

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 21

WCC No. 2007-1962

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GREG CHALLINOR

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer.

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ORDER DENYING RESPONDENT'S MOTION TO COMPEL  
AN INDEPENDENT MEDICAL EXAMINATION

**Summary:** Respondent moved this Court to compel Petitioner, who lives in Orofino, Idaho, to attend an IME it had scheduled in Missoula, Montana. Petitioner objected on the grounds that the IME was not scheduled as practical to his residence as required by § 39-71-605(1)(b), MCA, and further argued that Respondent's request was untimely as it was made only three days prior to the expert witness disclosure deadline required by this Court's scheduling order.

**Held:** Respondent's motion to compel the IME is denied on the ground that Respondent did not demonstrate it scheduled the IME as close to Petitioner's residence as practical. While Respondent's request for an IME was untimely, Respondent has been diligent in preparing for trial and good cause for the untimeliness has been shown. If Respondent can cure the location issue by April 11, 2008, its request for an IME will not be barred for untimeliness.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605.** Request for motion to compel denied where Respondent scheduled an IME 175 miles from Petitioner's residence and argued that Petitioner should be precluded to objecting that the IME be scheduled "as close to the employee's residence as is practical" because Petitioner regularly drove 145 miles for medical care. Respondent bears the

burden of demonstrating that an appropriate IME cannot be had closer to the claimant's place of residence. Respondent has not done so in this case, and the Montana Supreme Court has held that a person's willingness to travel large distances for treatment has no bearing on whether he or she should be compelled to travel for an IME.

**Independent Medical Examinations: Generally.** Request for motion to compel denied where Respondent scheduled an IME 175 miles from Petitioner's residence and argued that Petitioner should be precluded to objecting that the IME be scheduled "as close to the employee's residence as is practical" because Petitioner regularly drove 145 miles for medical care. Respondent bears the burden of demonstrating that an appropriate IME cannot be had closer to the claimant's place of residence. Respondent has not done so in this case, and the Montana Supreme Court has held that a person's willingness to travel large distances for treatment has no bearing on whether he or she should be compelled to travel for an IME.

**Discovery: Independent Medical Examinations.** Where Respondent provided the Court with a detailed explanation of its efforts to obtain voluminous medical and employment records necessary for conducting an IME, the Court found Respondent had been diligent and good cause existed for its untimely request for an IME. However, Respondent has a duty to mitigate any prejudice caused by the late request and must timely disclose the IME report and arrange this to occur far enough in advance of trial that Petitioner will have the opportunity to depose the IME doctors and prepare his case.

¶ 1 Respondent Montana Insurance Guaranty Association moves this Court to compel Petitioner Greg Challinor to attend an independent medical examination (IME) which Respondent scheduled with two doctors on April 9, 2008, in Missoula, Montana. Petitioner objects on two grounds: (1) the IME is not scheduled as close as practical to his residence in Orofino, Idaho, as required by § 39-71-605(1)(b), MCA, and (2) that Respondent's request is untimely.<sup>1</sup>

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<sup>1</sup> On April 4, 2008, the parties participated in a telephonic conference with the Court, at which time I denied Respondent's motion on the ground that it had not demonstrated that it had scheduled the IME as close to Petitioner's residence as practical. I further held, however, that notwithstanding the fact that Respondent's scheduling of the IME was untimely, Respondent had shown good cause for its untimeliness. This Order is in accordance with my oral ruling on April 4, 2008, and more fully sets forth the reasoning behind my decision.

### IME Location

¶ 2 Section 39-71-605(1)(b), MCA, states in pertinent part, “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.” In the present case, Respondent scheduled the IME in Missoula, which is approximately 175 miles from Petitioner’s home. Respondent argues that since Petitioner regularly drives approximately 145 miles to Spokane, Washington, for medical care, Petitioner should be precluded from objecting to driving just 30 miles further for the IME.

¶ 3 I am not persuaded by Respondent’s argument. In *Stillwater Mining Co. v. Bunch*,<sup>2</sup> I noted that the insurer bears the burden of demonstrating that an appropriate IME cannot be had closer to the claimant’s place of residence. In the present case, while it would not surprise me if it turned out that an appropriate IME cannot be had in Orofino, several larger communities, including Lewiston, Walla Walla, Spokane, and Coeur d’Alene are all closer to Orofino than is Missoula. Respondent has not demonstrated that an appropriate IME cannot be had in a community closer to Petitioner’s place of residence.

¶ 4 Furthermore, the fact that Petitioner has traveled to Spokane in search of medical treatment has no bearing on whether he can be compelled to travel even further for an IME. The Montana Supreme Court held so in *Simms v. Montana Eighteenth Judicial Dist. Court*,<sup>3</sup> where the court stated that a person’s willingness to travel large distances for treatment has no bearing on whether he or she should be compelled to travel for an IME.

