IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 49

WCC No. 2006-1549

DEB HAMAN

Petitioner

vs.

WAUSAU INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL
ATTENDANCE AT AN INDEPENDENT MEDICAL EXAMINATION,
AND GRANTING IN PART AND DENYING IN PART
PETITIONER'S MOTION FOR PROTECTIVE ORDER

Summary: Respondent moved to compel Petitioner to attend a follow-up independent medical examination (IME) with Dr. Gregg Singer. Petitioner argues that a follow-up IME is unnecessary. As this motion specifically pertains to Dr. Singer, Petitioner argues that, in conducting the previous IME, Dr. Singer ignored her complaints of pain and pushed her to the point where she was in pain for several days after the examination. Moreover, Petitioner alleges that Dr. Singer did not note her pain complaints in his IME report. If the Court grants Respondent's motion to compel, Petitioner moves for a protective order to allow Petitioner's husband to be present during the entire examination and to videotape the examination.

Held: Respondent's motion to compel is granted. The Court finds good cause to allow a follow-up examination with Dr. Singer. Petitioner's motion for a protective order is granted in part and denied in part. Petitioner's husband may not be present for the examination. However, Petitioner's counsel may be present for both the history-taking portion of the IME and the examination itself. The entire IME will be recorded by a fixed video camera.

¶ 1 Respondent moved to compel Petitioner's attendance at an independent medical examination (IME) by Dr. Gregg Singer. Petitioner opposes Respondent's motion. In the alternative, Petitioner requests an order pursuant to ARM 24.5.325(1)(b), allowing Petitioner's husband to attend the examination in its entirety and to videotape the examination. The parties' respective motions are addressed in turn.

RESPONDENT'S MOTION TO COMPEL ATTENDANCE AT AN IME

¶ 2 In her original Petition for Hearing before this Court, Petitioner sought a determination that she was permanently totally disabled (PTD). Respondent filed a Motion for Summary Judgment on this issue seeking a ruling that, as a matter of law, Petitioner was not PTD. Although Petitioner initially resisted Respondent's motion, she later conceded that the issue in the case was whether she was temporarily totally disabled (TTD) rather than PTD. Petitioner requested leave to amend her petition to reflect this change. I granted Petitioner leave to amend and, since Petitioner was no longer seeking a determination of PTD, I denied Respondent's Motion for Summary Judgment as moot.

¶ 3 Dr. Singer conducted his IME of Petitioner on May 30, 2006. At the time of this examination, Petitioner was still pursuing a claim that she was PTD. Because of this, the focus of Dr. Singer's examination was towards addressing that issue. Dr. Singer assessed Petitioner as being at maximum medical improvement (MMI) and opined that she was not PTD.

¶ 4 Exactly a year after Dr. Singer performed his IME, Petitioner amended her petition. Petitioner changed her demand from a claim of PTD to TTD. Because she is now claiming she is TTD instead of PTD, this invokes the issue of Petitioner's healing status as well as her employability. Petitioner's healing status was not at issue when Dr. Singer first examined Petitioner because she was not disputing that she was at MMI.

¶ 5 Boiled down, Petitioner argues that a second IME is neither desirable nor necessary because Petitioner "is not claiming her condition has changed, at all."[1] I am not persuaded by Petitioner's argument. At the time that Dr. Singer performed his IME, Petitioner was maintaining that she was PTD. She now claims that she is TTD. Essential to Petitioner's initial claim of PTD was that she was at MMI. Her contention of maximum healing was based on the opinion of her treating physician at the time. Since that time, Petitioner has been treated by different physicians who have opined that she is not at MMI. For Petitioner to resist Respondent's motion for a follow-up IME by arguing that she "is not claiming her condition has changed, at all" simply does not fly.

¶ 6 This Court has previously held:

> [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.[2]

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[1] [Petitioner's] Motion and Brief Requesting Discovery Protective Order at 3.

[2] *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

In this case, there is more than a mere "indication" that Petitioner's medical condition has changed. Petitioner has formally amended her petition to reflect the change in her medical condition. Accordingly, a repeat IME is warranted.

