

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 20

WCC No. 2011-2714

DOUGLAS DODGE

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer.

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

Summary: Respondent moved for an order compelling Petitioner to attend an IME with Dr. John R. Harrison in Missoula pursuant § 39-71-605, MCA. Respondent claims that Petitioner's condition has changed since his last IME necessitating an additional examination. Specifically, Respondent argues that it only learned of Petitioner's subjective complaints of memory loss since Petitioner underwent the last IME. Petitioner objects to the additional IME on the grounds that his condition has not changed since undergoing two separate IMEs in the past year.

Held: Respondent's motion to compel a third IME is denied. An insurer is entitled to additional IMEs where there is an indication that claimant's medical condition has changed or there is some other sound reason. Respondent has not shown a sound reason nor a change in Petitioner's condition to warrant an additional IME. Respondent has been aware of Petitioner's subjective complaints of memory loss since at least 2006, long before the most recent IMEs.

Topics:

Constitutions, Statutes, Regulations, and Rules: **Montana Code Annotated: 39-71-605.** Where Petitioner had a documented history of memory problems prior to submitting to two IMEs, Respondent cannot compel Petitioner to submit to a third IME on the grounds that his condition may have changed without offering any evidence in support of this allegation.

Independent Medical Examinations: Generally. Where Petitioner had a documented history of memory problems prior to submitting to two IMEs, Respondent cannot compel Petitioner to submit to a third IME on the grounds that his condition may have changed without offering any evidence in support of this allegation.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605. After Petitioner attended two IMEs, including a two-day psychological IME, Respondent cannot compel Petitioner to submit to a third IME by alleging that it wants Petitioner to undergo memory testing where it has neither identified which tests Petitioner has already undergone nor which tests it now seeks. Respondent has given the Court no means to assess whether these additional tests would be duplicative of tests already performed nor has it offered an explanation as to why those tests were not performed during Petitioner's previous IMEs.

Discovery: Independent Medical Examinations. After Petitioner attended two IMEs, including a two-day psychological IME, Respondent cannot compel Petitioner to submit to a third IME by alleging that it wants Petitioner to undergo memory testing where it has neither identified which tests Petitioner has already undergone nor which tests it now seeks. Respondent has given the Court no means to assess whether these additional tests would be duplicative of tests already performed nor has it offered an explanation as to why those tests were not performed during Petitioner's previous IMEs.

¶ 1 Respondent Montana Insurance Guaranty Association (MIGA) moves for an order requiring Petitioner Douglas Dodge to attend an independent medical examination (IME) with Dr. John R. Harrison in Missoula. Dodge objects to the need for an additional IME because he has already undergone two separate IMEs in the past year. MIGA argues that Dodge's recent complaints of memory loss indicate a change in his medical condition necessitating a third IME.

BACKGROUND

¶ 2 Dodge filed his Petition for Hearing on April 8, 2011, requesting permanent partial disability (PPD) benefits, permanent total disability (PTD) benefits, and other

relief in connection with his August 8, 2000, industrial injury occurring in the course and scope of his employment with Town Pump, Inc.¹

¶ 3 Since his 2000 industrial injury, Dodge has seen multiple physicians for pain, depression, and other psychological issues.

¶ 4 Dr. Steve Kemple, Dodge's treating physician for his pain, referred Dodge to William Patenaude, Ph.D., in December 2006 for a psychological examination.² Dr. Patenaude's notes from 2006 reflect that Dodge reported a "number of cognitive problems associated with his pain experience, including difficulty with memory."³

¶ 5 In September 2010, Dodge underwent a two-day IME with Dr. William D. Stratford.⁴ Among the medical records provided to Dr. Stratford for his review in advance of the IME were Dr. Patenaude's records referencing Dodge's complaints of "difficulty with memory."⁵ Dr. Stratford's findings at the conclusion of the two-day IME included an assessment that Dodge's "thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating, and he may experience his thoughts as being somehow blocked or disrupted."⁶

¶ 6 Dr. Robert Vallin, Ph.D, conducted an IME of Dodge on December 2, 2010.⁷

¶ 7 In January 2011, Dodge received a letter from his supervisor at Town Pump, advising Dodge that he has been unable to perform his job functions in a satisfactory manner.⁸ The letter stated that Dodge had "instances of memory loss, paranoia and

¹ Petition for Hearing, Docket Item No. 1, at 3.

² Petitioner's Brief in Opposition to Respondent's Motion to Compel Petitioner's Attendance at IME (Petitioner's Response Brief), Docket Item No. 17, at 2.

³ Petitioner's Response Brief, Ex. 1 at 2.

⁴ Petitioner's Response Brief at 2.

⁵ Petitioner's Response Brief at 3.

⁶ Petitioner's Response Brief, Ex. 2 at 13.

⁷ Respondent's Motion to Compel Petitioner's Attendance at IME and Brief in Support (Motion to Compel), Docket Item No. 9, at 5.

