

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2019 MTWCC 8**

**WCC No. 2019-4630**

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**COLLIN CARLSON**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

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**ORDER DENYING RESPONDENT'S MOTION TO COMPEL ATTENDANCE AT AN  
INDEPENDENT MEDICAL EXAMINATION  
AND  
ORDER DENYING RESPONDENT'S REQUEST TO VACATE THE  
SCHEDULING ORDER**

**Summary:** Respondent has not scheduled an examination under § 39-71-605, MCA, nor identified the physician who will conduct the examination should it be scheduled. However, Respondent seeks an order compelling Petitioner to attend such an examination whenever it schedules it. Respondent also requests this Court to vacate the current Scheduling Order so it has more time to schedule the examination.

**Held:** This Court denies Respondent's Motion to Compel. The plain language of § 39-71-605(1)(b), MCA, provides that this Court must set forth the time and place of the examination. Moreover, this Court has previously held that the insurer must notify the claimant of the identity of the examiner, the examiner's area of expertise, and the nature of the examination so the claimant can intelligently assess whether to object to the examination. Thus, this Court cannot issue a general order compelling a claimant to attend an examination when the information about the proposed examination is unknown. This Court also denies Respondent's request to vacate the current Scheduling Order because it has not set forth good cause to do so.

¶ 1 Respondent Montana State Fund (State Fund) moves to compel Petitioner Collin Carlson to attend an independent medical examination (IME) under § 39-71-605, MCA, at some time in the future. Because trial in this matter is in six weeks, Respondent asks this Court to vacate the current Scheduling Order so it has more time to schedule the examination. Carlson opposes State Fund's motions.

### FACTS

¶ 2 Carlson asserts that he suffered a compensable injury on December 21, 2018. Carlson alleges that he fell and thereafter suffered bilateral lower extremity weakness and diminished sensation.

¶ 3 On December 22, 2018, Carlson saw Benny E. Brandvold, MD, a neurosurgeon. Dr. Brandvold noted no neurosurgical explanation for Carlson's neurologic deficit. Dr. Brandvold thought that a differential diagnosis was conversion disorder.<sup>1</sup>

¶ 4 On December 23, 2018, Carlson saw Aaron Flanagan, MD. Dr. Flanagan diagnosed "paraplegia secondary to spinal cord injury without radiologic abnormality (SCIWORA) injury." Dr. Flanagan also diagnosed a concussion and a soft tissue injury to Carlson's low- and mid-back. Dr. Flanagan thought that Carlson would likely make a "significant recovery," though informed Carlson that the recovery time for a SCIWORA injury was "variable."

¶ 5 Dr. Flanagan saw Carlson again on December 26, 2018. Carlson had improved function in his legs. Dr. Flanagan recommended inpatient rehabilitation for approximately two weeks.

¶ 6 Dr. Brandvold saw Carlson again on December 28, 2018. Dr. Brandvold noted:

The patient reports he is demonstrating some improvement, though his neurologic status is still relatively profound given his normal MRIs on two occasions. In general, most cord injuries would be identified on a delayed MRI. Again, I have no anatomic explanation for his lower extremity weakness. As I had recommended in the past, I feel he would be best suited by a formal assessment by a neurologist who is board-certified in both Neurology and Psychiatry by definition. I concurred that he should go to rehab with aggressive therapy to get his function returned regardless of his underlying diagnosis. From a neurosurgical standpoint, there is no

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<sup>1</sup> In *State v. Ailer*, 2018 MT 18, ¶ 13 n.1, 390 Mont. 200, 410 P.3d 964, the Montana Supreme Court quoted a psychologist who testified that conversion disorder "is when a patient presents with motor or sensory deficits that aren't really attributable to a medical cause. Often a neurologist will evaluate the patient and cannot find a medical explanation for why the patient is having this—the symptom they are having."). See also *Fuss v. Ins. Co. of N. Am.*, 2004 MTWCC 34, ¶ 15 (citation omitted) (stating that conversion disorder is "a psychoneurosis in which bodily symptoms (such as paralysis of the limbs) appear without physical basis or explanation.").

operative lesion and we will sign off at this time. If neurosurgical questions arise, feel free to contact us.

¶ 7 Also, on December 28, 2018, Carlson saw Jamal A. Balouch, DO. Dr. Balouch determined, “exact etiology unknown but differential diagnosis could include spinal cord injury without radiographic abnormality versus conversion disorder.” Dr. Balouch thought that Carlson should be evaluated for “possible conversion disorder.”

¶ 8 On January 2, 2019, Carlson saw Stephanie Burcusa, PhD, a psychologist, to “set the expectation for continued recovery, to encourage continued participation in therapies, and to build rapport in case further psychological intervention is needed during this rehab stay.” Dr. Burcusa met with Carlson again on January 4, 7, and 10, 2019. Her notes state that she was seeing Carlson “to address adjustment/coping and engagement in rehab therapies.”

