

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 9

WCC No. 2017-4143

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**MICHAEL NEISINGER**

**Appellant/Claimant**

**vs.**

**NEW HAMPSHIRE INS. CO.**

**Appellee/Insurer.**

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**Montana Supreme Court Appeal No. DA 18-0400 – 07/12/18**  
**Affirmed in Part & Reversed in Part in**  
***Neisinger v New Hampshire Ins. Co., 2019 MT 275 - 11/19/2019***

ORDER REVERSING IN PART AND AFFIRMING IN PART  
ORDER DIRECTING A MEDICAL EXAMINATION

**Summary:** Claimant appeals an Order from the DLI directing him to attend a § 39-71-605, MCA, examination with a psychiatrist and an orthopedist. Claimant asserts that the DLI did not have jurisdiction to order him to attend an IME. Claimant also asserts that Insurer, which has not authorized him to see a treating psychiatrist or psychologist, is “stacking its deck” with “hired guns,” and that Insurer does not have good cause for multiple IMEs. Insurer asserts that the DLI correctly ordered the examination with the psychiatrist because one of Claimant’s treating physicians referred him to a psychiatrist or psychologist. Insurer also asserts that the DLI correctly ordered the examination with the orthopedist because Claimant’s condition has changed.

**Held:** The DLI’s order is reversed in part and affirmed in part. The DLI had jurisdiction. However, Insurer does not currently have good cause for an IME with the psychiatrist. Because of the potential for bias, an insurer may not force a claimant to attend an IME with a psychiatrist of its choosing, who will provide no treatment. To balance a claimant’s rights with an insurer’s rights, the insurer must first authorize a treating psychiatrist or psychologist. Insurer has good cause for an IME with the orthopedist because Claimant’s condition has arguably changed, the previous IME was two years ago, and Claimant’s treating physicians can comment on the IME physician’s opinions.

¶ 1 Appellant/Claimant Michael Neisinger appeals the Department of Labor and Industry’s (DLI) Order Directing Medical Examination, which it made pursuant to § 39-71-605, MCA. The DLI ordered Neisinger to attend an examination by William D. Stratford, MD, a psychiatrist, and Mark Rotar, MD, an orthopedist. Appellee/Insurer New

Hampshire Ins. Co. (New Hampshire) asserts that the DLI correctly ordered the examination. Neither party requested a hearing.

### Issues

¶ 2 This Court considers the following issues:

Issue 1: Did the DLI have jurisdiction to order Neisinger to attend the § 39-71-605, MCA, examination?

Issue 2: Did the DLI err in ordering Neisinger to attend the § 39-71-605, MCA, examination?

### Procedural History and Facts

¶ 3 The following facts are from the DLI's record, the exhibits the parties attached to their briefs, to which neither party objected, and this Court's file in the existing litigation.<sup>1</sup>

¶ 4 On May 27, 2015, Neisinger was injured in the course of his employment when a high-pressure stream of water hit his left thigh and knocked him off a platform. Neisinger suffered several injuries to his left leg, including a rupture of his quadriceps tendon.

¶ 5 New Hampshire accepted liability for Neisinger's leg injuries.

¶ 6 For his leg injuries, Neisinger treated with John Ortiz, MD, and James Elliot, MD.

¶ 7 Neisinger asserts that he also injured his low back in the accident. New Hampshire has denied liability for his low-back injury. Consequently, Neisinger filed a Petition for Hearing. The trial in that case is scheduled for July 11, 2018.

¶ 8 On June 15, 2016, Neisinger underwent an independent medical evaluation (IME) with Joseph M. Erpelding, MD, an orthopedist. Dr. Erpelding determined that Neisinger was at maximum medical improvement (MMI) for his leg injuries and assigned a 5% whole person impairment rating. Dr. Erpelding opined that Neisinger should limit his use of stairs and ladders to no more than 5% of his work and should be afforded rest periods after using stairs and ladders.

