patrol car and seeks occupational disease benefits.

¶3 After a medical panel examination, the Workers' Compensation Claims Assistance Bureau (WCCAB) issued an Order Referring Copy of Medical Reports to Parties (January 27, 1997). The Order was favorable to claimant, however, the insurer disputed the findings and requested a hearing. A hearing was held on October 7, 1997, after which the hearing officer denied the claim. (Findings of Fact; Conclusions of Law; and Final Order at 23.)

¶4 Claimant then appealed to this Court. After filing his opening brief on appeal, but prior to the expiration of time for filing his reply brief, the claimant filed a Motion to Submit New Evidence. Through his motion the claimant seeks to introduce a copy of a two page letter from L. Kim Mills (Mills), owner of Mills Ford Company in Fairfield, Montana. The letter relates to mechanical work on his patrol car and specifically to the date on which a rubber grommet for a PCV valve was installed. Claimant requests that the letter be considered in rebuttal to testimony of Dennis Wilhelm (Wilhelm), a mechanic, who testified that he installed the grommet in December 1995. Mill's letter suggests that the grommet was not installed until sometime in early 1996.

Discussion

¶5 The timeliness of claimant's motion is governed by 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 the motion is granted, the court will remand the matter to the department of labor and industry for further hearing.

Claimant's motion is timely since it was filed prior to the deadline for the last brief. Therefore, the Court must determine whether there is good cause to admit the additional evidence.

¶6 To prevail on his motion the claimant must establish two things: first, he must show that the proffered testimony is "material" and, second, he must show "there were good reasons for failure to present it in the proceeding before the agency." § 2-4-703, MCA; *Holbeck v. Stevi-West, Inc*., 240 Mont. 121, 126, 783 P.2d 391, 396 (1989). Section 2-4-703, MCA, which governs the receipt of additional evidence upon judicial review, provides:

> **2-4-703. Receipt of additional evidence**. If, before the date set for hearing, application is made to the court for leave to present additional evidence and **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 agency**, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency 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.]

¶7 The second requirement -- good reasons for failure to present the evidence in the agency proceeding -- is dispositive. The record below shows that claimant was aware of the nature of Wilhelm's testimony well in advance of hearing and therefore could have called Mills to testify in rebuttal. In a pre-hearing memorandum of March 12, 1997, claimant identified Wilhelm as a witness. At hearing claimant offered a "[r]eport of Douglas Wilhelm, mechanic for Mills Ford, dated February 21, 1997" as an exhibit and it was admitted as Exhibit 10. The exhibit indicates Wilhelm's recollection that he installed the grommet in December of 1995. In his motion to this Court, claimant has presented no evidence that Mills was unavailable to testify when the hearing below was held or that he was prevented from obtaining and presenting Wilhelm's information at the hearing.

¶8 The motion is **denied**.

¶9 SO ORDERED.

DATED in Helena, Montana, this 4th day of January, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Wade H. McKay, Sr. - Certified Mail
Mr. Oliver H. Goe
Date Submitted: September 2, 1998