

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 15

WCC No. 2015-3601

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NEW HAMPSHIRE INSURANCE COMPANY

Petitioner/Appellant

vs.

MELISSA A. MATEJOVSKY

Respondent/Appellee.

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ORDER AFFIRMING INTERIM BENEFITS UNDER § 39-71-610, MCA

**Summary:** Petitioner appealed from a Department order granting interim benefits to Respondent under § 39-71-610, MCA, arguing that that the Department did not have jurisdiction to award interim benefits and that Respondent had neither demonstrated financial hardship nor presented a prima facie case which are required for her to be entitled to such benefits.

**Held:** The Department had jurisdiction to order interim benefits, and Respondent has met the four factors this Court considers in determining whether a claimant is entitled to interim benefits under § 39-71-610, MCA. Therefore, the Department's order granting interim benefits is affirmed.

**Topics:**

**Appeals (To Workers' Compensation Court): Standard of Review.** This Court reviews appeals from the DLI regarding interim benefits under § 39-71-610, MCA, *de novo*.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610.** Where an insurer argued that it only "suspended" a claimant's TTD benefits for "unreasonably" refusing to attend an IME exam unless she was allowed to videotape it, which the doctor refused, DLI had jurisdiction to order interim benefits since the use of the word "terminates" in § 39-71-710, MCA, means to "stop paying benefits," which the insurer did.

**Administrative Agencies: Jurisdiction.** Where an insurer argued that it only “suspended” a claimant’s TTD benefits for “unreasonably” refusing to attend an IME exam unless she was allowed to videotape it, which the doctor refused, DLI had jurisdiction to order interim benefits since the use of the word “terminates” in § 39-71-710, MCA, means to “stop paying benefits,” which the insurer did.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610.** The Court considers four factors in determining whether a claimant is entitled to interim benefits: (1) was liability for the claim accepted; (2) were benefits paid, especially for a significant period of time; (3) has the claimant demonstrated significant financial hardship if interim benefits are not re-instated; and (4) has the claimant tendered a strong prima facie case for reinstatement of the benefits she seeks? To meet the fourth factor, claimant need not prove an entitlement to benefits, only that she tender substantial evidence which if believed would entitle her to benefits.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610.** Where claimant testified that the insurer accepted liability for the claim and paid benefits for eight months, she satisfied the first two of the four factors this Court considers for an award of interim benefits. Claimant satisfied the third factor when she testified that having her biweekly benefits terminated would put her family at risk of losing their vehicles and having their bills put into collection. It is sufficient to show significant financial hardship by demonstrating that claimant will go into default or will fall behind on bills if her benefits were terminated without having to actually endure that hardship.

**Interim (Section 39-71-610, MCA) Benefits, Criteria for Awarding.** Where claimant testified that the insurer accepted liability for the claim and paid benefits for eight months, she satisfied the first two of the four factors this Court considers for an award of interim benefits. Claimant satisfied the third factor when she testified that having her biweekly benefits terminated would put her family at risk of losing their vehicles and having their bills put into collection. It is sufficient to show significant financial hardship by demonstrating that claimant will go into default or will fall behind on bills if her benefits were terminated without having to actually endure that hardship.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610.** Claimant made a prima facie case for reinstatement of benefits by demonstrating that her refusal to attend an IME exam was not unreasonable for two reasons: (1) there is a legitimate dispute over whether claimant's reason for refusing to attend was "unreasonable"; and (2) the insurer waited until just before the exam before informing the claimant she could not videotape it. Since IME's are the most invasive type of discovery and implicate a person's constitutional right to privacy, an insurer may not coerce a claimant to attend an IME by making an ultimatum to attend or lose benefits when there is a legitimate dispute over the conditions of the IME.

**Interim (Section 39-71-610, MCA) Benefits, Criteria for Awarding.** Claimant made a prima facie case for reinstatement of benefits by demonstrating that her refusal to attend an IME exam was not unreasonable for two reasons: (1) there is a legitimate dispute over whether claimant's reason for refusing to attend was "unreasonable"; and (2) the insurer waited until just before the exam before informing the claimant she could not videotape it. Since IME's are the most invasive type of discovery and implicate a person's constitutional right to privacy, an insurer may not coerce a claimant to attend an IME by making an ultimatum to attend or lose benefits when there is a legitimate dispute over the conditions of the IME.

