

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 37

WCC No. 9603-7525

WILLIAM POLK

Appellant

vs.

PLANET INSURANCE COMPANY

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

Summary: Montana Supreme Court reversed decision of WCC affirming hearing officer of Department of Labor in occupational disease claim. Following remand from the Supreme Court, the WCC in turn remanded to the Department of Labor for further proceedings consistent with the Supreme Court's decision. Appellant/claimant then asked the WCC to reconsider the remand, arguing that the WCC should hold an additional hearing and determine claimant's entitlement. In the alternative, appellant asked the WCC to order the Department to appoint a new medical panel and then hold a hearing to take additional evidence.

Held: The WCC's jurisdiction in this matter is appellate jurisdiction, meaning it cannot substitute its original determinations for those of the Department. Under both section 2-4-703, MCA and ARM 24.5.350(5), any additional evidence must be taken by the agency. Appellant's arguments should be directed to the Department on remand.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 2-4-703, MCA. After the Montana Supreme Court reversed and remanded the WCC's decision affirming a DOL hearing officer in an occupational disease case, the WCC in turn remanded to the DOL. Appellant then asked the WCC to reconsider the remand, urging the WCC to hold its own evidentiary hearing and resolve the claims or, in the alternative, remand to the DOL with certain orders and instructions. Request denied because the WCC's jurisdiction in this matter is appellate jurisdiction, meaning it cannot substitute its original determinations for those of the Department. Under both section 2-4-703, MCA and ARM 24.5.350(5), any additional

evidence must be taken by the agency. Appellant's arguments should be directed to the Department on remand.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.350(5). After the Montana Supreme Court reversed and remanded the WCC's decision affirming a DOL hearing officer in an occupational disease case, the WCC in turn remanded to the DOL. Appellant then asked the WCC to reconsider the remand, urging the WCC to hold its own evidentiary hearing and resolve the claims or, in the alternative, remand to the DOL with certain orders and instructions. Request denied because the WCC's jurisdiction in this matter is appellate jurisdiction, meaning it cannot substitute its original determinations for those of the Department. Under both section 2-4-703, MCA and ARM 24.5.350(5), any additional evidence must be taken by the agency. Appellant's arguments should be directed to the Department on remand.

Judicial Review: Additional Evidence. After the Montana Supreme Court reversed and remanded the WCC's decision affirming a DOL hearing officer in an occupational disease case, the WCC in turn remanded to the DOL. Appellant then asked the WCC to reconsider the remand, urging the WCC to hold its own evidentiary hearing and resolve the claims or, in the alternative, remand to the DOL with certain orders and instructions. Request denied because the WCC's jurisdiction in this matter is appellate jurisdiction, meaning it cannot substitute its original determinations for those of the Department. Under both section 2-4-703, MCA and ARM 24.5.350(5), any additional evidence must be taken by the agency. Appellant's arguments should be directed to the Department on remand.

Jurisdiction: Judicial Review. After the Montana Supreme Court reversed and remanded the WCC's decision affirming a DOL hearing officer in an occupational disease case, the WCC in turn remanded to the DOL. Appellant then asked the WCC to reconsider the remand, urging the WCC to hold its own evidentiary hearing and resolve the claims or, in the alternative, remand to the DOL with certain orders and instructions. Request denied because the WCC's jurisdiction in this matter is appellate jurisdiction, meaning it cannot substitute its original determinations for those of the Department. Under both section 2-4-703, MCA and ARM 24.5.350(5), any additional evidence must be taken by the agency. Appellant's arguments should be directed to the Department on remand.

¶1 Appellant has requested that the Court reconsider its Order remanding this case to the Department of Labor and Industry (Department) for further proceedings. (Order Remanding to Department for Reconsideration, March 4, 1998.)

¶2 Respondent initially objects to reconsideration on the ground that no rule authorizes reconsideration. While that is true, this Court on previous occasions has reconsidered its

orders. The Court is of the opinion that it should be able to do so. Judges make mistakes and this judge, at least, would like the opportunity to consider whether he has made a mistake in issuing any given order. In light of the disposition of the appellant's other arguments, it is unnecessary for me to determine whether, absent an express rule, I have jurisdiction to reconsider the Order.

¶13 This matter initially came to this Court on appeal from a decision of a Department hearing officer denying appellant's occupational disease claim. The medical evidence was complex and conflicting. The hearing officer found the medical evidence mustered by the respondent was the more persuasive. I found his decision supported by substantial evidence and affirmed. On further appeal, the Supreme Court found that the hearing examiner and three of the four physicians who testified in support of the respondent's position had employed an erroneous legal standard. Specifically, they failed to consider whether appellant's occupation aggravated a preexisting disease. The Supreme Court went on to determine that, had aggravation been properly considered, the hearing examiner "could" have found that appellant's occupation in fact contributed to his condition, thereby entitling him to pro rata benefits based on the percentage of the occupational contribution. The Supreme Court remanded the case to this Court.

¶14 I read the Supreme Court decision as requiring that the matter be remanded to the Department's hearing officer for further proceedings. Without soliciting argument from the parties, I entered an Order doing just that. Appellant urges that the Order was in error. Initially, he argues that the matter should not be remanded at all, rather the Workers' Compensation Court should hold an additional hearing and determine claimant's entitlement. Secondly, he argues that if remand is necessary, then this Court should instruct the Department to appoint a new medical panel to review the claim and then hold a hearing to take additional evidence. During oral argument held May 4, 1998, appellant's attorney also urged that the Court should disqualify the original hearing officer.

¶15 This Court's jurisdiction in this matter is appellate jurisdiction. It cannot substitute its own decision for that of the Department. Moreover, the Court cannot take additional evidence and render a new decision. Both the Montana Administrative Procedure Act, §2-4-703, MCA, and this Court's own rules, ARM 24.5.350(5), require that additional evidence be taken by the agency. The agency must issue a new decision based on that additional evidence. This matter must, as a matter of law, be remanded to the Department.

¶16 The Supreme Court did not issue any instructions concerning the further proceedings before the Department. Sitting as a first level appellate court, it would be improper for me to append any. The matters argued by appellant should be taken up with the Department.

¶17 The motion for reconsideration is **denied**.

DATED in Helena, Montana, this 7th day of May, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Ms. Sara R. Sexe