

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 28

WCC No. 2005-1231

GERALD MACK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING REQUEST FOR OUT-OF-STATE IME

Summary: The respondent insurer applied to the Court for an order directing the petitioner to submit to an out-of-state independent medical examination.

Held: The request is denied because it is untimely. The information provided to the Court is in any event insufficient to persuade the Court to order an out-of-state IME.

Topics:

Independent Medical Examinations: Out-of-State. Where an out-of-state independent medical examination is requested, the requesting party must satisfy the Court that an out-of-state examination is both reasonable and necessary. *Kruzich v. Old Republic Ins. Co.*, 2005 MTWCC 12, ¶ 7.

Independent Medical Examinations: Out-of-State. Where an order for an out-of-state independent medical examination is requested, the requester should provide the Court with information showing the special expertise of the proposed examiner and how that expertise is related and important to the medical issues in the case. Second, the requester should address why it is necessary to employ an out-of-state rather than an in-state examiner. If there are other Montana physicians with the same speciality, e.g., board-certified neurologists, then the requester should explain any additional expertise or qualifications the proposed examiner has that makes the proposed examiner more qualified to address the medical issues in the case

than Montana specialists or why the requester has been unable to secure a satisfactory in-state examiner. Third, the requester should provide a short statement from the proposed examiner indicating why an actual physical examination, as opposed to a records review, is necessary for him or her to formulate his or her opinions. Fourth, and finally, the requester should provide information as to the proposed examiner's prior experience as an expert witness. This latter information is to enable the Court to determine whether the proposed examiner is impartial. *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678.

¶1 The matter before the Court is the Montana State Fund's (State Fund) request that the Court order petitioner, Gerald Mack (claimant), to undergo an out-of-state independent medical examination (IME) by Dr. Richard E. Kanner, a pulmonologist practicing in Utah. The State Fund has provided the Court with Dr. Kanner's Curriculum Vitae (CV), which is impressive. He is a professor of medicine at the University of Utah School of Medicine and has numerous professional journal articles, books, and textbook chapters to his credit.

¶2 By agreement of counsel, the request was presented informally and was addressed in a telephone conference I had with them on May 6, 2005. However, because my analysis may provide further guidance regarding out-of-state IMEs, I agreed to put that analysis to pen and paper and publish it.

Factual Background

¶3 According to the petition, the claimant suffers from a pulmonary condition caused or aggravated by his work at Noel Farms Incorporated (Noel Farms). He has been examined by two Montana physicians, one designated by the Department of Labor and Industry. The two physicians disagree as to whether the claimant's employment is the cause of his current pulmonary conditions. State Fund, which insured Noel Farms, has denied liability based on the one physician's opinion that claimant's condition is not an occupational disease.

¶4 The petition was set for trial on an emergency basis. A trial date of March 31, 2005, was fixed. Lists of witnesses and witness summaries, including summaries for expert witnesses, were due February 11, 2005. A pretrial conference was scheduled for March 14, 2005.

¶5 A draft of a proposed pretrial order was submitted prior to the pretrial conference, which was held on March 14, 2005. On March 15, 2005, the claimant's counsel proposed that the parties attempt to settle the case by participating in a settlement conference with the Court's settlement master. Instead of going to trial on March 31st, they agreed to hold the settlement conference on that day.

¶6 A settlement conference took place but no settlement was reached. On the day after the settlement conference, the claimant's counsel requested that the trial be reset on an expedited basis. After conferring with counsel, the Clerk of Court reset the matter for June 2, 2005, in Great Falls.

¶7 Then, on April 26, 2005, counsel for the State Fund requested a telephone conference call with the Court and the claimant's counsel to discuss his request for an IME. The conference was held on May 6, 2005. In anticipation of the conference, both counsel submitted written statements regarding their positions. State Fund's counsel also submitted a copy of Dr. Kanner's CV.

Discussion

¶8 The time for designating witnesses and filing expert witness' summaries expired before the parties' decision to engage in a settlement conference, and the matter of an IME was not raised until the date originally designated for trial. The request that the Court order an IME must therefore be denied because it was untimely.

¶9 Even if the request were timely, it would still be denied. Out-of-state IMEs are limited by statute and will be required only under exceptional circumstances. As this Court noted in the recent case of *Kruzich v. Old Republic Ins. Co.*, 2005 MTWCC 12:

¶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.

Kruzich, 2005 MTWCC 12, ¶7.

¶10 To facilitate the Court's review of requests for out-of-state IMEs, in the future the requesting party should address four matters. First, it should indicate the nature of the proposed examiner's expertise and how that expertise is related and important to the medical issues in the case. If there are other Montana physicians with the same speciality, e.g., board-certified neurologists, then the requester should explain any additional expertise or qualifications the proposed examiner has that makes the proposed examiner more

qualified to address the medical issues in the case than Montana specialists or why the requester has been unable to secure a satisfactory in-state examiner. Third, the requester should provide a short statement from the proposed examiner indicating why an actual physical examination, as opposed to a records review, is necessary for him or her to formulate his or her opinions. Fourth, and finally, the requester should provide information as to the proposed examiner's prior experience as an expert witness. This latter information is to enable the Court to determine whether the proposed examiner is impartial. *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678.

ORDER

¶11 The request for an out-of-state independent medical examination is **denied**.

DATED in Helena, Montana, this 18th day of May, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Sara R. Sexe
Mr. David A. Hawkins
Submitted: May 6, 2005