¶ 9 On January 25, 2019, State Fund denied liability for Carlson’s claim, asserting that that Carlson and his attorney had not provided necessary information.

¶ 10 On January 30, 2019, State Fund notified Carlson that it was going to schedule a neuropsychological examination under § 39-71-605, MCA.

¶ 11 Dr. Flanagan saw Carlson on February 8, 2019, for a follow-up after inpatient rehabilitation. Dr. Flanagan noted, in relevant part:

The patient had a work related injury when he fell backwards off a piece of equipment on a rock from about 7-8 up, with progressive weakness in the lower extremities following this. MR imaging was unremarkable for any spinal cord abnormality. The patient was diagnosed with spinal cord injury without radiographic abnormality. He was admitted to inpatient rehabilitation on December 28, 2018 and participated well in therapies and since has returned to home. He is using a cane for household mobility and a walker for long distances in the community. He is performing all of his activities of daily living independently.

Dr. Flanagan recommended, *inter alia*, that Carlson continue with physical therapy.

¶ 12 On February 6, 2019, Carlson’s attorney sent a letter to State Fund stating that it was Carlson’s position that a psychiatric examination was “unwarranted.”

¶ 13 State Fund sent letters to Dr. Brandvold on February 21, 2019, and Dr. Balouch on February 25, 2019, in which it asked them to provide a referral to a physician who was board-certified in both neurology and psychiatry. However, Dr. Brandvold and Dr. Balouch declined to refer Carlson to such a physician, as they thought Dr. Flanagan should make the referral as he was Carlson’s treating physician.

¶ 14 State Fund did not ask Dr. Flanagan for the referral.

¶ 15 On March 6, 2019, State Fund's attorney sent Carlson's attorney an email stating that State Fund was willing to pay for a psychiatric evaluation and asked Carlson's attorney to ask Dr. Flanagan for the referral. Carlson's attorney declined, taking the position that such an evaluation "is unnecessary given the diagnoses of a spinal concussion and soft tissue lumbar contusion." Carlson's attorney also asserted that Carlson's treating physician had ruled out conversion disorder.

¶ 16 On April 23, 2019, Dr. Burcusa wrote a letter to Carlson's attorney in which she stated that her treatment was "based on his rehab diagnosis of SCIWORA," that she did not see prior evidence of a premorbid mental health diagnosis, and that while she saw conversion disorder as a differential diagnosis in his records, her treatment was "focused on his psychological adjustment to the fall and to the physical symptoms he experienced as a result."

¶ 17 Carlson filed his Petition for Hearing on April 25, 2019.

¶ 18 State Fund filed its Response to Petition for Trial on May 20, 2019.

¶ 19 On May 23, 2019, State Fund filed its Motion to Compel Attendance at an Independent Medical Examination and Brief in Support. State Fund had not yet scheduled the examination, nor identified the examiner. Thus, it asks this Court to order Carlson "to attend an IME with a neurologist who is board-certified in Neurology and Psychiatry to assess a possible conversion disorder" at some time in the future.

¶ 20 Carlson opposes State Fund's motion on two grounds. First, Carlson argues that under the plain language of § 39-71-605, MCA, this Court cannot issue an order compelling attendance at an IME unless State Fund identifies the time and place of the examination and that under this Court's case law, State Fund must identify the examiner. Second, Carlson argues that State Fund's motion is untimely, as it was apparent when Carlson filed his brief that State Fund was going to miss the deadline to disclose the physician as an expert.

¶ 21 In its Reply Brief, filed on June 10, 2019, State Fund acknowledged that it still had not scheduled the examination, explaining that it has had "difficulty in locating a physician" . . . "who is board-certified in both Neurology and Psychiatry" who was willing to travel to Great Falls to examine Carlson. State Fund urges this Court to allow it to schedule the examination and to vacate the current trial setting to allow for the examination and, thereafter, a trial on the merits.

### LAW AND ANALYSIS

¶ 22 Section 39-71-605, MCA, provides, in relevant part:

**Examination of employee by physician -- effect of refusal to submit to examination -- report and testimony of physician -- cost. (1) (a)**

Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel that must be provided and paid for by the insurer and shall likewise submit to examination from time to time by any physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.

(b) ***The request or order for an examination must fix a time and place for the examination, with regard for the employee's convenience, physical condition, and ability to attend at the time and place that is as close to the employee's residence as is practical.*** An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. The employee is entitled to have a physician present at any examination. 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. Any physician, psychologist, or panel employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.<sup>2</sup>

¶ 23 State Fund's request does not comply with § 39-71-605(1)(b), MCA, because it does not set forth the time and place of the examination. Under the plain language of this statute, this Court can only order a claimant to attend an examination at a specific time and place; this Court cannot order a claimant to attend an examination that might be scheduled at some time in the future at an unknown location.<sup>3</sup> And, as Carlson points out, in *Gryttenholm v. Fremont Industrial Indemnity Co.*,<sup>4</sup> this Court noted that an insurer's right to an IME is not unlimited and that to allow a claimant to intelligently exercise his rights, an insurer must provide the nature of the examination and the identity and specialty of the examiner.<sup>5</sup> Although State Fund has informed this Court what the specialty of the examiner will be, if it can find such a physician, there is no evidence of the identity of the examiner or the nature of the examination. In short, State Fund has not provided this Court with sufficient information under § 39-71-605(1)(b), MCA, for this Court to order an

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<sup>2</sup> Emphasis added.