¶ 9 On August 18, 2016, Dr. Elliot agreed with Dr. Erpelding's opinions that Neisinger had reached MMI. Dr. Elliot also agreed with Dr. Erpelding's assessment that Neisinger should limit his use of stairs and ladders and added that Neisinger should avoid squatting.

¶ 10 Neisinger returned to Dr. Elliot on October 26, 2017, with an increase in left-knee pain. Dr. Elliot noted that Neisinger had had knee pain since his injury, and that Neisinger had a recent event at a grocery store in which his knee gave out, resulting in severe pain. Dr. Elliot did not appreciate any additional injury and assessed: "Ongoing injury associated with his left knee with a sense of giving way." Dr. Elliot thought that in addition

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<sup>1</sup> The DLI's record is filed as Docket Item No. 23.

to medication to control pain, Neisinger should complete a course of physical therapy. Dr. Elliot also referred him to S. Dante Oriente, MD, a pain management specialist.

¶ 11 Neisinger saw Dr. Oriente on February 8, 2018. Dr. Oriente assessed Neisinger with “chronic left knee pain status post left quadriceps surgical repair and chronic low back pain radiation down left leg greater than right.” Because Neisinger also complained of anxiety disorder with sleep disturbance, Dr. Oriente referred Neisinger to a psychiatrist or psychologist.

¶ 12 In response, New Hampshire did not authorize Neisinger to see a treating psychiatrist or psychologist. Instead, on February 12, 2018, New Hampshire scheduled a panel IME with Spencer Greendyke, MD, an orthopedist, and Dr. Stratford, a psychiatrist, to take place in Great Falls on March 16, 2018.

¶ 13 On February 16, 2018, Neisinger notified New Hampshire that he would not attend the panel IME, asserting that it did not have good cause for a second IME, and because Dr. Greendyke does not have admitting privileges in any Montana hospital.

¶ 14 New Hampshire requested an order from the DLI under § 39-71-605, MCA, directing Neisinger to attend an IME with Dr. Greendyke and Dr. Stratford.

¶ 15 Neisinger objected to the IME for several reasons, including that Dr. Greendyke is from Idaho and does not have admitting privileges at any hospital in Montana and that New Hampshire did not set forth the time and place for the examination, as required by § 39-71-605(1), MCA.

¶ 16 New Hampshire cancelled the IME. Thus, on March 19, 2018, the DLI issued an Order Denying Request for Medical Examination.

¶ 17 On March 21, 2018, New Hampshire scheduled an IME with Dr. Stratford and Dr. Rotar, an orthopedist, for April 13, 2018.

¶ 18 On March 23, 2018, New Hampshire requested that the DLI order Neisinger to attend the scheduled IME with Dr. Stratford and Dr. Rotar.

¶ 19 On March 27, 2018, the DLI issued its Order Directing Medical Examination, directing Neisinger to attend an examination by Dr. Stratford and Dr. Rotar. The DLI’s order states, “Upon a thorough review of the information submitted on the claimant, the Department concludes the claimant should be examined by a physician for a diagnostic update of claimant’s medical problems attributable to claimant’s industrial injury of 05/27/2015.”

#### Standard of Review

¶ 20 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

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 1: Did the DLI have jurisdiction to order Neisinger to attend the § 39-71-605, MCA examination?**

¶ 21 Neisinger asserts that because he had a case pending before this Court, this Court had exclusive jurisdiction to decide whether he must attend the examination. Although the current litigation is limited to whether Neisinger suffered a compensable back injury, he argues that under *Car Werks, LLC v. Uninsured Employers' Fund*,<sup>2</sup> this Court has jurisdiction over all issues in his claim regardless of whether they were mediated. He also challenges the DLI's authority to order claimants to attend § 39-71-605, MCA, examinations, asserting that the DLI cannot impose protective measures on such examinations. Thus, he claims that the DLI did not have jurisdiction to order him to attend the examination with Dr. Stratford and Dr. Rotar.

