

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 8

WCC No. 2016-3733

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NEW HAMPSHIRE INS. CO.

Appellant/Insurer

vs.

MELISSA MATEJOVSKY

Appellee/Claimant.

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ORDER REVERSING IN PART  
ORDER DIRECTING MEDICAL EXAMINATION

**Summary:** The insurer appeals that portion of the DLI's Order Directing Medical Examination which allows the claimant to videotape an IME. The insurer argues that this Court should reverse the DLI because it does not have authority to impose protective measures on an IME or because there was insufficient evidence for the DLI to order that the claimant be allowed to videotape the IME. The insurer also argues this Court should allow it to suspend the claimant's benefits until she attends the IME.

**Held:** To the extent that the DLI's Order Directing Medical Examination allows Matejovsky to videotape the IME, the order is reversed. Under § 39-71-605(2), MCA, the DLI may set conditions on IMEs and order protective measures when necessary. However, the claimant did not present sufficient evidence to allow her to videotape the examination. The insurer may not suspend the claimant's benefits because she did not unreasonably fail to attend the IME.

¶ 1 Appellant New Hampshire Ins. Co. (New Hampshire) appeals the Department of Labor and Industry's (DLI) Order Directing Medical Examination. The DLI ordered Appellee Melissa Matejovsky to attend an independent medical examination (IME) by William D. Stratford, Jr., MD. At Matejovsky's request, the DLI also ordered that she be allowed to videotape of the IME.

¶ 2 The parties orally argued their positions on May 4, 2016. Thomas M. Murphy represented Matejovsky. Lucas A. Wallace represented New Hampshire.

## Issues

¶ 3 This Court considers the following issues:

Issue One: Is the DLI's order allowing Matejovsky to videotape the IME in excess of the statutory authority of the agency?

Issue Two: Is the DLI's order allowing Matejovsky to videotape the IME affected by other error of law, clearly erroneous in view of the record evidence, or characterized by abuse of discretion?

Issue Three: May New Hampshire suspend Matejovsky's benefits until she attends the IME with Dr. Stratford?

## Procedural History and Facts

¶ 4 Unless otherwise noted, the following facts are from the DLI's record.<sup>1</sup>

¶ 5 On December 22, 2014, Matejovsky suffered an injury to her left ankle in the course of her employment. One of her physicians has suggested that she may have some form of complex regional pain syndrome (CRPS).

¶ 6 Matejovsky underwent an IME with Emily B. Heid, MD, Robert J. Vincent, MD, and Lennard S. Wilson, MD. They "strongly recommended" a neuropsychological examination.

¶ 7 New Hampshire scheduled an IME with Dr. Stratford for June 5, 2015. Matejovsky did not attend the IME because New Hampshire refused to allow her to videotape the IME. Thus, New Hampshire suspended her temporary total disability benefits under § 39-71-607, MCA.

¶ 8 In *New Hampshire Ins. Co. v. Matejovsky*,<sup>2</sup> this Court affirmed the DLI's order granting interim temporary total disability benefits to Matejovsky under § 39-71-610, MCA, because there was a "legitimate dispute" as to whether Matejovsky could videotape the examination and because New Hampshire's notice to Matejovsky that Dr. Stratford would not allow the examination to be videotaped was untimely.<sup>3</sup> This Court stated it was "expressing no view on the merits of the dispute over whether Matejovsky will ultimately be allowed to videotape the IME with Dr. Stratford," as that issue was not properly before this Court.<sup>4</sup>

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<sup>1</sup> The DLI's record is filed as Docket Item No. 10.

<sup>2</sup> 2015 MTWCC 15 (*Matejovsky I*).

<sup>3</sup> *Matejovsky I*, ¶¶ 21-22.

<sup>4</sup> *Matejovsky I*, ¶ 21.

¶ 9 On February 1, 2016, New Hampshire rescheduled an IME with Dr. Stratford for February 26, 2016.

¶ 10 On February 1, 2016, New Hampshire filed its Petition for Order Compelling Independent Medical Examination with the DLI. New Hampshire's attorney sent a letter to the DLI setting forth New Hampshire's position and enclosed, *inter alia*, the IME panel's report dated June 5, 2015.