**Constitutional Law: Privacy.** Since IME's are the most invasive type of discovery and implicate a person's constitutional right to privacy, an insurer may not coerce a claimant to attend an IME by making an ultimatum to attend or lose benefits when there is a legitimate dispute over the conditions of the IME.

**Independent Medical Examination: Generally.** Since IME's are the most invasive type of discovery and implicate a person's constitutional right to privacy, an insurer may not coerce a claimant to attend an IME by making an ultimatum to attend or lose benefits when there is a legitimate dispute over the conditions of the IME.

**Unreasonable Conduct by Insurer.** Since IME's are the most invasive type of discovery and implicate a person's constitutional right to privacy, an insurer may not coerce a claimant to attend an IME by making an ultimatum to attend or lose benefits when there is a legitimate dispute over the conditions of the IME.

¶ 1 Petitioner/Appellant New Hampshire Insurance Company (New Hampshire) suspended Respondent/Appellee Melissa A. Matejovsky's temporary total disability (TTD) benefits under § 39-71-607, MCA, because she did not attend a scheduled Independent Medical Examination (IME). Matejovsky did not attend the IME because New Hampshire refused to allow her to videotape the examination. The Department of Labor & Industry's (DLI) Employment Relations Division (ERD) then granted Matejovsky interim TTD benefits under § 39-71-610, MCA.<sup>1</sup> New Hampshire appeals.

### Procedural Background

¶ 2 This Court held an evidentiary hearing on July 22, 2015, under ARM 24.5.314(2). Matejovsky appeared with her attorney, Thomas M. "Tommy" Murphy. Lucas A. Wallace and Ken Lay appeared on behalf of New Hampshire. Exhibits 1 through 13, consisting mostly of correspondence and Matejovsky's medical records, were admitted over Matejovsky's objections. Matejovsky was sworn and testified. This Court found her to be a credible witness. Closing arguments were given by both parties, following which the Court explained that it deemed the issue in this matter limited to the appeal of the ERD's order regarding interim benefits under § 39-71-610, MCA, and that it did not currently have jurisdiction to issue an order regarding the underlying issue of whether Matejovsky could videotape the IME because the parties had not completed mediation on that issue.

### Findings of Fact<sup>2</sup>

¶ 3 Matejovsky incurred a work-related injury to her left foot and ankle on December 22, 2014, for which New Hampshire accepted liability.<sup>3</sup> By letter dated May 4, 2015, Matejovsky's attorney agreed to a panel IME of his client, to be performed by Robert J. Vincent, MD, and Lennard S. Wilson, MD, on June 5, 2015.<sup>4</sup> However, the letter goes on to state that New Hampshire's request for an IME by William M. Stratford, MD, would occur only if the entire session with Dr. Stratford could be videotaped.<sup>5</sup> The letter requested confirmation in writing two days prior to Dr. Stratford's examination that the session could be videotaped, or Matejovsky would not attend the IME portion of the exam with Dr. Stratford.<sup>6</sup>

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<sup>1</sup> Ex. 1 at 2.

<sup>2</sup> All findings herein are taken from hearing testimony except where otherwise noted.

<sup>3</sup> Ex. 1 at 5.

<sup>4</sup> Ex. 1 at 60-61.

<sup>5</sup> Ex. 1 at 60.

<sup>6</sup> *Id.*

¶ 4 New Hampshire responded by letter dated May 27, 2015, stating that Dr. Stratford would not agree to his IME being videotaped, and that Matejovsky's failure to attend the IME may result in "suspension" of her benefits pursuant to § 39-71-605, MCA.<sup>7</sup> Matejovsky's attorney responded on May 29, 2015, by stating that Matejovsky "will not attend Dr. Stratford's extended history taking session without a recorded record."<sup>8</sup> The letter goes on to request that if Dr. Stratford will not reconsider Matejovsky's desire to videotape the IME, that the insurer cancel Dr. Stratford's portion of the IME "to allow the parties to seek clarification from the Department of Labor and/or the Workers['] Compensation Court."<sup>9</sup> New Hampshire's attorney fired back on June 2, 2015, stating that the insurer was insisting on its right to an IME with Dr. Stratford and that refusal to attend "will result in termination of Ms. Matejovsky's benefits pursuant to § 39-71-605."<sup>10</sup> The letter went on to state that Ms. Matejovsky could "seek a protective order from the Workers' Compensation Court" if she felt the need to avoid the IME scheduled for June 5, 2015.<sup>11</sup>

¶ 5 Matejovsky did not attend the scheduled IME with Dr. Stratford.