¶ 22 However, this Court agrees with New Hampshire that the DLI had jurisdiction. Section 39-71-605(2), MCA, gives the DLI jurisdiction to order a claimant to attend an IME without qualification; thus, even if there is a case before this Court, the DLI has concurrent jurisdiction to order a claimant to attend an examination under § 39-71-605, MCA. And, there is no merit to Neisinger's claim that only this Court can provide protective measures. In *New Hampshire Ins. Co. v. Matejovsky*, this Court ruled that the DLI has authority to impose protective measures on IMEs,<sup>3</sup> and the DLI must impose protective measures when necessary to protect the claimant's rights. Accordingly, the DLI had jurisdiction to order Neisinger to attend the § 39-71-605, MCA, examination.

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<sup>2</sup> 2015 MTWCC 21.

<sup>3</sup> 2016 MTWCC 8, ¶ 23.

## **Issue 2. Did the DLI err in ordering Neisinger to attend the § 39-71-605, MCA, examination?**

¶ 23 Neisinger argues that the DLI erred in ordering him to attend the IME for three reasons. First, Neisinger argues that New Hampshire did not give him adequate notice of the IME and the DLI did not give him adequate time to respond to New Hampshire's request for an order directing him to attend the IME with Dr. Stratford and Dr. Rotar. Second, Neisinger argues that by ordering him to attend an IME with Dr. Stratford before authorizing him to see a treating psychiatrist or psychologist, New Hampshire is "stacking its deck" with "hired guns." Third, Neisinger argues New Hampshire does not have good cause for multiple IMEs.

¶ 24 Countering Neisinger's first argument, New Hampshire asserts that Neisinger raised essentially the same arguments when he opposed its request to order him to attend the IME with Dr. Greendyke and Dr. Stratford. Thus, New Hampshire maintains that Neisinger's position was known to the DLI, and there was no need to give him more than four days to respond. Second, New Hampshire claims that it is not utilizing "hired guns." Third, New Hampshire maintains it has good cause for the IME because Neisinger's condition has changed since his first IME, and because Dr. Oriente referred him to a psychiatrist or psychologist.

¶ 25 This Court does not condone a situation in which the DLI orders a claimant to attend an examination under § 39-71-605, MCA, four days after receiving the request, and without any response from the claimant. However, the examination did not occur; thus, Neisinger's notice argument is moot. His second and third arguments remain justiciable.

¶ 26 Section 39-71-605(1)(a), MCA, provides, in relevant part, "Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon 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 . . . ." Section 39-71-605(2), MCA, provides that the DLI has authority to order a claimant to attend these examinations.

¶ 27 This Court has explained, "The plain purpose of section 39-71-605, MCA, is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, his or her current medical condition and need for further treatment, and the relationship of the claimant's condition to the industrial injury or disease."<sup>4</sup>

¶ 28 However, an insurer's right to an IME is not unlimited. "This Court has stated that an IME is the most invasive form of discovery, that an IME implicates a claimant's constitutional rights, and, therefore, that an insurer must have good cause for an IME."<sup>5</sup> Under case law from the Montana Supreme Court, this Court is to "scrutinize a request

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<sup>4</sup> *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

<sup>5</sup> *Heffernan v. Safety Nat'l Cas. Corp.*, 2017 MTWCC 18, ¶ 11 (citations omitted).

for a proposed examination on a case-by-case basis,” and balance the insurer’s right to an informed defense with a claimant’s inalienable rights.<sup>6</sup>

