IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 37

WCC No. 9502-7243

GARY WINGFIELD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER REMANDING FOR FURTHER EVIDENCE

Summary: On appeal from finding of the Department of Labor and Industry that option (c) of section 39-71-1012 MCA (1989) is the first appropriate rehabilitation option for him, claimant requests that he be permitted to introduce additional evidence that he had not reached maximum medical healing at the time of the hearing.

Held: While claimant's pro se status at the Department hearing is not sufficient to permit his introduction of new evidence following the hearing, vocational testimony presented at the hearing constituted new information and unfair surprise in light of prior information available to claimant. While insurer may have cured the problem at the hearing by presenting information from the doctor in light of the new vocational evidence, it objected to admission of the doctor's letter. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence on appeal to the Workers' Compensation Court, this matter is more appropriately remanded to the Department hearing officer for acceptance of new evidence from both parties and reconsideration of claimant's case, a procedure contemplated by section 2-4-703, MCA.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.350(4). Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate

rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 2-4-703, MCA. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Appeals (To Workers' Compensation Court): Generally. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Appeals (To Workers' Compensation Court): Generally. While claimant's pro se status at the Department hearing is not sufficient to permit his introduction of new evidence following the hearing, vocational testimony presented at the hearing constituted new information and unfair surprise in light of prior information available to claimant, justifying presentation of new evidence.

Administrative Procedure: Contested Case Hearing: Evidence. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Administrative Procedure: Contested Case Hearing: Evidence. While claimant's pro se status at the Department hearing is not sufficient to permit his introduction of new evidence following the hearing, vocational testimony presented at the hearing constituted new information and unfair surprise in light of prior information available to claimant, justifying presentation of new evidence.

Evidence: Generally. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on

appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Evidence: Generally. While claimant's pro se status at the Department hearing is not sufficient to permit his introduction of new evidence following the hearing, vocational testimony presented at the hearing constituted new information and unfair surprise in light of prior information available to claimant, justifying presentation of new evidence.

Procedure: Post-Trial Proceedings: New Trial: Newly Discovered Evidence. Although Workers' Compensation Court rule 24.5.350(4) contemplates acceptance of new evidence in the Workers' Compensation Court on appeal from a decision of the Department of Labor and Industry, where claimant has shown entitlement to present new evidence, controversy over appropriate rehabilitation option for claimant is more appropriately remanded to the Department hearing officer, a procedure contemplated by section 2-4-703, MCA.

Procedure: Post-Trial Proceedings: New Trial: Newly Discovered Evidence. While claimant's pro se status at the Department hearing is not sufficient to permit his introduction of new evidence following the hearing, vocational testimony presented at the hearing constituted new information and unfair surprise in light of prior information available to claimant, justifying presentation of new evidence.

This is an appeal by claimant from a finding by the Department of Labor and Industry (Department) that option (c) is the appropriate rehabilitation option for him. On appeal, claimant requests that he be permitted to introduce additional evidence. Finding good cause, the request is granted but for somewhat different reasons than put forth by claimant. The matter is **remanded** to the Department for presentation of the additional evidence.

Factual and Procedural Background

On October 17, 1990, the claimant suffered a work-related injury to the metatarsal bones of his left foot. (Finding 1: Findings of Fact; Conclusions of Law; and Order - Amended Order.) Surgery was performed on his foot in May of 1991 and again in December 1991. (*Id.*) Surgical screws were removed on April 6, 1992. (*Id.*) On September 18, 1992, claimant's treating physician, Dr. Loren Rogers, wrote a letter stating that claimant had reached maximum healing. (Finding 2.)

On May 6, 1992, the State Compensation Insurance Fund (State Fund) designated a rehabilitation provider pursuant to section 39-71-1014, MCA (1989). (Respondent's Ex.

2 at 3.) The rehabilitation provider ultimately identified several jobs which, in his opinion, were suitable for claimant. The jobs included those of quality control inspector/strap inspector and production worker electronics assembler. (Respondent's Ex. 2 at 4.) Job descriptions for both positions were submitted to Dr. Rogers and he approved them with the comment, "[A]void continuous standing/walking." (Respondent's Ex. 4 at 2.)

On February 11, 1993, the State Fund notified the Department that claimant had not returned to work, thereby invoking the rehabilitation panel review provided in sections 39-71-1015 (3), -1016 and -1017, MCA (1989). (Respondent's Ex. 2 at 3.) On October 18, 1993, the panel issued its report. It found that claimant was medically precluded from returning to his time-of-injury job but could return to an occupation suited to his education and skills, i.e. option (c). (*Id.*) It specifically identified the electronics assembler and strap inspector as suitable jobs.