PETITIONER'S MOTION FOR PROTECTIVE ORDER

¶ 7 In her response to Respondent's motion to compel, Petitioner requests that, if this Court grants Respondent's motion for a second IME, the Court also issue an Order, pursuant to ARM 24.5.325(1)(b), allowing Petitioner's husband to be present for the entire examination and that he be allowed to videotape the examination. In support of this request, Petitioner has submitted a sworn affidavit in which she states, in pertinent part:

> ¶ 7a I requested that my husband be allowed to be in the examination room with me during the [May 30, 2006] examination. Dr. Singer refused, stating that his secretary could witness the examination, which she did.[3]
>
> ¶ 7b During the course of the examination, Dr. Singer required me to raise my arms above my head. I told him that I could do that, but that it would cause pain. He then guided my arms above my head despite my protest. The pain was severe enough to cause my eyes to water. I was in pain during the examination, and had pain for days afterward before it quieted down to my usual state . . . .[4]
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> ¶ 7c I have read Dr. Singer's examination report. There is no mention of the pain I had raising my arms above my head, and worse, he reported there were no "pain behaviors" with my arm in the full overhead position. . . .[5]

¶ 8 Petitioner states in her affidavit that she "dreads" another examination with Dr. Singer in light of her previous experience with him. Respondent argues that the presence of one of Dr. Singer's staff should address Petitioner's concerns. Respondent raises the concern that if Petitioner's husband were present for the examination, it would be impossible to prevent him from potentially influencing Petitioner's conduct and responses during the examination with such things as nods, shakes of the head, grimaces, groans, etc. Respondent notes that an IME "is no different than with a deposition" in which a party has the right to exclude any non-party to ensure that the responses from the

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[3] Affidavit of Claimant Deb Haman, ¶ 3.

[4] *Id.*, ¶ 4.

[5] *Id.*, ¶ 5.

deponent are accurate and uninfluenced.[6] On this point, I find Respondent's argument persuasive.

¶ 9 While I have no reason to presuppose that Petitioner's husband would attempt to unduly influence the conduct of the IME, I think it is reasonable to anticipate that he would not stand idly by if he perceives that Dr. Singer is causing undue pain to his wife. By the same token, while I have no reason to presuppose that Dr. Singer's employee is not the "unbiased third person" Respondent characterizes her as, I think it is reasonable to anticipate that she may be somewhat reticent to intervene in the IME even if she perceives that Dr. Singer may be causing Petitioner undue pain.

¶ 10 Similarly, I am concerned that Petitioner's husband may not objectively document the conduct of the IME if he were to videotape the examination as Petitioner requests. Just as Respondent raises legitimate concerns that Petitioner's husband may influence Petitioner's conduct and responses, it is not unreasonable to be concerned that he may naturally be inclined to focus on issues which he subjectively deems important. There is, however, a middle ground.

¶ 11 In arguing that Petitioner's husband should not be present during the examination, Respondent analogizes an IME to a deposition. In many respects, this is an apt analogy and, as noted above, Respondent's argument in this regard is well-taken. The critical distinction, however, is that the deposition of a party is taken on the record and with the party's attorney present. The obvious purpose for this is so the Court can rely on an objective record of what was said during the deposition as opposed to the subjective recollections of the respective parties. In light of Petitioner's history with Dr. Singer and the conflicting recollections already present from the first IME, it seems wise to follow Respondent's deposition analogy one step further and conduct this examination on the record and with Petitioner's counsel present during the examination.

¶ 12 ARM 24.5.325 provides, in pertinent part:

> [T]he court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> . . .
>
> (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
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> . . .
>
> (e) that discovery be conducted with no one present except persons designated by the court . . . .

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[6] Reply Brief in Support of Motion to Compel Attendance at IME and in Opposition to Petitioner's Motion for Protective Order at 3.

¶ 13 Respondent has argued that the Supreme Court proscribed the presence of an attorney during the examination in *Mohr v. District Court*.[7] However, in *Hegwood v. Montana Fourth Judicial Dist. Ct.*,[8] the Montana Supreme Court specifically addressed this issue by noting:

> *Mohr* does not categorically preclude representation at, and documentation of, the physical examination. In fact, it provides that "[t]he actual physical examination, *at least in most cases*, does not require the presence of counsel to safeguard its objectivity because, by nature it is a nonadversarial procedure." *Mohr*, 202 Mont. at 426, 660 P.2d at 89 (emphasis added). Implicit in *Mohr* is the notion that the examinations may, in some instances, border on advocacy. When an examinee sufficiently demonstrates subjective predilections or the likelihood of prejudice, i.e., the exam shifts from independent in nature to adversarial, courts must have protective mechanisms at their disposal to negate the inequities.[9]

¶ 14 Respondent further argues that § 39-71-605(1)(b), MCA, only allows for a physician to be present during an IME. Section 39-71-605(1)(b), MCA, states, in pertinent part: "The employee is entitled to have a physician present at any examination." Respondent interprets this affirmative entitlement as a proscription of the presence of any others during the examination. Following Respondent's interpretation, an injured minor or otherwise incapacitated person would not be allowed to have his legal guardian present during an examination unless the guardian happened to also be a physician. This argument is without merit.