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Dr. Stratford

¶ 29 In *Ross v. Victory Ins. Co.*,<sup>7</sup> this Court faced an issue similar to that in this case and ruled that allowing an insurer to have an IME before a treating psychologist evaluated Ross tipped that balance too far in the insurer’s favor. Ross’s treating physician considered a spinal cord stimulator to treat Ross’s Complex Regional Pain Syndrome, which required a neuropsychological examination.<sup>8</sup> Ross’s treating physician referred her to Terry Reed, PhD.<sup>9</sup> However, Victory did not authorize Ross to see Dr. Reed; instead, Victory chose John R. Harrison, PhD, and asserted he was its examiner under § 39-71-605, MCA, and was to be the consulting psychologist for Ross’ treating physician under § 39-71-1101, MCA.<sup>10</sup> This Court explained that treating physicians are “responsible for coordinating the workers’ receipt of medical services,” and have the duty to “provide or arrange for treatment within the utilization and treatment guidelines.”<sup>11</sup> In contrast, IME examiners’ “only duty is to ‘file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved.’ ”<sup>12</sup> Moreover, most IME examiners, including Dr. Harrison in an earlier IME in Ross’s case, specifically inform the worker “ ‘that no doctor-patient relationship [is] established and that [the examiner] cannot prescribe any medications or treatment.’ ”<sup>13</sup> Where deciding whether Ross was a candidate for the stimulator was within the responsibility and duty of a treating physician and allowing Dr. Harrison alone to make that decision was in excess of both his statutory authority and the authority he explicitly told Ross he was taking on, this Court ruled that Victory did not have good cause for a second IME with Dr. Harrison before Ross had first undergone an evaluation with the treating physician’s chosen psychologist.<sup>14</sup>

¶ 30 Likewise, allowing New Hampshire to have an IME before Neisinger can see a psychiatrist or psychologist who would provide treatment, if the condition is claim-related and treatment is necessary, would tip the balance too far in New Hampshire’s favor. By seeking an examination with Dr. Stratford at this stage, New Hampshire is asking Dr. Stratford to make the decision as to whether Neisinger’s conditions are compensable, on which New Hampshire will rely. If Dr. Stratford opined that Neisinger’s anxiety disorder

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<sup>6</sup> See *Simms v. Mont. Eighteenth Jud. Dist. Court*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678.

<sup>7</sup> 2017 MTWCC 14.

<sup>8</sup> *Ross*, ¶ 18.

<sup>9</sup> *Ross*, ¶ 12.

<sup>10</sup> *Ross*, ¶¶ 13-16; see *id.*, ¶ 18.

<sup>11</sup> *Ross*, ¶ 20 (quoting § 39-71-1101(2), MCA).

<sup>12</sup> *Ross*, ¶ 21 (quoting § 39-71-605(2), MCA).

<sup>13</sup> *Ross*, ¶ 21.

<sup>14</sup> *Ross*, ¶¶ 1, 22, 23.

with sleep disturbance was not a claim-related condition, New Hampshire would deny liability and argue it had no duty to authorize a treatment physician for the condition, thereby forcing Neisinger either to pay for an evaluation with a psychiatrist or psychologist and then pay for treatment until this Court could decide whether that condition was compensable or, if that was cost-prohibitive for Neisinger, to forego an evaluation and treatment of that condition altogether.

¶ 31 This calculated strategy is impermissible because it gives too much authority to the § 39-71-605, MCA, physician, a witness who is potentially biased. The Montana Supreme Court has noted, “the IME procedures of years past have experienced marked permutation. The mounting prevalence of the proverbial ‘hired gun’ has increasingly strained the ‘nonadversarial’ nature of court-ordered examinations.”<sup>15</sup> In part because of an IME physician’s potential for bias,<sup>16</sup> Montana law does not allow a workers’ compensation insurer to make determinations solely on the opinions of its selected IME physician; rather, an insurer is required to fairly consider the opinions of the treating physicians.<sup>17</sup> In fact, though not conclusive, the opinions of treating physician are generally accorded greater weight than the opinions of non-treating experts.<sup>18</sup> If Dr. Stratford opined that Neisinger’s anxiety disorder with sleep disturbance was not a claim-related condition, there would be no treating psychiatrist’s or psychologist’s opinion against which New Hampshire could fairly evaluate Dr. Stratford’s opinions. This would be particularly concerning since the Montana Legislature has recognized that mental conditions are “difficult to objectively verify.”<sup>19</sup>