¶ 11 New Hampshire also provided the DLI with an affidavit from Dr. Stratford. Dr. Stratford avers that he is a practicing "forensic psychiatrist," and performs IMEs as part of his practice. He has performed "thousands" of IMEs in his career. Dr. Stratford avers he performs IMEs "at the request of both plaintiffs and defendants," and that he has "testified as an expert witness on behalf of both plaintiffs and defendants." Dr. Stratford maintains he is not biased, and that he will make available the psychological tests he employs and his notes. Dr. Stratford also avers that, as a matter of "policy," he does not allow IMEs that he conducts to be recorded or videotaped and that he is not willing to allow Matejovsky to videotape the IME. However, Dr. Stratford states, "Matejovsky is welcome to bring a representative to accompany her during my independent medical examination."

¶ 12 In response, Matejovsky's attorney provided the DLI with a letter explaining her position. The letter states, "The medical records suggest that [she] is suffering from CRPS (complex regional pain syndrome), which is a very disabling condition." Matejovsky argued she was entitled to videotape the IME with Dr. Stratford under existing law:

From the beginning, Mrs. Matejovsky has agreed to attend the [IME] with Dr. Stratford; however, due to his well-known bias, she asked to videotape the [IME] to protect her constitutional right to cross-examination and her constitutional right to privacy. This is not [a] novel concept. The Court has recognized a claimant's right to videotape a [IME] for the last 30 years. See, *Mohr v. Fourth Judicial District Court*, 660 P.2d 88, 202 Mont. 423 (1983). Mrs. Matejovsky cited *Mohr* to the insurer, but the insurer refused to allow the recording. The Department has jurisdiction to set time, place, and manner restrictions on a [IME] pursuant to Mont. Code Ann. § 39-71-605; therefore, the Department has authority to permit Mrs. Matejovsky to videotape the [IME].

Matejovsky's attorney also stated, "Rather than leave the question of fact to a crude 'Dr. Stratford said vs. Mrs. Matejovsky said,' Mrs. Matejovsky asks the Department to protect both parties by ordering a videotaped record of all verbal contact."

¶ 13 Matejovsky also provided the DLI with a copy of Dr. Stratford's fee schedule for 2015. Dr. Stratford charges between \$4,200 - \$9,750 for a two-day IME in Missoula, and between \$4,500 - \$11,500, plus expenses, for a two-day IME in other places in Montana.

¶ 14 The DLI was also provided a copy of *McGreevey v. State Farm Fire and Casualty Co.*<sup>5</sup> In *McGreevey*, Dr. Stratford conducted an IME of a plaintiff who was injured in a car accident. State Farm sought to introduce Dr. Stratford's testimony that attributed 75% of McGreevey's problems to preexisting causes or conditions. Another psychiatrist and a psychologist averred that Dr. Stratford's allocation was unscientific, speculative, not methodologically sound, unreliable, invalid, not peer reviewed, and not accepted in the fields of psychiatry and psychology. Judge Larson concluded that Dr. Stratford's proposed testimony was not scientifically sound and, therefore, inadmissible under M.R.Evid. 702 and 403.

¶ 15 In its Order Directing Medical Examination, the DLI ordered Matejovsky to attend the IME. The DLI also ordered that she be allowed to videotape the examination. However, the DLI noted that "Dr. Stratford has stated that he will not evaluate the Worker if the evaluation is going to be recorded," and that "based on Dr. Stratford's affidavit, he does not intend to evaluate the Worker if the evaluation is recorded."

¶ 16 New Hampshire appealed the DLI's Order Directing Medical Examination. New Hampshire requests this Court to reverse that portion of the DLI's order allowing Matejovsky to videotape the IME and requests an order allowing it to suspend Matejovsky's benefits until she attends an IME with Dr. Stratford.

¶ 17 This Court conducted a telephone conference with the parties on February 25, 2016. This Court stayed the IME pending resolution of this appeal pursuant to ARM 24.5.350(2), and denied New Hampshire's request to have Matejovsky undergo the IME but keep the results confidential until this Court resolved this appeal.

¶ 18 This Court granted Matejovsky leave to conduct discovery for purposes of obtaining additional evidence under § 2-4-703, MCA, and ARM 24.5.350(5). The discovery revealed that Dr. Stratford performed 60-70 IMEs per year in 2014 and 2015. His fee schedule for 2015 shows that he charges between \$4,200 - \$9,750 for a two-day IME in Missoula, and between \$4,500 – \$11,500, plus expenses, for a two-day IME in other places in Montana.

#### Standard of Review

¶ 19 When reviewing an order from the DLI, with the exception of an order for interim benefits under § 39-71-610, MCA, this Court basis its decision on the record.<sup>6</sup> Section 2-4-704(2), MCA, sets forth the standard of review:

The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the

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<sup>5</sup> Missoula County Cause No. DV-05-998 (Opinion and Order Regarding Testimony of Dr. William Stratford dated February 14, 2008).