Based on the panel report, on November 15, 1993, the Department issued an Initial Order of Determination adopting the panel report. (Respondent's Ex. 2.) The petitioner then requested a hearing before a Department hearing examiner. A hearing was initially scheduled for June 23, 1994. However, on June 17, 1994, the hearing examiner was notified, apparently by telephone, that claimant was scheduled for additional foot surgery on July 12, 1994. On June 24, 1994, the hearing examiner received a letter from Dr. Rogers. The letter outlined continuing problems claimant was having with his foot, along with the doctor's recommendation for surgery. It said:

> Gary is still having considerable pain in the first MP joint and the first metatarsal head on the medial side. The second toe is dorsiflexing and allowing the hallux to move laterally. Gary's strength in the flexor group of the second toe seems quite unimpressive. He is able to maintain position but is not able to overpower, suggesting a fairly significant loss of strength at the second flexor tendon. The toe was fractured some years ago and the metatarsal is somewhat bowed dorsally suggesting that the MP joint is positioned in a dorsal position and contributing to this factor.
>
> I advised that a possible osteotomy of the second metatarsal to create a plantar flexor position as well as a Reverdin osteotomy at the metatarsal head to create a medial angulation of the set angle and righting the MP joint articular set position as well. This is scheduled for July 12, 1994 at St. Patrick Hospital.

The hearing was rescheduled for August 29, 1994, and took place at that time. During the hearing, petitioner represented himself, as he had throughout the pre-hearing period. At the hearing, petitioner offered a letter from Dr. Rogers dated July 7, 1994, and addressed "To Whom It May Concern." The letter, which petitioner had obtained from Dr. Rogers, stated:

> In regards to the job analysis for the strap inspector position with Sun Mountain Sports, the amount of time spent standing was misinterpreted initially. Gary is unable to spend more than <u>two hours total</u> on his feet a day.

(Claimant's Ex. J.)

The State Fund, (taking a hard line approach to the case despite claimant's pro sé status), objected to the letter because it was not exchanged by the exchange date, which was four months earlier. (Tr. at 4.) Nonetheless, the hearing examiner admitted and considered the letter.

The claimant testified at the hearing but called no other witnesses. He told the hearing examiner that he had undergone surgery on July 12, 1994. (Tr. at 38.) When asked by the State Fund's attorney why he had not called Dr. Roger's as a witness, he replied, "[B]ecause you had him on your initial list and I thought that I could interview him. You had him on your initial witness list." (Tr. at 26.)

Neither the State Fund nor its rehabilitation provider did any follow-up after 1993. The State Fund rested its case in support of option (c) on Dr. Roger's earlier determinations that claimant had reached maximum healing and could perform the two jobs. No further information was sought concerning Dr. Roger's findings in June 1994 or the effect of the July 1994 surgery. The hearing examiner issued his Findings of Fact; Conclusions of Law; and Order - amended order on January 19, 1995. He affirmed option (c) as the first appropriate rehabilitation option. However, he determined that claimant could not perform the strap inspector position.

Following the hearing examiner's decision, petitioner employed counsel, who filed an appeal on his behalf. In an Amended Notice of Appeal, filed April 3, 1995, petitioner alleges that the Department did not have jurisdiction to consider rehabilitation options because claimant had not reached maximum healing and that its decision must be vacated. He also asserts that his temporary total disability benefits must be reinstated retroactive to the date they were terminated.

On April 24, 1995, petitioner filed a Motion for Leave to Present Additional Evidence and Brief in Support of. In his motion, he argues that he should be allowed to present

additional medical evidence to show that he had not yet reached maximum medical improvement and prove that the Department did not have jurisdiction to consider his rehabilitation status. He also informs the Court that he underwent yet another surgery on December 23, 1994.

Discussion

The rehabilitation statutes in effect on the date of the claimant's injury provide for a determination of what employment, if any, an injured claimant can return to. The statutes call for the insurer to designate a rehabilitation provider to evaluate available options for a "disabled worker." § 39-71-1014, MCA (1989). Those options, designated (a) through (g), range from a return to the claimant's original position (option (a)) to self-employment (option (g)). § 39-71-1012, MCA (1989).

If the claimant does not return to work following the evaluation, the insurer is required to notify the Department, which is then required to empanel a rehabilitation panel. § 39-71-1015(3), MCA (1989). The panel is required to review the matter and identify the first appropriate return-to-work option. § 39-71-1017, MCA (1989). Based on the panel's report, the Department is then required to issue an initial order of determination. § 39-71-1018(1), MCA (1989). If either the claimant or the insurer disagree with the initial order, he may request a hearing. § 39-71-1018(2), MCA. After the hearing the Department is required to issue a final order, which is then appealable to the Workers' Compensation Court. § 39-71-1018(2) and (4), MCA.

The statutory scheme outlined above was enacted in 1987, and repealed in 1991. Despite its repeal, the procedure has continued to be applied with respect to injuries occurring between July 1, 1987 and June 30, 1991. This Court has approved that practice. *Wood v. Montana School Groups Insurance Authority,* WCC No. 9401-6986, Order Granting Partial Summary Judgment at 7-9 (August 12, 1994).