¶ 6 On June 15, 2015, New Hampshire provided notice to Matejovsky that it was suspending her benefits effective June 22, 2015, for refusing to appear for Dr. Stratford's IME.<sup>12</sup>

¶ 7 Matejovsky petitioned the ERD for an order under § 39-71-610, MCA, for interim benefits.<sup>13</sup> The ERD ordered New Hampshire to pay interim benefits.<sup>14</sup> New Hampshire now appeals the ERD's order to this Court.<sup>15</sup>

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<sup>7</sup> Ex. 1 at 64.

<sup>8</sup> Ex. 1 at 66.

<sup>9</sup> *Id.*

<sup>10</sup> Ex. 1 at 67.

<sup>11</sup> *Id.*

<sup>12</sup> Ex. 1 at 38.

<sup>13</sup> Ex. 1 at 35–36.

<sup>14</sup> Ex. 1 at 2.

<sup>15</sup> Letter To Court - Appeal of the Determination by the DLI Regarding Interim Benefits under § 39-71-610, MCA. (Letter of Appeal), Docket Item No. 1.

## Law and Analysis

¶ 8 This case is governed by the 2013 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Matejovsky's industrial accident.<sup>16</sup>

¶ 9 Matejovsky seeks benefits under § 39-71-610, MCA, which states:

If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing before the workers' compensation court or prior to mediation, but the biweekly compensation benefits may not be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of the hearing or mediation. A party may appeal this order to the workers' compensation court. A proceeding in the workers' compensation court brought pursuant to this section is a new proceeding and is not subject to mediation. If after a hearing before the workers' compensation court it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for the payments by the claimant.

¶ 10 This Court reviews appeals from the DLI's orders regarding interim benefits *de novo*.<sup>17</sup>

¶ 11 New Hampshire first argues that the DLI did not have jurisdiction to award interim benefits under § 39-71-610, MCA, because it did not "terminate" Matejovsky's TTD benefits. Rather, it "suspended" her TTD benefits under § 39-71-607, MCA, which states:

Under rules adopted by the department, an insurer may suspend compensation payments pending the receipt of medical information when an injured worker unreasonably fails to keep scheduled medical appointments. If, after a medical examination, the injured worker is released to return to work, the worker forfeits the right to any suspended benefits.

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<sup>16</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citing *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 26, 346 Mont. 141, 194 P.3d 77); § 1-2-201, MCA.

<sup>17</sup> *Hartford Fire Ins. Co. v. Hostetter*, 2013 MTWCC 14, ¶ 2.

Thus, New Hampshire argues, “Since her benefits have merely been suspended, not terminated, the Department lacks jurisdiction to issue an order under Section 39-71-610.”<sup>18</sup>

¶ 12 In *Montana Sports Shooting Association, Inc. v. State*,<sup>19</sup> the Montana Supreme Court set forth the following rules of statutory construction:

We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, “without isolating specific terms from the context in which they are used by the Legislature.” We will not interpret the statute further if the language is clear and unambiguous. We look to legislative intent if the language is not clear and unambiguous, and give effect to the legislative will. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. We must harmonize statutes relating to the same subject, as much as possible, giving effect to each.

¶ 13 Under these rules of statutory construction, § 39-71-610, MCA, is not as narrow as New Hampshire argues. In the context of § 39-71-610, MCA, the word “terminates” means to stop paying biweekly benefits; it does not mean stop paying forever, as benefits that have been terminated can be reinstated.<sup>20</sup> By its plain language, § 39-71-610, MCA, is not limited to the situation in which an insurer “terminates” TTD benefits under § 39-71-609, MCA, which is the statute that provides when TTD benefits may be “terminated.” Moreover, it would defeat the purpose of § 39-71-610, MCA — which is “intended to provide interim benefits while claimant litigates the merits”<sup>21</sup> — to allow an insurer to stop paying biweekly benefits to a claimant when there is a legitimate dispute over whether the claimant “unreasonably” failed to attend a medical appointment without giving the claimant an opportunity to receive interim benefits while contesting the insurer’s decision.

