

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 13

WCC No. 2020-4963

JUSTIN GORDON

Petitioner

vs.

CONTINENTAL WESTERN INS. CO.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner asserts that the Department of Labor & Industry erred by allowing Respondent to suspend his TTD benefits for unreasonably failing to attend an examination under § 39-71-605, MCA. Petitioner argues that he had a reasonable reason for failing to attend the examination.

Held: The Department of Labor & Industry's order is affirmed. Petitioner missed previous appointments, assured the examiner that he would attend the examination, and assured Respondent that he would attend the examination. Nevertheless, Petitioner was a "no call, no show" for the appointment and did not attempt to contact the examiner to reschedule until after his examination was scheduled to start. Petitioner's claim that the examiner scheduled the appointment with knowledge that he might not be able to attend was not credible. Moreover, Petitioner's excuses did not convince this Court that his failure to attend scheduled appointments was not his fault. Petitioner's failure to attend the examination was unreasonable.

¶ 1 Petitioner Justin Gordon appeals the Department of Labor & Industry's (DLI) Order Suspending Temporary Total Compensation Benefits. On a request from Respondent Continental Western Ins. Co. (Continental Western), the DLI determined that Gordon unreasonably failed to attend an examination under § 39-71-605, MCA. Thus, the DLI ordered that Gordon's temporary total disability (TTD) benefits be suspended pursuant to §§ 39-71-605 and -607, MCA, until Gordon attended the examination.

¶ 2 This Court usually decides appeals from the DLI's orders based on the record before the DLI under the standard of review in § 2-4-704(2), MCA.¹ However, the parties stipulated that this Court would conduct a de novo review based on the evidence admitted at a hearing, which was held via Zoom videoconference on April 3, 2020. This Court could see the witnesses testify and assess their credibility.² Gordon was present via video and was represented by Rex Palmer. Continental Western was represented by Geoffrey R. Keller.

¶ 3 Exhibits: This Court admitted Exhibits 1 through 17 without objection.

¶ 4 Witnesses: Judith Martin, John Harrison, PhD, and Justin Gordon were sworn and testified.

¶ 5 Issue Presented: The following issue is before this Court:

Did the DLI err in determining that Gordon unreasonably failed to keep a scheduled medical appointment and, therefore, that Continental Western could suspend his TTD benefits under §§ 39-71-605 and -607, MCA?

FINDINGS OF FACT

¶ 6 This Court finds the following facts by a preponderance of the evidence.

¶ 7 On August 29, 2019, Gordon suffered a head injury in the course of his employment.

¶ 8 Continental Western accepted liability.

¶ 9 On November 7, 2019, Continental Western notified Gordon that it had scheduled him for a panel examination under § 39-71-605, MCA, for November 19, 2019, at 3:30 p.m.

¶ 10 On November 8, 2019, Gordon retained Palmer to represent him in his workers' compensation claim. Palmer informed Continental Western that it could no longer contact Gordon directly.

¶ 11 On November 19, 2019, at 10:21 a.m., Palmer's office sent the claims examiner an email asking that Gordon's scheduled examination for that afternoon be postponed.

¹ § 2-4-704(1), MCA; ARM 24.5.350(6). See also *N.H. Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶ 19 ("When reviewing an order from the DLI, with the exception of an order for interim benefits under § 39-71-610, MCA, this Court bas[e]s its decision on the record.").

² See *City of Missoula v. Duane*, 2015 MT 232, ¶ 20, 380 Mont. 290, 355 P.3d 729 (holding that a trial court can make credibility determination based on witness who testifies via videoconference because, "While telephone testimony presents the listener with a disembodied voice and no clue as to the demeanor of the witness, Skype allows the court and jury to observe and hear the testimony of the witness firsthand.").

The email asserted that Palmer could not “determine the propriety” of the examination because he had not received a copy of Gordon’s claim file. The email also stated that Gordon could not attend the examination because he “got very little sleep last night due to his new baby and sickness in his family.”

¶ 12 An hour later, Keller responded to Palmer’s email, noting that Gordon’s “notice of a refusal to attend on the day of the IME will likely result in a cancellation fee” Keller asked Palmer to reconsider and have Gordon attend the examination.

¶ 13 Gordon did not attend the examination because Palmer instructed him not to attend. The physicians each charged Continental Western a cancellation fee.

¶ 14 Continental Western scheduled Gordon for a neuropsychological examination under § 39-71-605, MCA, with John Harrison, PhD, on December 10 and 11, 2019. On the first day, Dr. Harrison was scheduled to interview Gordon. On the second day, Dr. Harrison was scheduled to administer tests.

¶ 15 On December 10, 2019, Palmer advised Continental Western that Gordon would not attend the examination with Dr. Harrison scheduled for that day because Palmer had not yet received a copy of Gordon’s claim file. Gordon’s refusal resulted in another cancellation fee for Continental Western.