<sup>6</sup> § 2-4-704(1), MCA; ARM 24.5.350(6).

decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;  
(ii) in excess of the statutory authority of the agency;  
(iii) made upon unlawful procedure;  
(iv) affected by other error of law;  
(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

### Law and Analysis

#### **Issue One: Is the DLI's order allowing Matejovsky to videotape the IME in excess of the statutory authority of the agency?**

¶ 20 New Hampshire acknowledges that § 39-71-605(2), MCA, gives the DLI authority to order a claimant to submit to an IME, but argues that the DLI does not have authority to impose any protective measures on the examination. Thus, New Hampshire argues this Court should reverse the DLI's Order Directing Medical Examination under § 2-4-704(2)(a)(ii), MCA, which provides that a court may reverse an administrative decision if the agency has acted "in excess of the statutory authority of the agency." Matejovsky counters that the DLI has authority to place protective measures on an IME under the language of § 39-71-605(2), MCA, which gives the DLI authority to order a claimant "to submit to an examination as it considers desirable."

¶ 21 "Administrative agencies may only exercise the powers conferred upon them by the Legislature."<sup>7</sup> However, when an agency engages in rulemaking, it has authority "to add substance to the [acts of the legislature], to complete absent but necessary details, and to resolve unexpected problems."<sup>8</sup> "[A] rule is an 'agency regulation, standard, or statement of *general applicability* that implements, interprets, or prescribes law or policy . . . .'"<sup>9</sup> The Montana Supreme Court has explained:

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<sup>7</sup> *Core-Mark Int'l, Inc. v. Montana Bd. of Livestock*, 2014 MT 197, ¶ 45, 376 Mont. 25, 329 P.3d 1278.

<sup>8</sup> *Core-Mark*, ¶ 26 (alteration in original) (emphasis in original) (citation omitted) (internal quotation marks omitted).

<sup>9</sup> *Id.* (omission in original) (citation omitted).

When the agency's authority to create a rule is challenged, we look to the statutes to determine whether there is a legislative grant of authority. If the agency has been granted the authority to create the challenged rule, we are not tasked with "redesign[ing] the program should we find it lacking in any respect, but [must] merely determine whether or not the [agency] acted reasonably and within its delegated authority." "[A]dministrative regulations are 'out of harmony' with legislative guidelines if they (1) engraft additional and contradictory requirements on the statute; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature." We afford an agency's interpretation of its statutory authority "respectful consideration" when its interpretation has stood unchallenged for a considerable length of time.<sup>10</sup>

¶ 22 The DLI's authority to order IMEs is in § 39-71-605(2), MCA, which states:

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.<sup>11</sup>

¶ 23 The statutory language giving the DLI authority to order a claimant to attend an IME "it considers desirable" is sufficiently broad to give the DLI authority to place conditions and protective measures on an IME should the claimant submit sufficient evidence to warrant such measures under Montana law. Although the DLI initially questioned whether it has this authority, it ordered that Matejovsky be allowed to videotape the IME, thereby demonstrating that it ultimately determined that it did have such authority under § 39-71-605(2), MCA – an interpretation that is entitled to deference.<sup>12</sup> The DLI's interpretation of § 39-71-605(2), MCA, does not contradict the statute nor add any additional requirements not contemplated by the Legislature, and is in accordance with Montana law stating that conditions may be placed on IMEs.<sup>13</sup> The

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<sup>10</sup> *Core-Mark*, ¶ 45 (alterations in original) (internal citations omitted).

<sup>11</sup> Emphasis added.

<sup>12</sup> *Burlington Res. Oil & Gas Co. v. Lang & Sons, Inc.*, 2011 MT 199, ¶ 36, 361 Mont. 407, 259 P.3d 766 (citation omitted).

<sup>13</sup> See, e.g., *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, 317 Mont. 30, 75 P.3d 308.

Montana Supreme Court has held that when considering a request for an IME, “[t]he time, place, manner, conditions and scope of an examination must be balanced with the [claimant’s] inalienable rights” to privacy under Article II, Section 10, of the Montana Constitution, and safety, health, and happiness under Article II, Section 3, of the Montana Constitution.<sup>14</sup> Therefore, § 39-71-605(2), MCA, must give the DLI the authority to place protective measures on an IME.<sup>15</sup> Finally, although New Hampshire posits that the DLI may start to “ ‘rubber stamp’ . . . whatever conditions the claimant chooses to demand,” its concern is unfounded because the DLI must follow Montana law when determining whether to place conditions on an IME,<sup>16</sup> and its orders are appealable to this Court.<sup>17</sup> Accordingly, the DLI’s order allowing Matejovsky to videotape the IME is not in excess of the statutory authority of the agency.