¶ 14 The record shows that New Hampshire intended to “terminate” — i.e., stop paying — Matejovsky’s biweekly benefits until she attended an IME with Dr. Stratford. Indeed, in New Hampshire’s attorney’s letter to Matejovsky’s attorney dated June 2, 2015, he stated, in relevant part: “I am afraid the insurer is going to have to insist on its statutory right to an independent medical examination. The examination will proceed as

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<sup>18</sup> Letter of Appeal at 1.

<sup>19</sup> *Montana Sports Shooting Ass’n, Inc.*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (internal citations omitted).

<sup>20</sup> See, e.g., *Thompson v. Montana State Fund*, 2013 MTWCC 25 (insurer “terminated” TTD upon receipt of approved job analysis and then “reinstated” TTD under a reservation of rights upon receipt of letter rescinding the approval).

<sup>21</sup> *Liberty Northwest Ins., Corp. v. Thompson*, 2000 MTWCC 53, ¶ 11.

scheduled. Refusal to attend will result in **termination** of Ms. Matejovsky's benefits pursuant to § 39-71-605."<sup>22</sup>

¶ 15 Despite New Hampshire's argument to the contrary, this situation is not analogous to that in *Klinkam v. MACo Workers' Compensation Trust*.<sup>23</sup> In *Klinkam*, the insurer converted claimant's TTD benefits to permanent partial disability benefits. Since claimant continued to receive biweekly benefits, this Court ruled that the claimant could not obtain interim benefits under § 39-71-610, MCA. This Court explained: "Klinkam admits that she continues to receive compensation benefits; therefore, her compensation benefits have not been terminated. Rather, her benefits have been converted from one type of compensation benefit to a different type of compensation benefit."<sup>24</sup>

¶ 16 Here, New Hampshire did not intend on paying Matejovsky another type of biweekly benefit while it disputed the conditions of the IME; rather, it intended to stop paying her biweekly benefits for the period of time in which she refused to attend the IME with Dr. Stratford. Since New Hampshire intended to stop paying biweekly benefits, the DLI had jurisdiction to order interim benefits under § 39-71-610, MCA.

¶ 17 This Court considers four factors in determining whether a claimant is entitled to interim benefits under § 39-71-610, MCA: (1) was liability for the claim accepted; (2) were benefits paid, especially for a significant time period; (3) has the claimant demonstrated she will suffer significant financial hardship if interim benefits under § 39-71-610, MCA, are not ordered; and (4) has the claimant tendered a strong prima facie case for reinstatement of the benefits she seeks?<sup>25</sup> This Court has explained that to meet the fourth factor, a claimant need not prove her entitlement to biweekly benefits, only that she "tender substantial evidence which if believed would entitle her to the benefits."<sup>26</sup>

¶ 18 Matejovsky has satisfied the first two factors. She testified that New Hampshire accepted her claim and paid her biweekly TTD benefits at the rate of \$541.68 per week for eight months.

¶ 19 Matejovsky has also satisfied the third factor. Her benefits are the bulk of the income for her, her young son, and her husband, who is employed as a temporary postal employee with no guarantee of hours. Matejovsky testified that her husband's last biweekly paycheck amounted to \$760.42. Monthly household expenses are

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<sup>22</sup> Ex. 1 at 67 (emphasis added).

<sup>23</sup> *Klinkam*, 2012 MTWCC 25.

<sup>24</sup> *Klinkam*, ¶ 10.

<sup>25</sup> *Montana Health Network v. Graham*, 2002 MTWCC 61, ¶ 5 (citing *Smith v. State Comp. Ins. Fund*, 2000 MTWCC 9, ¶ 28).

<sup>26</sup> *Montana Health Network*, ¶ 6.



approximately \$3,599.<sup>27</sup> Matejovsky testified that if her biweekly benefits were terminated her family would be at risk of losing their vehicles and the bulk of their bills being placed into collection. There is no merit to New Hampshire's argument that this Court should find no significant financial hardship because Matejovsky's husband makes more money than a person working full time at minimum wage.<sup>28</sup> The testimony at the hearing established that Matejovsky's husband does not make a sufficient amount to pay the family's bills. Moreover, there is no requirement that a claimant first go into default on loans or fall behind on her bills to show significant financial hardship; it is sufficient for a claimant to show that she will go into default or will fall behind without the benefits.

