

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 58

WCC No. 9506-7336

DUANE ERICKSON

Petitioner

vs.

CHAMPION INTERNATIONAL

Respondent.

ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

Summary: Claimant who appeared pro se before Department of Labor on his claim for occupational disease benefits, and is represented by counsel on his appeal to the Workers' Compensation Court, requests leave to present additional medical evidence.

Held: Even though the proffered evidence was material to claimant's case, request denied where claimant was informed prior to DOL hearing that he had the right to be represented by counsel and had in fact been in contact with current counsel before the DOL hearing. Where claimant offers no good reason for his failure to present the evidence before the department other than his pro se status, the Court's allowance of new evidence on appeal would permit every party to proceed pro se before the Department, then to hire counsel and secure a new hearing on appeal.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 2-4-703, MCA. This section and ARM 24.5.350(4) permit new evidence on appeal before the Workers' Compensation Court only where there were good reasons for the failure to present the evidence below. Where claimant was informed he had the right to an attorney below, and was in fact in contact with counsel prior to his Department of Labor hearing, his pro se status before the DOL is not alone sufficient reason to allow introduction of additional medical evidence, even if such evidence is material to his case. Where claimant offers no good reason for his failure to present the evidence before the department other than his pro se status,

the Court's allowance of new evidence on appeal would permit every party to proceed pro se before the Department, then to hire counsel and secure a new hearing on appeal.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.350(4). This rule and section 2-4-703, MCA permit new evidence on appeal before the Workers' Compensation Court only where there were good reasons for the failure to present the evidence below. Where claimant was informed he had the right to an attorney below, and was in fact in contact with counsel prior to his Department of Labor hearing, his pro se status before the DOL is not alone sufficient reason to allow introduction of additional medical evidence, even if such evidence is material to his case. Where claimant offers no good reason for his failure to present the evidence before the department other than his pro se status, the Court's allowance of new evidence on appeal would permit every party to proceed pro se before the Department, then to hire counsel and secure a new hearing on appeal.

Appeals (To Workers' Compensation Court): New Evidence. Where claimant was informed he had the right to an attorney below, and was in fact in contact with counsel prior to his Department of Labor hearing, his pro se status before the DOL is not alone sufficient reason to allow introduction of additional medical evidence, even if such evidence is material to his case. Where claimant offers no good reason for his failure to present the evidence before the department other than his pro se status, the Court's allowance of new evidence on appeal would permit every party to proceed pro se before the Department, then to hire counsel and secure a new hearing on appeal.

Evidence: Generally. Where claimant was informed he had the right to an attorney below, and was in fact in contact with counsel prior to his Department of Labor hearing, his pro se status before the DOL is not alone sufficient reason to allow introduction of additional medical evidence, even if such evidence is material to his case. Where claimant offers no good reason for his failure to present the evidence before the department other than his pro se status, the Court's allowance of new evidence on appeal would permit every party to proceed pro se before the Department, then to hire counsel and secure a new hearing on appeal.

Petitioner/claimant appeals from a determination of the Department of Labor and Industry concerning his claim that he suffers from an occupational disease. In conjunction with his appeal he requests that he be permitted to present additional medical evidence.

The ground for claimant's request is that he appeared pro sé in the proceedings below. On appeal he is represented by counsel, who have apparently marshalled additional medical evidence to support his claim. However, an unrebutted affidavit of counsel for respondent shows that on numerous occasions the claimant was made aware of his right to retain counsel to assist him in the proceedings below and that he indicated that he was at least in "contact with counsel." Affidavit of Bradley J. Luck. Moreover, petitioner informed respondent's counsel prior to hearing that he had contacted his present counsel, but at the hearing he nonetheless chose to go forward without counsel. *Id.* To compound matters, petitioner notified respondent on February 27, 1995, more than three months prior to the Department decision, that he had retained current counsel. *Id.*

Section 2-4-703, MCA, permits the Court to order that additional evidence be taken. However, the section requires a finding that "there were good reasons for failure to present" the evidence at the original hearing. This Court's own rule on additional evidence mirrors that requirement. ARM 24.5.350(4) provides in relevant part that the Court may permit additional evidence **if** "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 proceedings before the department.**" (Emphasis added.)

Petitioner has demonstrated that the additional evidence is material but has failed to persuade me that there were good reasons for his failure to present the evidence at the hearing below. He chose to proceed pro sé. He was aware of his right to representation by counsel and had indeed discussed his case with counsel. He could have requested a continuance so he could retain counsel. If his self-representation is ground for presenting additional evidence then every party could proceed pro sé, then if dissatisfied he could find counsel and secure a new hearing. The request is **denied**.

Dated in Helena, Montana, this 26th day of July, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. Bradley J. Luck