<sup>3</sup> See also *Robinson v. Mont. State Fund*, 2005 MTWCC 33, ¶ 21 (citation omitted) (explaining that this Court does not resolve hypothetical questions, give advisory opinions, nor "provide for contingencies which may hereafter arise.").

<sup>4</sup> 2002 MTWCC 24.

<sup>5</sup> See *Gryttenholm*, ¶ 9 ("Accurate information concerning a proposed IME is essential to the claimant's rights under the IME provisions.").

examination, and this Court will not order Carlson to attend an IME at an unknown place and time with an unknown examiner.

¶ 24 State Fund acknowledges that it has not provided the information required by § 39-71-605, MCA, but promises that it “will provide the statutorily required information in a timeframe that will not jeopardize the current scheduling order.” However, State Fund has no basis for this statement. State Fund has already missed the deadline to disclose expert witnesses, as that was on June 14, 2019. Although State Fund also states that it will allow Carlson to depose the IME physician beyond the discovery deadline, it is unknown whether the examiner will be able to issue a report within a time that will allow Carlson’s attorney to prepare for a deposition and unknown whether the parties could schedule a deposition within a reasonable time before the trial in this case, which is set for the week of July 29, 2019.

¶ 25 As a final point, for three main reasons, State Fund has not set forth good cause for this Court to vacate the Scheduling Order to allow it more time to schedule the examination. First, there is no merit to State Fund’s claim that it is blameless for not obtaining an examination before now because it “attempted to schedule a Neuro-Psychological IME, but Carlson, through his counsel, declined to submit to the requested examination.” State Fund was not powerless when Carlson’s attorney stated it was his position that such an examination was “unwarranted.” Pursuant to § 39-71-605(2), MCA, in February or March 2019, State Fund could have petitioned the Department of Labor & Industry for an order compelling Carlson to attend an IME. If the Department of Labor & Industry denied State Fund’s petition, State Fund could have appealed to this Court.

¶ 26 Second, while Dr. Brandvold and Dr. Balouch thought Carlson should see a physician who is board-certified in both neurology and psychiatry, State Fund was not required to choose such a physician for an examination under § 39-71-605, MCA. Indeed, § 39-71-605(1)(a), MCA, allows for panel examinations; therefore, State Fund could have scheduled a panel examination with a neurologist and a psychiatrist.

¶ 27 Third, there is no merit to State Fund’s position that Carlson’s attorney should have asked Dr. Flanagan for a referral. It is apparent that Dr. Flanagan does not think Carlson has conversion disorder; thus, this Court doubts that Dr. Flanagan would have provided a referral. While State Fund emphasizes that the examination it seeks was recommended by two physicians who were treating Carlson, State Fund is not seeking the examination for treatment. It is apparent that State Fund’s position is that if Carlson has conversion disorder, then it is not liable on the grounds that conversion disorder is not an “injury” as that term is defined in § 39-71-119, MCA.<sup>6</sup> While a claimant has a duty to cooperate with

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<sup>6</sup> See *Yarborough v. Mont. Mun. Ins. Auth.*, 282 Mont. 475, 481-82, 938 P.2d 679, 683-84 (1997) (holding that claimant’s PTSD was not compensable as an “injury” under the Workers’ Compensation Act because it was caused by emotional or mental stress, not a physical injury).

a § 39-71-605, MCA, examination,<sup>7</sup> a claimant does not have a duty to help build the insurer's case by finding the examiner.<sup>8</sup>

¶ 28 Accordingly, this Court now enters the following:

ORDER

¶ 29 State Fund's Motion to Compel Attendance at an Independent Medical Examination is **denied**.

¶ 30 State Fund's request to vacate the Scheduling Order is **denied**.

DATED this 20<sup>th</sup> day of June, 2019.

(SEAL)

/s/ David M. Sandler  
JUDGE

c: Thomas M. Murphy  
Mark D. Meyer

Submitted: June 10, 2019

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<sup>7</sup> See, e.g., *Grenz v. Prezeau*, 244 Mont. 419, 424, 798 P.2d 112, 115 (1990).

<sup>8</sup> See *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 212, 911 P.2d 1129, 1138 (1996) (holding that while insurer has affirmative duty to reasonably investigate and evaluate a claim, the insurer need not "build a case for the claimant.").