

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 12

WCC No. 2005-1247

HENRY KRUZICH

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING MOTION FOR OUT-OF-STATE IME

Summary: Respondent insurer seeks an out-of-state medical examination of the claimant for purposes of determining whether his Parkinson's disease or syndrome is related to an industrial head injury.

Held: The request for an out-of-state medical examination is denied where the claimant has been examined by three "highly qualified" Montana specialists and the insurer has failed to provide evidence indicating that actual physical examination and testing is necessary to the out-of-state physicians formulating opinions as to causation, or that, if further testing is necessary, the special expertise necessary to conduct such examination and testing is unavailable in Montana.

Topics:

Independent Medical Examination: Generally. The Workers' Compensation Court will order a claimant to undergo an out-of-state medical examination only if the requested examination is reasonable and the medical expertise needed to address the medical issue at stake is unavailable in Montana or Montana physicians having the necessary expertise are unwilling to conduct the examination. § 39-71-605, MCA (2003).

Statutes and Statutory Interpretation. Where a statute is procedural rather than substantive, the version in effect at the time it is applied is applicable. Statutes governing medical examinations are procedural, thus the statute in

effect at the time the Court is asked to order an examination applies in determining whether the examination will be ordered.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-605, MCA (2003). Section 39-71-605, MCA (2003), authorizes the Workers' Compensation Court to order a claimant to undergo an out-of-state medical examination requested by an insurer. However, the request for examination must be reasonable; it must be necessary to the formulation of the designated physician's opinions; and the insurer must demonstrate that the out-of-state physician has expertise in doing the necessary examination and testing beyond what is available in Montana.

¶1 Respondent moves for an order compelling the petitioner to submit to an independent medical examination at the Mayo Clinic, which is located in Rochester, Minnesota. For the reasons set forth below, the motion is **denied**.

Factual Background

¶2 The petitioner (claimant) suffered a head injury on August 16, 1988, while working for Blue Ridge Mining Limited. The respondent insured the claimant's employer at the time of the accident and accepted liability for his injury.

¶3 In 1994 the claimant and the respondent entered into a settlement agreement with respect to the claimant's future indemnity benefits. However, the agreement entitles the claimant to future medical benefits with respect to his industrial injuries.

¶4 A dispute has now arisen with respect to those medical benefits. The claimant has been diagnosed with Parkinson's syndrome or disease (Parkinsonism). Two Montana neurologists have opined that the claimant's Parkinsonism is related to his original head injury. A third Montana neurologist, who performed an independent medical examination (IME) at the request of the respondent, has opined that the Parkinsonism is idiopathic, i.e., of unknown cause, and not related to the claimant's original head injury. Based on the latter neurologist's opinion, the respondent has denied liability for medical expenses for the treatment of the claimant's Parkinsonism. The present petition seeking medical benefits ensued.

¶5 The respondent has requested the claimant submit to a second IME, this time at the Mayo Clinic. The claimant has refused the request. The respondent now seeks an order compelling the Mayo Clinic IME.

Discussion

¶6 The Court's authority to order an independent medical examination is governed by section 39-71-605, MCA (2003). The section does not govern benefits, rather, it is a procedural provision governing medical examinations for purposes of determining benefits. Since it is procedural, the current – 2003 – version of the law applies. *Wolfe v. Webb*, 251 Mont. 217, 227, 824 P.2d 240, 246 (1992); *State Comp. Ins. Fund v. Sky Country, Inc.*, 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989); *Weiss v. State*, 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986); and see discussion in *Seeger v. Magnum Oil, Inc.*, 1999 MTWCC 67, and *Sears v. Travelers Ins.*, 1997 MTWCC 18.

Section 39-71-605, MCA (2003), provides in relevant part:

Examination of employee by physician – effect of refusal to submit to examination – report and testimony of physician – cost.

(1) (a) Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel that must be provided and paid for by the insurer and shall likewise submit to examination from time to time by any physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.

(b) 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. An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. The employee is entitled to have a physician present at any examination. If the employee, after written request, fails or refuses to submit to the examination or in any way obstructs the examination, the employee's right to compensation must be suspended and is subject to the provisions of 39-71-607. Any physician, psychologist, or panel employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.

(2) In the event of a dispute concerning the physical condition of a claimant or the cause or causes of the injury or disability, if any, the department or the workers' compensation judge, at the request of the claimant or insurer, as the case may be, shall require the claimant to submit to an examination as it considers desirable by a physician, psychologist, or panel within the state or elsewhere that has had adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute. The physician, psychologist, or panel making the

examination shall file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved. The requesting party shall pay the physician, psychologist, or panel for the examination.

(3) As used in this section, a panel includes a practitioner having substantial experience in the field of medicine concerned with the matters presented by the dispute and whose licensure would qualify the practitioner to act as a treating physician, as defined in 39-71-116, and may include a psychologist.

Subsections (1) and (2) appear to overlap under the circumstances of this case. Under both subsections, however, the Court is authorized to order an independent medical examination requested by an insurer.

¶7 Section 39-71-605, MCA (2003), does not grant the insurer an unfettered right to unlimited IMEs or a right to compel a claimant to travel anywhere at any time for purposes of an IME. Implicit in section 39-71-605, MCA (2003), is a requirement that the IME request be reasonable. Moreover, subsection (1)(b) requires that IMEs be held as close to the claimant's residence as practicable. If the medical expertise necessary to resolving the controversy in the case is unavailable in Montana due to a lack of physicians with the appropriate expertise or due to the unwillingness of physicians having the expertise to perform the examination and testify, then the Court may order an out-of-state examination if such examination is necessary to formulation of opinions regarding the issue at hand.

¶8 Respondent urges that involvement of Mayo Clinic physicians is appropriate since the Mayo Clinic is "the number one [neurology institute] in the country and the facility that is conducting cutting edge research on the very topic at issue." (Motion to Compel Out of State Independent Medical Examination and Supporting Brief at 5.) That argument, without more, is not enough. Respondent is certainly entitled to seek opinions from Mayo Clinic physicians, but it has not provided a sufficient basis for the Court to conclude that an actual physical examination or testing of the claimant is necessary to their rendering opinions or, if necessary, why the further examination and testing cannot be carried out in Montana by other physicians. The claimant has been examined by three Montana neurologists – two of whom the respondent characterizes as "highly respected." (*Id.*) Presumably, their physical examinations and testing of the claimant were thorough and well documented. Extensive medical records are also available for Mayo Clinic physicians to review. Lacking evidence that actual examination and testing of the claimant by Mayo Clinic physicians is necessary and that the Mayo Clinic physicians have expertise in doing the necessary examination and testing beyond what is available in Montana, the Court declines to order the claimant to submit to an examination in Minnesota.

ORDER

¶9 The motion to compel the claimant to submit to an out-of-state IME is **denied**.

DATED in Helena, Montana, this 10th day of March, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. William P. Joyce
Mr. Joe C. Maynard
Submitted: March 7, 2005