

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

**1995 MTWCC 90**

**WCC No. 9508-7369**

---

**RENE ANNE HARBALL**

**Petitioner**

**vs.**

**LIBERTY MUTUAL FIRE INSURANCE COMPANY**

**Respondent/Insurer for**

**J.C. PENNEY COMPANY**

**Employer.**

---

**ORDER DENYING INDEPENDENT MEDICAL EXAMINATION AND  
STAYING FURTHER PROCEEDINGS**

**Summary:** Claimant sought PPD benefits based on the determination by two physicians that she suffered 5% impairment and had restrictions. A physician hired by the insurer found 0% impairment and no restrictions based on records review. The insurer asked the Court to order claimant to attend an independent medical examination and functional capacities evaluation.

**Held:** The parties agree the applicable statute is section 39-71-711, MCA (1989). Under subsection (2), both parties have obtained an impairment rating. Since the parties cannot agree on the rating, subsection (3) applies, which contemplates designation of an evaluator by the Department of Labor. This Court presently lacks jurisdiction to make further order on the matter.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-711, MCA (1989).** Under section 39-71-711, MCA (1989), where each party has already obtained an impairment rating, and the parties dispute the appropriate rating, the procedure to be followed is designation of an evaluator by the

Department of Labor, as specified in subsection (3) of the statute. Until that procedure is followed, the Workers' Compensation Court lacks jurisdiction to make further orders on the dispute and will not compel claimant to attend.

**Impairment: Impairment Ratings.** Under section 39-71-711, MCA (1989), where each party has already obtained an impairment rating, and the parties dispute the appropriate rating, the procedure to be followed is designation of an evaluator by the Department of Labor, as specified in subsection (3) of the statute. Until that procedure is followed, the Workers' Compensation Court lacks jurisdiction to make further orders on the dispute and will not compel claimant to attend an Independent Medical Examination or Functional Capacities Evaluation.

**Benefits: Permanent Partial Disability Benefits: Generally.** Under section 39-71-711, MCA (1989), where each party has already obtained an impairment rating, and the parties dispute the appropriate rating, the procedure to be followed is designation of an evaluator by the Department of Labor, as specified in subsection (3) of the statute. Until that procedure is followed, the Workers' Compensation Court lacks jurisdiction to make further orders on the dispute and will not compel claimant to attend.

**Benefits: Impairment Awards.** Under section 39-71-711, MCA (1989), where each party has already obtained an impairment rating, and the parties dispute the appropriate rating, the procedure to be followed is designation of an evaluator by the Department of Labor, as specified in subsection (3) of the statute. Until that procedure is followed, the Workers' Compensation Court lacks jurisdiction to make further orders on the dispute and will not compel claimant to attend.

**Independent Medical Examination (IME): Generally.** Under section 39-71-711, MCA (1989), where each party has already obtained an impairment rating, and the parties dispute the appropriate rating, the procedure to be followed is designation of an evaluator by the Department of Labor, as specified in subsection (3) of the statute. Until that procedure is followed, the Workers' Compensation Court lacks jurisdiction to make further orders on the dispute and will not compel claimant to attend.

On October 30, 1995, the Court was contacted by Mr. Larry W. Jones and Mr. Bernard J. Everett who respectively represent respondent and petitioner. Mr. Jones sought an order for an IME by Dr. Chambers and a physical capacities evaluation in connection with that evaluation. Mr. Everett opposed the request but agreed to telephonic presentation and argument of the motion.

The essential facts, as appear in the petition and from the attorneys' representations, are as follows. Claimant injured her shoulder in January 1991. She later received an impairment rating of 5% from two physicians, one or both of whom were treating her. According to Mr. Everett the physicians have indicated that she suffers a physical restriction on account of her injury. At the respondent's request, Dr. Chambers reviewed the claimant's medical records and issued an opinion that claimant had 0% impairment and no physical restrictions. He did not examine claimant, indeed claimant refused the respondent's request that she submit to his examination. Nonetheless, by issuing an impairment rating and opinion, Dr. Chambers thereby indicated that he had a sufficient basis to do so.