**Issue Two: Is the DLI’s order allowing Matejovsky to videotape the IME affected by other error of law, clearly erroneous in view of the record evidence, or characterized by abuse of discretion?**

¶ 24 New Hampshire argues that the DLI erred in ordering that Matejovsky be allowed to videotape the IME because Matejovsky did not present sufficient evidence under Montana law for this protective measure. Matejovsky argues that good cause exists because Dr. Stratford regularly performs IMEs, makes a substantial income from performing IMEs, and according to Matejovsky, has a “well-known bias” against claimants.

¶ 25 An IME implicates a claimant’s constitutional right to privacy guaranteed by Article II, Section 10 of the Montana Constitution, and her constitutional rights to safety, health, and happiness guaranteed by Article II, Section 3 of the Montana Constitution.<sup>18</sup> Thus, an insurer’s right to an IME is not unlimited.<sup>19</sup> In *Simms*, the Montana Supreme Court explained that conditions and protective measures may be placed upon an IME to protect the claimant’s rights:

The historical debate concerning ordered examinations and the individual’s personal sanctity indicates that the good cause requirement of Rule 35, M.R.Civ.P., examinations is not to be taken lightly. Moreover, good cause for an examination may not constitute good cause for the specific examination requested by a defendant. A court must scrutinize a request for a proposed examination on a case-by-case basis. The time, place,

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<sup>14</sup> *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶¶ 21, 33, 315 Mont. 135, 68 P.3d 678.

<sup>15</sup> *Hernandez v. Bd. of Cnty. Comm’rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638. (“Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible.”).

<sup>16</sup> See § 2-4-704(2)(a), MCA.

<sup>17</sup> ARM 24.5.350.

<sup>18</sup> *Simms*, ¶ 32.

<sup>19</sup> *Simms*, ¶ 31.

manner, conditions and scope of an examination must be balanced with the plaintiff's inalienable rights. A court is further required to consider the availability of other means through which a defendant can obtain the information necessary to an informed defense. Rule 35, M.R.Civ.P., does not empower a defendant to seek out and employ the most favorable "hired gun" available - no matter the inconvenience to the plaintiff and without regard to the plaintiff's rights.<sup>20</sup>

¶ 26 The Montana Supreme Court has started to set parameters for protective measures that can be placed upon IMEs. In *Mohr v. Montana Fourth Judicial District Court*, Mohr moved for a protective order allowing her attorney to attend an IME, or allowing her to videotape it.<sup>21</sup> Although Matejovsky contends that *Mohr* allows IMEs to be videotaped, the decision is not that broad. The court rejected Mohr's request to videotape her IME and held that a "party's attorney has a right to be present while the examining physician is taking the client's history, but that the attorney cannot be present during the physical examination."<sup>22</sup> The Court explained:

The examined party therefore has the advice and benefit of counsel while the physician is taking the medical history of the patient or gathering facts as to how the party was injured. On the other hand, the attorney is excluded from the actual physical examination. The actual physical examination, at least in most cases, does not require the presence of counsel to safeguard its objectivity because, by nature it is a nonadversarial procedure.<sup>23</sup>

¶ 27 However, in *Hegwood*, a personal injury case, the Montana Supreme Court recognized that the IME process has become adversarial and addressed the circumstances under which a trial court can place protective measures on an IME.<sup>24</sup> The defendants moved for an order compelling Hegwood to attend an IME with Catherine Capps, MD.<sup>25</sup> Hegwood moved for an order allowing her attorney to attend the entire examination and for her to be allowed to document the examination with a court reporter and a video.<sup>26</sup> Hegwood argued such measures were necessary because Dr. Capps no longer practiced medicine; instead, she "conducts IMEs 'for insurance companies and defense counsel full time.'"<sup>27</sup> Hegwood also argued that requiring her to attend the IME without her attorney violated her right to counsel and that she would be disadvantaged "if

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<sup>20</sup> *Simms*, ¶ 33.

<sup>21</sup> 202 Mont. 423, 424, 660 P.2d 88, 88 (1983).

<sup>22</sup> *Id.*

<sup>23</sup> *Mohr*, 202 Mont. at 426, 660 P.2d at 89.

