

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 66

WCC No. 9701-7685

DAVID R. HOLCOMB

Appellant

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY &

SUBSEQUENT INJURY FUND

Respondents.

ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

This is an appeal from a decision of the Department of Labor and Industry (Department) denying appellant's request for wage supplement benefits under section 39-71-703, MCA (1987). At the time appellant was injured, he had been certified as vocationally handicapped under the terms and conditions of the Subsequent Injury Fund. Thus, the Department, rather than the Workers' Compensation Court, had jurisdiction to determine what, if any, wage supplement benefits are due him. § 39-71-910, MCA. The jurisdiction of this Court is appellate jurisdiction. § 39-71-204, MCA.

On June 18, 1996, a hearing officer of the Department held a hearing concerning appellant's request for benefits. A month and a half later, on July 31, 1996, the appellant submitted a motion to the hearing officer requesting that he be permitted to submit, post-hearing, an additional medical report from claimant's treating physician, Dr. Mark Rotar, and three written prescriptions of Dr. Thomas G. Hildner, one for the drug Elavil, one for physical therapy, and one directing that claimant be off work until further notice. (Motion to Authorize Submission of Additional Post-hearing Medical Reports.) Dr. Rotar's report was prepared and dated July 11, 1996, approximately 3 weeks after the hearing. (*Id.*; attachment.) Dr. Hildner's notes were dated July 29, 1996. (*Id.*; attachments.) Appellant argued that the information used by vocational experts who testified at hearing "was inconsistent of [sic] Dr. Rotar, as expressed in his previous reports, and as verified by his more recent examinations and treatment." (*Id.*) The hearing officer denied the motion on August 14, 1996, and thereafter, on December 9, 1996, issued his Findings of Fact, Conclusions of Law and Order. This appeal followed.

On appeal, appellant renews his request that he be permitted to introduce the additional medical information. In his opening brief he argues that he should be permitted to introduce Dr. Hildner's reports and prescriptions because they were not received until after the hearing and because such introduction would be "in the interests of justice." (Motion for Leave to Present Additional Evidence and Brief at 2.) He cites no legal authority or other facts relating to the tendered evidence. In his reply brief, he does cite case law. (Reply Brief in Support of Motion for Leave to Present Additional Evidence at 2.) As to his failure to proffer the evidence at hearing, he says:

The reason why this medical evidence was not presented at the hearing is that until the hearing, there existed no report indicating Appellant's lifting restrictions were any different than what Dr. Rotar had in his medical record and what the therapist, Vince Buzzas, stated in his Functional Capacities Assessment. It wasn't necessary to have Dr. Rotar's report until Ms. Blackman testified Appellant had a 60 pound lifting restriction. However, Ms. Blackman never spoke with Dr. Rotar, never spoke with the examining physician, Dr. Coward, who testified on behalf of Appellant, and never once spoke with Appellant, much less consulted him. Ms. Blackman failed to even consult one medical person before testifying. Prior to the hearing, Appellant was not notified that Ms. Blackman was going to testify Appellant's lifting restriction was 60 pounds. Therefore, it wasn't necessary to have clarification from the treating physician, Dr. Rotar. Based on the forgoing reasons and the materiality of the evidence, Appellant should be allowed to submit the letter.

(*Id.* at 2.)

I am unpersuaded by appellant's arguments. The authority of this Court to order the admission of additional evidence is governed by section 2-4-703, MCA, which 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.]

Appellant has not provided "good reasons" for his failure to present the evidence at hearing. The issue at the hearing below was whether claimant is entitled to wage loss benefits based on the difference between what he was earning prior to his injury and what he is qualified to earn post-injury. § 39-71-703, MCA (1987). His physical ability to perform particular jobs was plainly at issue. Appellant was free to call Drs. Rotar and Hildner to

testify at hearing but chose to rely on Dr. Rotar's medical records, which were introduced as exhibits. That the hearing did not go as he may have expected is not grounds for reopening the hearing so he can muster additional evidence on a matter which was plainly in issue when the hearing was held.

Motion **denied**.

DATED in Helena, Montana, this 3rd day of June, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Douglas J. Skjelset

Mr. Oliver H. Goe

Mr. Kevin Braun

Submitted: April 28, 1997