

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 3

WCC No. 9608-7605

TIMOTHY PARTIN

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

Summary: Appellant seeking reversal of DOL hearing officer's decision he should not be granted waiver of the one-year filing requirement of section 39-71-601(1), MCA, filed motion in WCC seeking leave to present testimony of two witnesses not presented below. One witness was excluded by the hearing officer because not timely disclosed. The other witness was simply not offered below.

Held: Under section 2-4-703, MCA, to prevail on his motion, claimant must demonstrate two things: (1) that the proffered testimony is "material"; and (2) that "there were good reasons for his failure to present it in the proceeding before the agency. He has not shown "good reasons" for failing to present the evidence earlier. The proposed witnesses were co-workers, whose identities were known to him before trial. As to the witness not timely disclosed, appellant cannot use this motion procedure to circumvent the hearing officer's decision to exclude. That issue is part of the appeal and should be handled in that fashion. As to the other witness, claimant presents no justification for failing to call him below.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 2-4-703, MCA. Under section 2-4-703, MCA, to prevail on a motion to present new evidence in the WCC on appeal of a DOL hearing officer decision, claimant must demonstrate two things: (1) that the proffered testimony is "material"; and (2) that "there were good reasons for his failure to present it in the proceeding before the agency. He has not shown "good reasons" where the proposed witnesses were co-workers, whose identities were known to him before trial, and no excuse for failing to present the evidence earlier was offered. As to the

witness not timely disclosed, appellant cannot use this motion procedure to circumvent the hearing officer's decision to exclude. That issue is part of the appeal and should be handled in that fashion.

Judicial Review: Additional Evidence. Under section 2-4-703, MCA, to prevail on a motion to present new evidence in the WCC on appeal of a DOL hearing officer decision, claimant must demonstrate two things: (1) that the proffered testimony is "material"; and (2) that "there were good reasons for his failure to present it in the proceeding before the agency. He has not shown "good reasons" where the proposed witnesses were co-workers, whose identities were known to him before trial, and no excuse for failing to present the evidence earlier was offered. As to the witness not timely disclosed, appellant cannot use this motion procedure to circumvent the hearing officer's decision to exclude. That issue is part of the appeal and should be handled in that fashion.

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

The claimant seeks a waiver of the one-year filing requirement prescribed by section 39-71-601(1), MCA. He submitted his request for a waiver to the Department pursuant to section 39-71-601(2)(c), MCA, which provides:

(2) The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

(a) lack of knowledge of disability;

(b) latent injury; or

(c) equitable estoppel.

The request was made under (c) -- equitable estoppel -- and the Department issued an initial determination in claimant's favor, waiving the one- year period. The insurer disputed that finding and requested a hearing.

Thereafter, a Department hearing was held. After considering the evidence presented by the parties, the hearing officer Entered Findings of Fact, Conclusions of Law, and Order reversing the initial determination and holding that the employer was not estopped from asserting the one-year filing requirement. The effect of the final order was to deny claimant's request for a waiver.

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 for Leave to Present Additional Evidence. Through his motion the claimant seeks to introduce the

testimony of two witnesses who did not testify in the original proceeding. Those witnesses are Mike Miller and Harlan Hodge, co-employees of the claimant.

Claimant's motion is supported by two affidavits. The first affidavit is of Mike Miller and sets out the testimony he would give if allowed the opportunity to testify. The second is an affidavit of claimant's attorney and states that he contacted and telephonically interviewed Mr. Hodge in early October 1996, approximately two months after the hearing officer's decision and a month after the filing of the present appeal. With respect to Miller, claimant offered him as a witness at the hearing below, however, Miller was not allowed to testify because claimant had neglected to list him as a witness.

Discussion

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.

The motion is timely under the rule since it was filed prior to the deadline for the last brief. Therefore, the Court must determine whether sufficient grounds exist to permit the additional evidence.

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, 137, 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.]

The second requirement -- good reasons for failure to present the evidence in the agency proceeding -- is dispositive. The proposed witnesses were both coworkers of claimant, thus their identities were known to him. He cannot use the provisions for additional evidence to circumvent the hearing officer's ruling excluding Miller as a witness for failure to timely list

him as a witness. As to Miller, claimant's remedy is to appeal the hearing officer's ruling, and he has in fact done so. Moreover, he does not provide any good excuse for his failure to timely identify Miller as a witness. As to Hodge, claimant does not explain why he or his attorney failed to contact him prior to hearing.

Since the claimant has failed to show good reasons for his failure to present the two witnesses at the Department hearing, the Court need not determine whether the proffered testimony is material to his case. The motion is **denied**.

SO ORDERED.

DATED in Helena, Montana, this 13th day of January, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Mr. Thomas E. Martello

Submitted: January 13, 1997