During the October 30, 1995 telephonic conference, I indicated that I would order an IME by Dr. Chambers but would only order an FCE if the doctor felt an FCE necessary to formulate his opinions. I also suggested to counsel that consideration be given to settling the case since the monetary amount -- \$1,500 -- is small and is less than an IME and litigation costs.

On November 2, 1995, counsel again arranged a telephone conference. During this conference we determined that the statute applicable to impairment ratings is section 39-71-711, MCA (1989). Both counsel agree that the 1989 version of section 39-71-711, MCA, applies in this case. The section provides:

**39-71-711. Impairment evaluation — ratings.** (1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association; and

(c) must be expressed as a percentage of the whole person.

(2) A claimant or insurer, or both, may obtain an impairment rating from a medical doctor or from a chiropractor if the claimant's treating physician is a chiropractor. If the claimant and insurer cannot agree upon the rating, the procedure in subsection (3) must be followed.

(3) (a) Upon request of the claimant or insurer, the department shall direct the claimant to an evaluator for a rating. The evaluator shall:

(i) evaluate the claimant to determine the degree of impairment, if any, that exists due to the injury; and

(ii) submit a report to the department, the claimant, and the insurer;

(b) Unless the following procedure is followed, the insurer shall begin paying the impairment award, if any, within 30 days of the evaluator's mailing of the report:

(i) Either the claimant or the insurer, within 15 days after the date of mailing of the report by the first evaluator, may request that the claimant be evaluated by a second evaluator. If a second evaluation is requested, the department shall direct the claimant to a second evaluator, who shall determine the degree of impairment, if any, that exists due to the injury.

(ii) The reports of both examinations must be submitted to a third evaluator, who may also examine the claimant or seek other consultation. The three evaluators shall consult with one another, and then the third evaluator shall submit a final report to the department, the claimant, and the insurer. The final report must state the degree of impairment, if any, that exists due to the injury.

(iii) Unless either party disputes the rating in the final report as provided in subsection (6), the insurer shall begin paying the impairment award, if any, within 45 days of the date of mailing of the report by the third evaluator.

(4) The department shall appoint impairment evaluators to render ratings under subsection (1). The department shall adopt rules that set forth the qualifications of evaluators and the locations of examinations. An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12. The department may seek nominations from the board of medical examiners for evaluators licensed under Title 37, chapter 3, and from the board of chiropractors for evaluators licensed under Title 37, chapter 12.

(5) The cost of impairment evaluations is assessed to the insurer, except that the cost of an evaluation under subsection (3)(b)(i) or (3)(b)(ii) is assessed to the requesting party.

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(ii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. Disputes over impairment ratings are not subject to 39-71-605 or to mandatory mediation.

(7) An impairment rating rendered under subsection (3) is presumed correct. This presumption is rebuttable.

In this case, section (2) has been satisfied. Dr. Chambers prior impairment rating satisfies the provision for the insurer to obtain an independent impairment rating. Since claimant and insurer cannot agree on an impairment rating, the procedures specified under

subsection (3) must now be followed. Since those procedures have not been followed, the Court lacks jurisdiction at this time to conduct further proceedings.

I have noted respondent's argument that it is entitled to an IME under section 39-71-605, MCA, which requires the claimant to submit from time to time to examination of a physician or panel of physicians selected by the insurer. In this case, however, the more specific statute controls examinations which are for the specific purpose of rendering an impairment rating. Thus, even if I could order an IME in this case, I am not persuaded that I should do so.

THEREFORE, IT IS HEREBY ORDERED that the request for an IME and FCE is **denied**. IT IS FURTHER ORDERED that the proceedings in this case are **stayed** pending completion of the procedure specified in section 39-71-711, MCA (1989).

Dated in Helena, Montana, this 3rd day of November, 1995.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Bernard J. Everett  
Mr. Larry W. Jones