### Timeliness

¶ 5 Although I am denying Respondent’s motion to compel on the ground that it has not met the requirements of § 39-71-605(1)(b), MCA, Petitioner has further raised the alleged untimeliness of Respondent’s request for an IME as independent grounds for denying Respondent’s motion. Since Respondent may rectify the IME location, in the interest of judicial economy, I will further consider Petitioner’s timeliness argument at this time so that the parties need not rebrief the issue in the event that Respondent is able to reschedule the IME to an appropriate location.

¶ 6 In his brief in response to Respondent’s motion, Petitioner argues that Respondent’s motion to compel should also be denied on the ground that Respondent’s request is untimely. Petitioner points out various important dates in this case, including the filing of

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<sup>2</sup> 2006 MTWCC 43, ¶ 5 (citation omitted).

<sup>3</sup> 2003 MT 89, ¶ 39, 315 Mont. 135, 68 P.3d 678.

his occupational disease claim on May 12, 2006, Respondent's denial of the claim on June 29, 2006, and Petitioner's filing of his Petition for Trial on October 2, 2007. After one continuation of the case, this Court issued a second scheduling order on December 13, 2007, which required that expert witnesses be disclosed by March 21, 2008. Petitioner states:

With respect to expert witnesses, the order required not only disclosure of the witnesses' identity, but also disclosure of "the subject matter on which the expert is expected to testify, and the nature of the facts and opinions to which the expert is expected to testify." On March 17, just four days prior to the deadline for disclosure of expert witnesses testimony, Respondent faxed a letter advising that Mr. Challinor had been scheduled for an examination in Missoula on April 9. The proposed examination would be performed nearly three weeks after the Court's deadline for disclosure of expert testimony. . . .<sup>4</sup>

¶ 7 Petitioner points to this Court's recent decision in *Schoenen v. Uninsured Employers' Fund*,<sup>5</sup> in which I refused to compel the claimant's attendance at an IME where the UEF did not request the IME until three days after the deadline for expert witness disclosures. In *Schoenen*, I stated, "[W]hen a request for an IME is made after the time for designating witnesses and filing expert witness' summaries has expired, the request must be denied as untimely."<sup>6</sup> Petitioner argues that the present case presents the same situation because, although Respondent may have requested an IME a few days before the expert disclosure deadline, the proposed IME was scheduled for three weeks later. It would be impossible, therefore, for Respondent to comply with the expert witness disclosure deadline that would have passed before the IME was conducted. Petitioner further asserts that the untimeliness of the proposed IME would prejudice his ability to prepare for trial.

¶ 8 In *Schoenen*, I noted that the UEF had provided no explanation for its untimely request, but "simply ignored the timeliness issue in requesting its IME."<sup>7</sup> I further noted that I could conceive of circumstances in other cases that could justify an untimely request for an IME.<sup>8</sup> I conclude that the present case is one such case. Respondent

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<sup>4</sup> Petitioner's Brief Opposing Respondent's Motion to Compel Attendance at IME at 2-3.

<sup>5</sup> 2008 MTWCC 1.

<sup>6</sup> *Schoenen*, ¶ 5 (citation omitted).

<sup>7</sup> *Schoenen*, ¶ 5.

<sup>8</sup> *Id.*

has provided this Court with a detailed explanation of its efforts to obtain voluminous medical records and employment records from both California and Montana which were necessary to enable an IME to be conducted. Given the complexity of the medical issues in this case and Respondent's ongoing efforts to obtain these voluminous records, I find that Respondent has been diligent in its efforts to prepare for trial. I therefore find that good cause exists for the untimeliness of Respondent's request for an IME.

¶ 9 Respondent has a duty to mitigate any prejudice caused to Petitioner by its late request for an IME. Respondent must timely disclose the IME report and arrange this to occur far enough in advance of trial that Petitioner will have the opportunity to depose the IME doctors and prepare his case for trial.

#### ORDER

¶ 10 Respondent's motion to compel an IME is **DENIED**.

¶ 11 Respondent has until Friday, April 11, 2008, to schedule an IME in compliance with § 39-71-605(1)(b), MCA. This may include having its IME doctors travel to Petitioner's town of residence or the closest facility that is practical.

¶ 12 If Respondent cannot arrange for an appropriate remedy for the IME, it may file a motion requesting an alternate location for the IME.

¶ 13 If trial cannot continue on its current calendar, Respondent must request leave to schedule the trial in a special setting. The trial must be held no later than the week of June 2, 2008.

¶ 14 Respondent shall timely disclose the IME report to Petitioner and make arrangements sufficiently in advance of trial to allow for the deposition of its IME doctors so as to mitigate any prejudice Petitioner may incur because of Respondent's untimely request for the IME.

DATED in Helena, Montana, this 14th day of May, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Mark M. Kovacich  
Kelly M. Wills