⁸ Foundational Affidavit of Jeffrey B. Smith (Smith Affidavit I), Docket Item No. 10, Ex. 2.

impaired decision making skills and irritability.”⁹ On January 31, 2011, prior to filing his Petition for Hearing, Dodge resigned his employment with Town Pump.¹⁰

¶ 8 On February 28, 2011, rehabilitation consultant Michele McCann issued an Employability Assessment Report in which she concluded that Dodge was not employable.¹¹ McCann’s ultimate conclusion states: “Doug Dodge is not employable in the Butte labor market or elsewhere in the State due to his physical limitations, his chronic depression and cognitive dysfunction associated with his industrial injury of 8/8/2000.”¹² McCann noted Dodge’s reported memory loss in her report.¹³

¶ 9 On March 1, 2011, Dr. Kemple wrote a letter in which he noted: “[Dodge] probably does have some memory loss, impaired decision making skills, and irritability secondary to 1) His medical condition, which is severe depression, long-standing. 2) His chronic pain going down his left low back and left leg in the L4 and L5 distribution for as long as I have known [Dodge], and I first met [Dodge] on 04/25/2006.”¹⁴

DISCUSSION

¶ 10 MIGA argues that it needs an additional neuropsychological IME because Dodge’s condition may have changed since the IMEs conducted by Drs. Vallin and Stratford. MIGA contends that memory loss had not been addressed in the previous IMEs or medical records because the doctors were unaware of the issue. Dodge disputes that his condition has changed and contends that memory loss is not a new issue which has arisen since the previous IMEs.

¶ 11 Section 39-71-605, MCA, provides that an insurer has a right to an independent medical evaluation.¹⁵ Although this right is not absolute, this Court has concluded that an IME may be ordered if an insurer shows good cause. This Court has previously held:

⁹ Smith Affidavit I, Ex. 2

¹⁰ Smith Affidavit I, Ex. 1.

¹¹ Smith Affidavit I, Ex 3 at 12.

¹² Smith Affidavit I, Ex. 3 at 12 (emphasis removed).

¹³ Smith Affidavit I, Ex. 3 at 13.

¹⁴ Petitioner’s Response Brief, Ex. 5 at 1.

¹⁵ § 39-71-605, MCA (1999).

[A]n insurer is entitled to obtain a second, third or even more IMEs or FCEs where there is an indication that claimant's medical condition has changed or there is some other sound reason for doing a repeat examination; for example, where the prior examination did not address the current medical issue.¹⁶

¶ 12 MIGA has been aware of Dodge's subjective complaints of memory loss since at least 2006. When examined by Dr. Patenaude in December 2006, Dodge reported "a number of cognitive problems associated with his pain experience, including difficulty with memory."¹⁷ Dr. Stratford reviewed Dr. Patenaude's report as part of his September 2010 two-day IME, after which Dr. Stratford opined that Dodge's "thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating, and he may experience his thoughts as being somehow blocked or disrupted."¹⁸

¶ 13 MIGA contends that medical opinions from 2000 and 2003 finding that Dodge was "fully oriented"¹⁹ and had "good recent and remote memory"²⁰ indicate that there has been a change in his condition. Assuming this to be the case, the change in Dodge's condition would have occurred between 2003 and 2006, when Dr. Patenaude noted Dodge's reported difficulties with memory. This was well in advance of the two IMEs to which Dodge has already submitted and fails to justify a third IME.

¶ 14 MIGA argues that a third IME is appropriate so that Dr. Harrison can conduct tests regarding Dodge's reported memory loss. MIGA notes that although Dr. Stratford performed a number of tests on Dodge during the two-day IME, he did not perform tests specific to Dodge's memory. MIGA has not identified the tests Dr. Harrison would conduct if granted a third IME. I therefore have no means to assess whether these tests are duplicative of the tests already performed by Dr. Stratford or whether Dr. Stratford could not have performed them when he conducted the IME in September. Moreover, although MIGA suggests it is at a disadvantage because Dr. Kemple has opined that Dodge "probably does have some memory loss," MIGA acknowledges that Dr. Kemple has not performed any testing of Dodge's memory. Dr. Kemple's opinion regarding Dodge's memory loss is based on Dodge's subjective complaints of memory

¹⁶ *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

¹⁷ Petitioner's Response Brief, Ex. 1 at 2.

¹⁸ Petitioner's Response Brief, Ex. 2 at 13

¹⁹ Second Foundational Affidavit of Jeffrey B. Smith (Smith Affidavit II), Docket Item No. 20, Ex. A at 1.

²⁰ Smith Affidavit II, Ex B at 2.

loss -- subjective complaints that have been present in the medical records for nearly five years.

¶ 15 At MIGA's request, Dodge has submitted to two IMEs since last September, including a two-day psychological IME with Dr. Stratford. Dodge's subjective complaints of memory loss were noted in the medical records well in advance of either previous IME. MIGA has failed to demonstrate that Dodge's condition has changed since the previous IMEs nor has it provided any other sound reason for ordering Dodge to submit to a third IME.

ORDER

¶ 16 Respondent's motion to compel Petitioner's attendance at an IME is **DENIED**.

DATED in Helena, Montana, this 21st day of July, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Paul N. Simon/Bekki Weldon
Kelly M. Wills/Jeffrey B. Smith
Submitted: June 29, 2011