

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 47

WCC No. 2012-3014

ESTATE OF RICHARD HIRTH,
by and through Ashley Harmon, Personal Representative

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION TO EXCLUDE
CERTAIN REPORTS AND TESTIMONY

Summary: Petitioner moved to exclude the reports and testimony of two medical doctors who reviewed Petitioner's medical records and disputed the impairment rating assigned by Petitioner's treating physician. Respondent opposes Petitioner's motion, arguing that it would be denied due process of law if it were denied the opportunity to challenge the impairment rating assigned by Petitioner's treating physician.

Held: The arguments Petitioner has raised go to the weight rather than the admissibility of the evidence in question. Petitioner's motion is denied.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-711. Where two physicians reviewed the injured worker's medical records and rendered impairment ratings, the situation falls under § 39-71-711, MCA, and not § 39-71-605, MCA, because these physicians did not conduct an IME, but rather rendered opinions based on their record reviews. The value of their respective expert opinions, which conflict with the opinions of the treating physician, are a matter of weight, not admissibility.

Physicians: Treating Physician: Weight of Opinions. Where two physicians reviewed the injured worker's medical records and rendered

impairment ratings, the situation falls under § 39-71-711, MCA, and not § 39-71-605, MCA, because these physicians did not conduct an IME, but rather rendered opinions based on their record reviews. The value of their respective expert opinions, which conflict with the opinions of the treating physician, are a matter of weight, not admissibility.

¶ 1 Petitioner Estate of Richard Hirth, by and through Ashley Harmon, Personal Representative (Hirth Estate), moves this Court to exclude reports and any testimony of Drs. Cleary and Carpenter which Respondent Montana State Fund (State Fund) may seek to put into evidence in this matter.¹ State Fund opposes Hirth Estate's motion and responds that it would be denied due process of law if the Court were to grant this motion.²

¶ 2 In support of its motion, Hirth Estate explains that Hirth suffered an occupational disease on June 17, 1999.³ Hirth's treating physician evaluated Hirth and assigned him a 29% whole person impairment rating on August 3, 2001. On August 28, 2001, Dr. Joel E. Cleary reviewed Hirth's medical records and opined that Hirth's impairment rating should be a 3% whole person impairment rating. On April 12, 2012, Dr. Kenneth Carpenter reviewed Hirth's medical records and opined that Hirth's impairment rating should be a 3% whole person impairment rating. Hirth Estate notes that neither Dr. Cleary nor Dr. Carpenter ever physically examined or interviewed Hirth.⁴

¶ 3 Hirth Estate argues that State Fund obtained two non-consensual independent medical examinations (IME) of Hirth's medical records. Hirth Estate argues that § 39-71-605(5), MCA, expressly states that this statute has no application to impairment evaluations, and further argues that § 39-71-711(4), MCA, reiterates that disputes over impairment ratings are not subject to § 39-71-605, MCA. Hirth Estate therefore argues that the IMEs by Drs. Cleary and Carpenter were prohibited under the Workers' Compensation Act and are therefore not admissible.⁵

¹ Motion to Exclude Reports and Any Testimony of Drs. Cleary and Carpenter (Opening Brief), Docket Item No. 7.

² Brief in Opposition to Petitioner's Motion to Exclude Reports and Any Testimony of Drs. Cleary and Carpenter (Response Brief), Docket Item No. 11.

³ The 1999 statutes therefore apply to Hirth's claim and the statutes cited within this Order are the 1999 version.

⁴ Opening Brief at 1-2.

⁵ Opening Brief at 2-3.

¶ 4 State Fund argues that it is entitled to be heard on this issue and that it would violate State Fund's due process rights if the Court were precluded from considering evidence contrary to Hirth's treating physician's impairment rating calculation. State Fund notes that while the opinion of a treating physician is generally afforded greater weight, the treating physician's opinion is not conclusive.⁶ State Fund argues that § 39-71-605, MCA, is inapplicable to the present controversy and that the records reviews conducted by Drs. Cleary and Carpenter do not fall under the statute. State Fund argues that neither Dr. Cleary nor Dr. Carpenter conducted an "IME" because neither performed an examination of Hirth. State Fund points to § 39-71-711(1), MCA, which holds, in pertinent part, that an impairment rating is a purely medical determination which must be established by objective medical findings. State Fund argues that the necessary objective medical findings are contained in the medical records reviewed by Drs. Cleary and Carpenter and therefore they were both in an equal position to Hirth's treating physician in applying the documented objective medical findings to the applicable provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th Edition (Guides).⁷

¶ 5 Hirth Estate further argues that Hirth's treating physician was more qualified to render an impairment rating for his occupational disease than either Dr. Cleary or Dr. Carpenter.⁸ State Fund responds that Drs. Cleary and Carpenter have specialized expertise in applying the Guides.⁹ This argument goes to the weight of the respective physician's opinions, not their admissibility.

¶ 6 The parties appear to be in agreement that § 39-71-711, MCA, and not § 39-71-605, MCA, apply to the present situation. Where Hirth Estate's argument fails is that neither Dr. Cleary nor Dr. Carpenter conducted an IME; they reviewed Hirth's medical records and rendered opinions based on their records reviews. The issue of the conflicting expert opinions in this matter is one of weight, not admissibility. Hirth Estate's motion to exclude is denied.

ORDER

¶ 7 Petitioner's motion to exclude is **DENIED**.

⁶ Response Brief at 1-2; see *EBI/Orion Group v. Blythe*, 288 Mont. 356, 957 P.2d 1134 (1998).

⁷ Response Brief at 2.

⁸ Opening Brief at 3-4.

⁹ Response Brief at 2.

DATED in Helena, Montana, this 27th day of December, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Michael G. Barer
Thomas E. Martello
Submitted: December 18, 2012