Petitioner contends that he should be allowed to present additional evidence showing that he had not reached maximum healing at the time of the hearing; that the entire proceeding below was therefore void; and that he is entitled to retroactive temporary total disability benefits. He argues that achievement of maximum healing is a prerequisite to the rehabilitation panel process.

Initially, the Court will not address claimant's request for temporary total disability benefits. This matter comes to the Court on an appeal from a decision of the Department regarding the first appropriate rehabilitation option. The scope of the Court's review is confined to determining whether the Department committed some error in reaching its determination. Moreover, a claimant may attain maximum medical healing based on the best available evidence at the time. He may then return to temporary total disability status due to either a change in condition, *see Guild v. Bigfork Convalescent Center,* 229 Mont.

466, 470, 747 P.2d 217 (1987), or discovery that surgery or some other treatment may further improve his condition. A claimant may also be released to return to work before reaching maximum healing. *O'Brien v. Central Feeds,* 241 Mont. 267, 273, 786 P.2d 1161 (1990).

In this case, claimant's treating physician specifically found on September 18, 1992, that claimant had reached maximum healing. On June 9, 1993, he medically approved two job descriptions. The rehabilitation panel process was properly invoked and pursued in light of these facts. By the time of the hearing, however, new events should have triggered a further inquiry by both parties in this case. Dr. Rogers determined that claimant's condition required yet another surgery. At the specific request of claimant he also wrote a note stating that claimant could not stand on his feet for more than two hours total each day. That note amounted to a disapproval of the strap inspector job since the written job description states that a strap inspector must be able to stand for one to two consecutive hours and a total of five to eight hours a day.

Despite the new information, and the fact that the claimant was representing himself, the State Fund not only did not inquire of Dr. Rogers but opposed the admission of Dr. Rogers' letter. Dr. Rogers could have certainly replied to a question as to whether the new developments had changed his opinion concerning claimant's ability to perform the two jobs. The State Fund listed Dr. Rogers as a witness. Claimant, who is not trained in legal matters, thought that meant that Dr. Rogers would be appearing at the hearing and would answer questions about his condition.

The State Fund also had its vocational rehabilitation counselor repudiate the standing requirements set forth in the written job description for strap inspector. A written description stated that standing was from five to eight hours a day. The expert testified at hearing that no standing was required. (Tr. at 49.) This testimony constituted new information and constituted unfair surprise in light of the written description. Additionally, the claimant has revealed new medical developments, but the State Fund resists reopening the matter to hear how those developments affect claimant's ability to return to work. It has put Dr. Rogers' 1992 and 1993 opinions into its bank vault, and it wants to lock out any new light he might shed in this matter.

The Workers' Compensation Act provides that the Montana Rules of Administrative Procedure apply to the Court. Those Rules contain specific provisions regarding judicial review of agency decisions. Section 2-4-703, MCA, makes specific provision for additional evidence where an agency decision is appealed. It provides:

> **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.

Thus, a matter may be remanded for good cause to an agency for presentation of additional evidence.

The rules of this Court provide a different twist. The rules provide that additional evidence **may** be presented to the Court rather than the agency. ARM 24.5.350(4) provides:

> (4) Because of the overriding concern in a workers' compensation case to render a prompt decision, especially in matters concerning the payment of a worker's biweekly compensation benefits, and because of the time delays inherent in remanding a case to the department to hear additional evidence, the provisions of section 2-4-703, MCA, are not appropriate in workers' compensation court proceedings within the meaning of section 39-71-2903, MCA. In lieu thereof, if a motion 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 proceedings before the department, the court <u>may</u> order that the additional evidence be presented to the court. [Emphasis added.]

The rule appears to be in derogation of the statute but we need not consider its validity here. Whether or not I **may** hear additional evidence, I find it more appropriate for the Department to do so.

The December developments occurred after the hearing and are part of continuing medical care. Moreover, claimant has provided a reasonable explanation for not calling Dr. Rogers at the hearing. While his pro sé status did not excuse him from following the Department rules regarding the identification and calling of witnesses, the rules should not be hypertechnically and rigidly applied to work an injustice. The vocational rehabilitation counselor's testimony regarding the standing requirements for a strap inspector constituted unfair surprise. However, no harm was done since the hearing examiner found that medical restrictions precluded claimant from that job.

This matter is remanded to the Department for the purpose of permitting both parties the opportunity to present additional evidence concerning claimant's current condition and his ability to perform the electronics assembler position. At minimum it would appear appropriate to query Dr. Rogers as to whether he still approves the job. If he still approves the job, he can also state what periods since 1993, the claimant was unable to perform such a job on account of his surgeries or condition.

After consideration of the additional evidence, the hearing examiner may **affirm** or **modify** his decision in accordance with all of the evidence presented to him.

Dated in Helena, Montana, this 19th day of May, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Steve M. Fletcher
Ms. Susan C. Witte
Ms. Melanie A. Symons