<sup>24</sup> *Hegwood*, ¶¶ 12, 13.

<sup>25</sup> *Hegwood*, ¶ 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



Dr. Capps is permitted to examine and question her off the record, and then testify about what she says, unconstrained by a record of the examination.”<sup>28</sup>

¶ 28 The *Hegwood* court recognized “the IME procedures of years past have experienced marked permutation,” and that the “mounting prevalence of the proverbial ‘hired gun’ has increasingly strained the ‘nonadversarial’ nature of court-ordered examinations.”<sup>29</sup> The court expressed concern that such examinations are oftentimes not truly independent; rather, they may be adversarial, particularly when they are performed by a doctor “who has significant financial ties with insurance companies and attorneys assigned to defend personal injury cases.”<sup>30</sup> Thus, the court held that Montana’s district courts have the discretion under *Mohr* and M.R.Civ.P. 26(c) and 35(a) to determine what protective measures are necessary in any particular case.<sup>31</sup> However, the court concluded that *Hegwood* failed to show sufficient prejudice to justify videotaping the examination.<sup>32</sup> The court explained:

[D]emonstrating that an examiner performs exams for the insurance industry does not inherently establish the degree of prejudice or potential for abuse . . . . Therefore, without more, we conclude that the District Court did not abuse its discretion when it prohibited *Hegwood*’s counsel from attending, and recording devices from documenting, the entire independent medical examination.<sup>33</sup>

¶ 29 Under the standard set forth in *Hegwood*, there was insufficient evidence in the record before the DLI to support an order allowing Matejovsky to videotape her IME with Dr. Stratford. Via a letter from her attorney, Matejovsky argued that Dr. Stratford has a “well-known bias.” However, an attorney’s opinion is insufficient to establish bias, and the only evidence before the DLI supporting this claim was Dr. Stratford’s affidavit, his 2015 fee schedule and *McGreevey*, none of which warrants an order to videotape the IME.

¶ 30 Dr. Stratford’s affidavit and fee schedule demonstrate that he regularly conducts IMEs and that he makes a substantial amount of income when he conducts an IME. But, as set forth in *Hegwood*, the fact that a physician regularly conducts IMEs for insurance companies does not, by itself, establish the need to have the IME videotaped. For this reason, the evidence of the number of IMEs that Dr. Stratford performed in 2014 and 2015, which Matejovsky obtained in discovery in this case, is not “material” to the issue

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<sup>28</sup> *Hegwood*, ¶ 5.

<sup>29</sup> *Hegwood*, ¶ 9 (citations omitted).

<sup>30</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>31</sup> *Hegwood*, ¶ 13 (citation omitted).

<sup>32</sup> *Hegwood*, ¶ 14.

<sup>33</sup> *Id.*

of whether Matejovsky may videotape the IME. Thus, this Court need not remand this case back to the DLI to consider this additional evidence under § 2-4-703, MCA, and ARM 24.5.350(5). New Hampshire is correct that Matejovsky has put the proverbial cart before the horse, as the evidence of the number of IMEs that Dr. Stratford performs and the amounts he makes performing IMEs can be used to show bias at trial,<sup>34</sup> but it does not, by itself, justify videotaping the IME. Indeed, if this Court allowed Matejovsky to videotape the examination on this evidence, this Court would have to allow nearly every IME to be videotaped, as most of the IME physicians who testify before this Court routinely conduct IMEs.<sup>35</sup>

¶ 31 The *McGreevey* decision does not support Matejovsky's request to videotape the IME. Matejovsky argues that *McGreevey* shows that Dr. Stratford uses unsound and unscientific methods to reach his ultimate conclusions. However, New Hampshire is correct that, before this Court requires a protective measure at an IME, the claimant must identify a problem or issue and propose a protective measure that will remedy or alleviate that specific problem or issue. Matejovsky does not explain how videotaping the IME will change the ultimate conclusions that Dr. Stratford reaches. If Dr. Stratford attempts to give unscientific and unreliable testimony in a trial, this Court will likewise prohibit him from testifying under M.R.Evid. 702 and 403.