¶ 15 Finally, Respondent argues that it is effectively being precluded from conducting a follow-up IME because Dr. Singer refuses to conduct the examination with Petitioner's counsel present and Respondent alleges no other doctor will conduct an IME if Petitioner's counsel is present during the examination portion. My ruling provides for Petitioner's counsel to be present in lieu of Petitioner's husband to address Respondent's concern that Petitioner's husband may attempt to influence the examination. I would fully expect Petitioner's counsel, on the other hand, to conduct himself appropriately and refrain from any improper interference with the examination. As a safeguard, the examination will be on the record and, if Petitioner's counsel acted inappropriately during the examination, I would be able to review the conduct of the examination myself and address this issue. More to the point, Respondent has overlooked that this Order specifically applies only to Dr. Singer because of the previous history of this particular claimant with this particular

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[7] *Mohr*, 202 Mont. 423, 660 P.2d 88 (1983).

[8] *Hegwood*, 2003 MT 200, 317 Mont. 30, 75 P.3d 308.

[9] *Id.*, ¶ 12.

doctor on this particular case. If Dr. Singer is not conducting the examination, this order becomes moot and the presence of Petitioner's counsel at the examination is not an issue.

¶ 16 In *Simms v. Montana Eighteenth Judicial Dist. Ct.*,[10] the Montana Supreme Court held:

> [G]ood cause for an examination may not constitute good cause for the specific examination requested by a defendant. A court must scrutinize a request for a proposed examination on a case-by-case basis. The time, place, manner, conditions and scope of an examination must be balanced with the plaintiff's inalienable rights. A court is further required to consider the availability of other means through which a defendant can obtain the information necessary to an informed defense.[11]

¶ 17 Based on the history extant between Petitioner and Dr. Singer, I could have denied Respondent's motion to compel the IME with Dr. Singer and required Respondent to either forego a follow-up IME or require that the follow-up IME be conducted with a doctor other than Dr. Singer. Although I have found good cause to allow Respondent to conduct a follow-up IME, as the Court noted in *Simms*, "good cause for an examination may not constitute good cause for the specific examination requested by a defendant."[12] Respondent does not have an absolute right to the doctor of its choice and there are certainly other qualified physicians in the Billings area who could conduct this examination. It was in an effort to accommodate Respondent's desire to have the examination specifically conducted by Dr. Singer that I arrived at the solution reflected in this Order. The fact that Dr. Singer apparently finds this solution unacceptable is an issue for Respondent to address with Dr. Singer.

¶ 18 Finally, in the event this examination does go forward with Dr. Singer, Respondent's counsel has requested the right to be present for the examination in light of the fact that Petitioner's counsel will be present. Petitioner objects to this request. Boiled down, Petitioner argues that this would be an unnecessary invasion of Petitioner's privacy. At Petitioner's request, I have ordered that this examination be videotaped. This video would obviously be provided to Respondent's counsel and, at a minimum, would be submitted as a demonstrative exhibit for this Court's review. In this light, Petitioner's expressed concern about Respondent's counsel being present at the examination seems a little disingenuous. Moreover, if an issue were to arise during the conduct of the examination, fairness would dictate that Respondent's counsel should not be put at the disadvantage of not being present at the examination to address the issue while Petitioner's counsel is present.

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[10] *Simms*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678.

[11] *Id.*, ¶ 33.

[12] *Id.*

ORDER

¶ 19 Respondent's motion to compel attendance at a follow-up IME with Dr. Singer is **GRANTED**.

¶ 20 Petitioner's motion for a protective order is **GRANTED,** subject to the following conditions:

> ¶ 20a The examination will be recorded, both with audio and video, by means of a fixed video camera.
>
> ¶ 20b Petitioner's counsel and Respondent's counsel will be allowed to be present for both the history-taking portion and the physical examination itself.

¶ 21 Petitioner's motion for a protective order requesting that Petitioner's husband be allowed to be present for the IME is **DENIED**.

¶ 22 Any party to this dispute may have twenty days in which to request reconsideration from this Order.

DATED in Helena, Montana, this 30th day of November, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Kelly M. Wills
Submitted: November 16, 2007