¶ 16 On January 13, 2020, the DLI ordered Gordon to attend an examination by Dr. Harrison on January 29 and 30, 2020.

¶ 17 On January 29, 2020, Gordon attended the first day of his examination with Dr. Harrison, which was the interview part of the examination. However, Dr. Harrison was unable to finish the interview because Gordon had to leave early to pick up his daughter. Dr. Harrison and Gordon discussed rescheduling the remainder of the interview for the next day and Gordon agreed.

¶ 18 Dr. Harrison and Gordon also discussed rescheduling the day of testing for February 20, 2020; the testing was to start at 9:00 a.m. and end anywhere from 3:30 to 5:00 p.m. Dr. Harrison was concerned because Gordon had already missed appointments, because Gordon and his girlfriend were under stress, and because Gordon’s girlfriend had a surgery scheduled for February 21, 2020. Dr. Harrison wanted to make sure that Gordon would attend the appointment because Dr. Harrison had to hire a technician to help administer the tests. Dr. Harrison explained to Gordon that he was concerned about Gordon’s ability to make an appointment on February 20, 2020, and that he was not “going to schedule my time and the technician’s time . . . without some assurance that this is going to happen.” Dr. Harrison offered to schedule the testing a few weeks after February 20, 2020. However, Gordon, who did not expect to be required to care for his daughter on either the eve, or day, of the testing, assured Dr. Harrison that he would attend the appointment on February 20, 2020. Consequently, Dr. Harrison

scheduled the testing for February 20, 2020, starting at 9:00 a.m. Dr. Harrison credibly testified, “We didn’t just schedule this and then hope for the best.”

¶ 19 Dr. Harrison gave Gordon an appointment card stating that his appointment on February 20, 2020, started at 9:00 a.m. Gordon added the appointment to his cell phone calendar. However, Gordon was not careful and entered the appointment at 10:00 a.m.

¶ 20 On January 30, 2020, Gordon returned to Dr. Harrison’s office. Because Gordon was sick, Dr. Harrison decided to reschedule the remaining part of the interview.

¶ 21 Later that day, Keller sent an email to Palmer’s office, scheduling the remainder of the interview with Dr. Harrison for February 5, 2020, and the testing for February 20, 2020.

Attached are the rescheduled times for Justin to see Dr. Harrison, which Justin apparently indicated he would not have to care for his daughter, and told Dr. Harrison he could attend. Sarah said the Wed Feb 5 appointment probably would last 2 – 3 hours, face-to-face with Dr. Harrison at Clarus; the Thurs Feb 20 appointment is at Dr. Harris’ [sic] office for testing, which will probably take the entire 9:00 – 5:00 with breaks because Justin is a smoker.

Keller also attached a letter from Clarus IME, which clearly set forth the dates of the examinations and the start times.

¶ 22 Palmer does not personally use email in his practice. Instead, Palmer has emails delivered to his paralegal, Judith Martin, who reads each one and decides if it needs to go to Palmer. Martin did not forward Keller’s email to Palmer nor confirm the dates with Gordon because she “read [the email] that we were just being notified that the letter had been also sent to Justin, as others had been.” She felt that “it was clearly confirmed Justin had notice of that appointment.”

¶ 23 Because Palmer’s office did not notify Gordon of his February 5, 2020, appointment, Gordon did not attend. Continental Western was charged another cancellation fee.

¶ 24 On February 6, 2020, Martin sent an email to Keller confirming that Gordon would attend his rescheduled appointments with Dr. Harrison, including the appointment scheduled for February 20, 2020, at 9:00 a.m. Martin’s email states:

Geoff[,]

Mr. Gordon is scheduled to meet with Dr. Harrison on February 13th at 10:00 a.m. I have confirmed with Mr. Gordon that he is able to attend and will plan to do so. I contacted Clarus IME and confirmed these arrangements with Crystal. ***I have also confirmed with Mr. Gordon that he is able to attend***

the appointment on February 20th beginning at 9:00 am, and will plan to do so.³

¶ 25 Gordon attended his appointment with Dr. Harrison on February 13, 2020, and completed the interview portion of the examination.

¶ 26 Gordon claims that he had trouble sleeping on the night before the scheduled testing portion of the examination. He also claims that his girlfriend ran out of her anxiety medication and was panicking about her surgery. Gordon testified that he took his sleep medication around 10:20 p.m. but did not fall asleep until after 4:00 a.m. and that his girlfriend was still awake when he fell asleep.

¶ 27 Gordon woke up around 7:30 a.m. on February 20, 2020. He did not want to wake his girlfriend and did not think she could take care of their daughter. Thus, Gordon decided not to attend his scheduled appointment. However, at that time, Gordon did not relay that information to Dr. Harrison's office.