¶ 32 Moreover, the whole process of first getting an opinion from Dr. Stratford, even one in Neisinger’s favor, would further delay Neisinger’s treatment. It is clear that Dr. Oriente referred Neisinger for evaluation, and treatment if necessary. However, although New Hampshire maintains it is entitled to an IME to address Neisinger’s “treatment needs,” it acknowledges that Dr. Stratford would not be providing Neisinger with any treatment. Thus, even if Dr. Stratford opined that Neisinger’s anxiety with sleep disturbance was a claim-related condition and required treatment, then Dr. Oriente would have to refer him to a psychiatrist or psychologist for the treatment, a process that would further delay the treatment. This situation would run counter to the public policies supporting the Workers’ Compensation Act, which include providing treatment to injured workers and returning them to work as soon as possible.<sup>20</sup>

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<sup>15</sup> *Hegwood v. Mont. Fourth Jud. Dist. Court*, 2003 MT 200, ¶ 9, 317 Mont. 30, 75 P.3d 308; see also *Simms*, ¶ 33 (explaining that an insurer does not have the absolute right “to seek out and employ the most favorable ‘hired gun’ available”); *Gryttenholm v. Fremont Indus. Indem. Co.*, 2002 MTWCC 24, ¶ 13 (explaining that the experience of the WCC is that “physicians’ opinions may be affected by whether they view themselves as treating or IME physicians”).

<sup>16</sup> See, e.g., *Neal v. Nelson*, 2008 MT 426, ¶ 38, 347 Mont. 431, 198 P.3d 819 (recognizing the potential that an IME physician will be biased in favor of the party who hired him or her).

<sup>17</sup> See, e.g., *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 61 (citation omitted).

<sup>18</sup> See, e.g., *Floyd*, ¶ 47.

<sup>19</sup> § 39-71-105(6)(a), MCA.

<sup>20</sup> § 39-71-105(1) and (3), MCA.

¶ 33 Thus, to balance Neisinger’s right to an evaluation by a psychiatrist or psychologist who owes him a duty of care, and would provide treatment if necessary, and New Hampshire’s right to obtain independent opinions and information,<sup>21</sup> New Hampshire must first authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary. If New Hampshire questions the treating psychiatrist’s or psychologist’s opinions, it might then have good cause to obtain an examination by Dr. Stratford under § 39-71-605, MCA. But at this point, it does not. Accordingly, the DLI’s order directing Neisinger to attend an examination by Dr. Stratford prejudices Neisinger’s rights because it is affected by an error of law, clearly erroneous, arbitrary and capricious, characterized by abuse of discretion, and a clearly unwarranted exercise of discretion.<sup>22</sup> Therefore, this Court reverses the DLI’s order directing Neisinger to attend an examination under § 39-71-605, MCA, by Dr. Stratford.

Dr. Rotar

¶ 34 The DLI correctly determined that New Hampshire has good cause to have Neisinger attend an IME with Dr. Rotar. This Court has explained that while an insurer cannot have repeat IMEs for arbitrary reasons, “an insurer is entitled to obtain a second, third, or even more IMEs or FCEs where there is an indication that claimant’s medical condition has changed or there is some other sound reason for doing a repeat examination.”<sup>23</sup> Neisinger’s leg condition has arguably changed since Dr. Erpelding’s examination, which was two years ago. Moreover, Dr. Elliot and Dr. Oriente can comment on Dr. Rotar’s opinions, thereby balancing Neisinger’s and New Hampshire’s rights. Therefore, this Court affirms the DLI’s order directing Neisinger to attend an examination under § 39-71-605, MCA, by Dr. Rotar.

ORDER

¶ 35 The DLI’s Order Directing Medical Examination requiring Appellee/Claimant to attend an examination by Dr. Stratford and Dr. Rotar is **reversed in part and affirmed in part**.

¶ 36 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 13th day of June, 2018.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

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<sup>21</sup> *Marquardt*, ¶ 6.

<sup>22</sup> *See* § 2-4-704(2), MCA.

<sup>23</sup> *Marquardt*, ¶ 6.



c: Thomas J. Murphy  
Kelly M. Wills

Submitted: April 23, 2018