¶ 20 Finally, Matejovsky has made a prima facie case for reinstatement of benefits. New Hampshire did not terminate her TTD benefits on the grounds that a physician has released her to return to work. Rather, New Hampshire terminated benefits on the grounds that she unreasonably refused to attend the IME with Dr. Stratford. Section 39-71-607, MCA, predicates the suspension of benefits on situations where an injured worker "unreasonably fails to keep scheduled medical appointments." Matejovsky's refusal to attend the IME was reasonable for two reasons.

¶ 21 First, there is a legitimate dispute. At the hearing, New Hampshire argued that it was per se unreasonable for Matejovsky to insist upon videotaping the IME with Dr. Stratford and that it was therefore unreasonable for her to not attend the scheduled IME with Dr. Stratford when he declined that request. However, as Matejovsky has pointed out since the beginning of her dispute with New Hampshire, the Montana Supreme Court has recognized that in some circumstances, videotaping an IME will be allowed.<sup>29</sup> Moreover, this Court has ordered that an IME be videotaped.<sup>30</sup> This Court is expressing no view on the merits of the dispute over whether Matejovsky will ultimately be allowed to videotape the IME with Dr. Stratford. Nevertheless, Matejovsky submitted sufficient evidence about Dr. Stratford's IME practice to make a prima facie case. While New Hampshire maintains that Matejovsky has not presented sufficient evidence to prevail, "the purpose of a hearing under section 39-71-610, MCA, is not to decide the merits, only to determine whether sufficient circumstances exist to warrant an order that the insurer pay benefits for an additional 49 days while claimant awaits a hearing on the merits."<sup>31</sup>

¶ 22 Second, New Hampshire waited until the eleventh hour to notify Matejovsky that it would not allow her to videotape the IME with Dr. Stratford. Matejovsky's attorney placed

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<sup>27</sup> Ex. 1 at 73.

<sup>28</sup> [Petitioner's] Pre-Hearing Brief at 4–5, Docket Item No. 6.

<sup>29</sup> *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, ¶¶ 12–14, 317 Mont. 30, 75 P.3d 308.

<sup>30</sup> *Haman v. Wausau Ins. Co.*, 2007 MTWCC 49, ¶¶ 15 & 20a.

<sup>31</sup> *Schneider v. Liberty Northwest Ins. Corp.*, 2000 MTWCC 18A, ¶ 4.

New Hampshire on notice a month before the scheduled IME with Dr. Stratford that Matejovsky intended to videotape it — sufficient time for New Hampshire to petition the DLI for an order directing her to attend the medical examination under § 39-71-605(2), MCA, and ARM 24.29.205(2)(d), which the losing party could have then appealed to this Court.<sup>32</sup> However, it was not until May 27, 2015 — the week prior to the scheduled IME with Dr. Stratford — that New Hampshire first informed Matejovsky that Dr. Stratford would not permit videotaping and threatened to suspend her TTD benefits if she did not attend. In a follow-up letter written June 2, 2015 — 3 days before the scheduled IME — New Hampshire’s attorney stated that “[t]he examination will proceed as scheduled” and dismissively told Matejovsky that the “proper remedy” would be to seek a protective order from this Court.<sup>33</sup> Since IME’s are the most invasive type of discovery and implicate a person’s constitutional right to privacy,<sup>34</sup> an insurer may not coerce a claimant to attend an IME by making an ultimatum that the claimant either attend the IME or have benefits terminated when there is a legitimate dispute over the conditions of the IME.

¶ 23 Having undertaken a *de novo* review of the DLI’s order, this Court concludes that Matejovsky is entitled to interim benefits pursuant to § 39-71-610, MCA.

#### ORDER

¶ 24 The Department of Labor & Industry Employment Relations Division’s Order Reinstating Benefits Pending a Hearing is **affirmed**.

¶ 25 If it has not already done so, Petitioner shall reinstate Respondent’s benefits pursuant to § 39-71-610, MCA.

¶ 26 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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<sup>32</sup> See, e.g., *Chapman v. Smurfit-Stone Container Enters., Inc.*, 2013 MTWCC 12 (affirming the ERD’s order directing an IME).

<sup>33</sup> Ex. 1 at 67.

<sup>34</sup> *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶¶ 31 & 32, 315 Mont. 135, 68 P.3d 678 (citations omitted).

DATED this 7<sup>th</sup> day of August, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Lucas A. Wallace/Ken Lay  
Thomas M. "Tommy" Murphy

Submitted: July 22, 2015