¶ 28 At 9:26 a.m., Keller sent Palmer an email stating, "Rex – Justin has not shown up for his 9:00 appointment. I just attempted to call you to advise and discuss, left a message regarding his non-attendance."

¶ 29 Gordon first attempted to call Dr. Harrison's office at 9:32 a.m., but the call did not go through because of a problem with his phone. At 9:56 a.m., Gordon got through and left a voice mail, stating, in relevant part:

Hi, this is Justin Gordon. I had an appointment today. On my phone it says 10:00 but on my card I just saw it says 9:00. In any case, I wasn't able to make it today. If you would give me a call . . . to reschedule I would appreciate it. . . . And my apologies. I was not able to make it today, just got things going on. Thanks so much, bye.

¶ 30 If Gordon had appeared for his appointment at 9:00 a.m., Dr. Harrison would have assessed his level of fatigue and decided whether they could have proceeded with at least some of the testing.

¶ 31 Continental Western petitioned the DLI to suspend Gordon's TTD benefits for failing to attend his appointment. Gordon opposed Continental Western's petition, asserting that his failure to attend was reasonable because, "Dr. Harrison already knew that [he] might be unable to attend" and that "[t]hey scheduled the appointment anyway, hoping for the best."

¶ 32 On February 24, 2020, the DLI issued its Order Suspending Temporary Total Compensation Benefits. The DLI found that Gordon unreasonably failed to attend the

³ Emphasis added.

appointment with Dr. Harrison and ordered that, “the temporary total compensation benefits are suspended from the date of this order until the claimant submits to and cooperates in an examination by a physician.” The DLI based its decision on two factors:

First, the background with the previous orders and the clear importance to the insurer that the claimant attend the IMEs. Second, the claimant was not working at the time and did not have a reason for not going to the IME appointment other than saying he forgot.

Resolution

¶ 33 Reasonableness is an issue of fact.⁴

¶ 34 Under the circumstances of this case, this Court finds that Gordon’s failure to attend the examination with Dr. Harrison on February 20, 2020, was unreasonable. Gordon’s assertion that Dr. Harrison knew that he might miss the appointment and that they scheduled it “hoping for the best” was not credible. This Court is convinced that Dr. Harrison made it clear to Gordon that he would not schedule the appointment on February 20, 2020, without Gordon’s assurance that he would attend, and that Gordon assured Dr. Harrison that he would attend. Moreover, Martin’s February 6, 2020, email to Keller states that she confirmed with Gordon that he would attend his appointment and that it started at 9:00 a.m. Because Gordon’s assertion was not credible, this Court is not convinced that his family circumstances the night before the examination kept him from attending.⁵

¶ 35 Gordon argues that his failure to attend was reasonable because he was following Dr. Harrison’s instructions to reschedule if he was under stress or not sufficiently rested. However, Dr. Harrison did not tell Gordon that he could be a “no call, no show” if he subjectively felt that he was under too much stress or not sufficiently rested. And, Gordon’s argument that he should be excused because he called to reschedule his appointment is unconvincing. Gordon did not show up for his appointment at 9:00 a.m. and then called to reschedule. Gordon, who testified that he woke up at 7:30 a.m., offered no explanation as to why he did not attempt to contact Dr. Harrison’s office before his scheduled appointment to discuss his alleged stress and fatigue, and his family circumstances. This Court is convinced that if Gordon had called Dr. Harrison’s office before his appointment and in time for Dr. Harrison to cancel the technician, then Dr. Harrison would have fairly worked with him. However, it was unreasonable for Gordon to be a “no call, no show” for his scheduled appointment.

⁴ *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996) (citation omitted).

⁵ See *Stevens v. State Comp. Ins. Fund*, No. 9304-6778 (Mont. Workers’ Compensation Ct. Dec. 3, 1993) (Order Adopting Findings of Fact and Conclusions of Law of Hearing Examiner and Entering Judgment), available at http://wcc.dli.mt.gov/S/Stevens_Patrick_FFCL.htm (citing §§ 26-1-302, -303(3), MCA) (stating, “A witness is presumed to speak the truth but when one part of the testimony is false, the remainder of the testimony is distrusted.”).

¶ 36 Gordon also argues that his failure to attend his appointment on February 20, 2020, was the first missed appointment that can be attributed to him and, essentially, that it should be excused. Although this Court agrees that a claimant has a right to his claim file⁶ and a right to know the nature of the examination,⁷ Gordon offers no explanation as to why he waited until the day of his previously-missed examinations to inform Continental Western that he would not attend, which resulted in unnecessary cancellation fees. This Court does not condone this practice. Moreover, Palmer informed Continental Western that it was no longer permitted to contact Gordon directly. Thus, Continental Western sent the notice of the February 5, 2020, examination to Palmer's office, which, as Continental Western points out, was sufficient notice of that appointment.⁸ There is nothing in Keller's January 30, 2020, email to Martin or in the letter Keller attached to his email from which one could reasonably think that Continental Western also sent the notice to Gordon directly; thus, Martin made a mistaken assumption when she determined that she did not need to notify Gordon of the appointments. Gordon's missed appointment on February 5, 2020, was attributable to him.

