

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 49

WCC No. 9802-7932

WADE H. McKAY, SR.

Appellant

vs.

CITY OF CHOTEAU

Respondent.

ORDER DENYING MOTION FOR NEW HEARING AND MOTION TO OVERTURN

Summary: Appellant contests the adverse determination of the Department of Labor and Industry on his occupational disease claim. Because the WCC has not yet received the transcript from the hearing below, it cannot reach the merits of the case, but does address two motions filed by appellant: (1) requesting a new hearing because claimant's telephone connection to the hearing was cut off during a doctor's testimony; and (2) requesting reversal because the transcript was not prepared within the time set by this Court's scheduling order.

Held: Both motions are denied. Appellant's allegations regarding the telephone connection raise factual matters that require the transcript for resolution and should be briefed by the parties. Contrary to appellant's suggestion, as the party raising issues requiring the transcript, he was responsible for moving forward to cause preparation of the transcript.

Topics:

Constitutions, Statutes, Regulations, and Rules: Workers' Compensation Court

Rules: ARM 25.5.350. Occupational disease claimant appealing adverse determination of Department of Labor and Industry is not entitled to reversal of the decision below because a transcript was not prepared by the Department in accordance with the schedule set by the WCC. As the party raising issues requiring the transcript, appellant bore responsibility for causing the transcript preparation to move forward; he cannot shift that burden to respondent.

Appeals (To Workers' Compensation Court): Transcripts. Occupational disease claimant appealing adverse determination of Department of Labor and Industry is not entitled to reversal of the decision below because a transcript was not prepared

by the Department in accordance with the schedule set by the WCC. As the party raising issues requiring the transcript, appellant bore responsibility for causing the transcript preparation to move forward; he cannot shift that burden to respondent.

¶ The appellant/claimant appeals from an adverse determination of the Department of Labor and Industry (Department) finding that he does not suffer from an occupational disease. In his notice of appeal he challenges the hearing officer's findings and also alleges that he did not hear ten to fifteen minutes of a doctor's testimony because his telephone connection to the Department was cut-off.

¶ The Court has yet to receive the transcript of the hearing below and the information provided by the parties indicates that it will be two to three weeks before it is ready. Nonetheless, appellant filed his brief as scheduled. He has also filed two motions. The Court will dispose of the motions in this Order.

¶ The first motion requests the Court to order a new hearing because claimant's telephone connection was cut-off during doctor's testimony and because the portion of the tape recording containing the doctor's testimony was erased. (Motion to Request for New Hearing.) The matters alleged in the motion raise factual matters which can only be resolved by obtaining a transcript of the hearing and the audiotapes. Moreover, the matter should be addressed in the parties' briefs on the merits. The motion is **denied**.

¶ The second motion requests the Court to reverse the decision below because the Department did not prepare a transcript within 30 days as directed by the Court. (Motion to over Turn Decision of the Department of Labor and Industry Hearing Board.) Appellant asserts it is not his responsibility to order the transcript, that respondent failed to order it until recently, and that the decision should therefore be reversed.

¶ The Department's failure to provide the transcript within the time set by the Court's scheduling order does not entitle appellant to automatic reversal and respondent was not required to order the transcript. Although Rule 25.5.350 provides that "either" party may order a transcript, if the appealing party wishes to pursue issues which require the transcript then he or she bears the burden of obtaining the transcript. In any event, without a transcript the Court cannot review the appellant's assignments of error and it would have to summarily affirm the decision below. The second motion is therefore **denied**.

¶ Since appellant did not have a copy of the transcript at the time he filed his initial brief, he will be permitted to file a new brief after receiving the transcript. A new scheduling order fixing deadlines for further briefing will be issued by the Clerk of Court.

¶ SO ORDERED.

DATED in Helena, Montana, this 10th day of June, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Wade H. McKay - Certified Mail

Mr. Oliver H. Goe

Submitted: June 4, 1998