¶ 32 Despite Matejovsky's argument, this case is distinguishable from *Haman v. Wausau Ins. Co.*<sup>36</sup> *Inter alia*, Haman moved to allow her husband to attend a second IME with Gregg Singer, MD, in its entirety and videotape it on the grounds that Dr. Singer misrepresented what was said and what had occurred during the first IME.<sup>37</sup> Relying upon ARM 24.5.325 and *Hegwood*, this Court ruled that the insurer could have Haman undergo a second IME with Dr. Singer on the condition that her attorney be allowed to attend the entire examination and that the entire examination be conducted on the record.<sup>38</sup> This Court explained these protective measures were necessary given Haman's history with Dr. Singer and the "conflicting recollections" as to what was said and what occurred at the first IME.<sup>39</sup>

¶ 33 Unlike the situation in *Haman*, Matejovsky has not previously seen Dr. Stratford, and Matejovsky did not present any evidence to the DLI that Dr. Stratford has done anything improper in a previous IME that would be remedied by allowing her to videotape

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<sup>34</sup> See *Hegwood*, ¶ 17.

<sup>35</sup> See, e.g., *Vulk v. Emp'rs Comp. Ins. Co.*, 2014 MTWCC 13, ¶ 14 (stating that John C. Schumpert, MD — a Missoula physician who frequently testifies before this Court — submitted an affidavit stating that he conducts approximately 200 IMEs annually, all for insurance companies or their agents, and that these IMEs constitute 65% of his work).

<sup>36</sup> 2007 MTWCC 49.

<sup>37</sup> *Haman*, ¶ 7-7c.

<sup>38</sup> *Haman*, ¶¶ 11-13.

<sup>39</sup> *Haman*, ¶ 11.

the examination; i.e., Matejovsky has not introduced any evidence that Dr. Stratford has mistreated an examinee or any evidence indicating that Dr. Stratford has misrepresented what examinees have told him during his past IMEs.

¶ 34 Matejovsky also argues that she needs to videotape the IME to protect her right to cross examine Dr. Stratford, and to eliminate any disputes over what is said during the IME. Nevertheless, the plaintiff in *Hegwood* made the same argument, but the Supreme Court did not allow her to videotape the IME.<sup>40</sup> While it is possible that this Court will have to resolve a dispute over what was said during the IME, the mere possibility is insufficient when there is no evidence that Dr. Stratford has previously misrepresented what was said during an IME. In addition, Dr. Stratford's willingness to allow Matejovsky to have someone with her for the entire examination is sufficient on this record to protect Matejovsky should a dispute arise as to what was said or what occurred during the IME. Here again, allowing Matejovsky to videotape the IME on the grounds that a dispute might arise would open the door to videotaping every IME.

¶ 35 As Matejovsky did not present sufficient evidence that videotaping the IME with Dr. Stratford was an appropriate protective measure, the DLI's order allowing Matejovsky to videotape the IME is affected by other error of law, clearly erroneous in view of the record evidence, and characterized by abuse of discretion. Thus, that portion of the DLI's Order Directing Medical Examination is reversed under § 2-4-704(2)(a)(iv), (v), and (vi), MCA.

**Issue Three: May New Hampshire suspend Matejovsky's benefits until she attends the IME with Dr. Stratford?**

¶ 36 New Hampshire requests an order, pursuant to § 39-71-605(1)(b), MCA, allowing it to suspend Matejovsky's benefits until she attends an IME with Dr. Stratford. That section provides that "[i]f 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." In turn, § 39-71-607, MCA, provides that "an insurer may suspend compensation payments pending the receipt of medical information when an injured worker unreasonably fails to keep scheduled medical appointments." Here, Matejovsky did not refuse to submit to, in any way obstruct, or unreasonably fail to keep a scheduled medical appointment; she was willing to attend the IME under the DLI's Order Directing Medical Examination. Indeed, it was Dr. Stratford that refused to proceed. At the beginning of this appeal, this Court stayed the IME to resolve the dispute, as it has done in other cases.<sup>41</sup> Thus, there are no grounds for New Hampshire to suspend Matejovsky's benefits.

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<sup>40</sup> *Hegwood*, ¶¶ 5, 14.

<sup>41</sup> *E.g.*, *Chapman v. Smurfit-Stone Container Enters.*, 2013 MTWCC 12, ¶ 3.

ORDER

¶ 37 To the extent that the DLI's Order Directing Medical Examination allows Matejovsky to videotape the IME, the order is **reversed**. Since this Court stayed the IME with Dr. Stratford, New Hampshire may reschedule it under § 39-71-605, MCA; however, Matejovsky will not be allowed to videotape the IME.

¶ 38 New Hampshire's request for an order allowing it to suspend Matejovsky's benefits until she attends the IME with Dr. Stratford is **denied**.

¶ 39 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.

DATED this 29<sup>th</sup> day of June, 2016.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Lucas A. Wallace  
Thomas M. Murphy

Submitted: May 4, 2016