¶ 37 Gordon also takes issue with the DLI's determination that Gordon missed the appointment because he "forgot." Gordon asserts that there is no evidence supporting the finding that he forgot and that this Court must reverse the DLI's order. However, this finding was a reasonable inference based on the evidence provided to the DLI. Again, Dr. Harrison told Gordon that his appointment started at 9:00 a.m. and gave him an appointment card stating so. Martin told Keller that she had confirmed with Gordon that the appointment started at 9:00 a.m. Notwithstanding, Gordon did not attempt to contact Dr. Harrison's office until 9:32 a.m., more than a half hour after his appointment was scheduled to start and after Keller had contacted Palmer to let him know that Gordon did not show for his appointment. Gordon left a voice mail stating that he could not attend the appointment because he "just [had] things going on." Moreover, this Court can affirm the DLI if it reached the correct determination for the wrong reason.⁹

⁶ See *Stewart v. MACo Workers' Comp. Trust*, 2008 MTWCC 22, ¶ 11 (stating, "Section 39-71-107(3), MCA, mandates that a claim file must be maintained in a manner that makes it accessible to the claimant."); *Porter v. Liberty Nw. Ins. Corp.*, 2007 MTWCC 42, ¶ 53 (stating, "I would caution insurers that there is also a point at which, if a claimant is forced to file a petition in this Court simply to receive a copy of his claims file, this fact would certainly be among the issues taken into consideration in determining whether an insurer acted reasonably in its adjustment of the claim.").

⁷ See *Gryttenholm v. Fremont Indus. Indem. Co.*, 2002 MTWCC 24, ¶ 9 ("Accurate information concerning a proposed IME is essential to the claimant's rights under the IME provisions.").

⁸ *Hansen v. Johnson*, 90 Mont. 597, 608, 4 P.2d 1088, 1090 (1931) ("It is true that an attorney, while on his client's business, is agent for the client, and a principal is deemed to have notice of that of which the agent has notice, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to his principal . . .") (citations omitted).

⁹ See *Md. Cas. Co. v. Asbestos Claims Ct.*, 2020 MT 70, ¶ 57, 399 Mont. 279, 460 P.3d 882 (citations omitted) ("[W]e will affirm a district court decision that reaches the correct result even if for the wrong reason.").

¶ 38 In sum, Gordon did not offer a sufficient reason to be a “no call, no show” for his 9:00 a.m. appointment on February 20, 2020. His excuses do not absolve him of fault. Thus, this Court finds that his failure to attend was unreasonable.

CONCLUSIONS OF LAW

¶ 39 This case is governed by the 2017 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Gordon’s industrial accident.¹⁰

¶ 40 Under § 39-71-605(1)(a), MCA, an insurer may have a claimant submit to an examination with a physician, psychologist, or panel. Subsection (1)(b) states, in relevant part: “If the employee, after written request, fails or refuses to submit to the examination or in any way obstructs the examination, the employee’s right to compensation must be suspended and is subject to the provisions of 39-71-607.”

¶ 41 In turn, § 39-71-607, MCA, states:

Under rules adopted by the department, an insurer may suspend compensation payments pending the receipt of medical information when an injured worker unreasonably fails to keep scheduled medical appointments. If, after a medical examination, the injured worker is released to return to work, the worker forfeits the right to any suspended benefits.¹¹

¶ 42 Here, this Court has found that Gordon unreasonably failed to attend a scheduled appointment on February 20, 2020. Accordingly, the DLI correctly determined that Continental Western had legal grounds to suspend Gordon’s TTD benefits under these statutes.

JUDGMENT

¶ 43 The DLI’s Order Suspending Temporary Total Compensation Benefits is **affirmed**.

¹⁰ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¹¹ The DLI’s rule, ARM 24.29.1408, states:

SUSPENSION ALLOWED (1) An insurer may suspend compensation payments under 39-71-607, MCA, for not more than 30 days pending the receipt of medical information, if:

(a) the insurer submits to the department a detailed written statement indicating that the insurer is having difficulty in receiving medical information relating to a claimant’s condition; and

(b) the department approves a suspension of compensation payments for not more than 30 days pending the receipt of medical information; and

(c) after the department approves the suspension of payments, the insurer notifies the claimant in writing that biweekly payments are being suspended pending the receipt of medical information. A copy of the notification shall be furnished to the department.

¶ 44 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 9th day of July, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Rex Palmer
Geoffrey R. Keller

Submitted: April 3, 2020