

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2019 MTWCC 13**

**WCC No. 2019-4656**

---

**MICHAEL NEISINGER**

**Appellant/Claimant**

**vs.**

**NEW HAMPSHIRE INS. CO.**

**Appellee/Insurer.**

---

**ORDER AFFIRMING AND MODIFYING ORDER DIRECTING A MEDICAL  
EXAMINATION**

**Summary:** Claimant appeals an Order from the DLI directing him to attend a two-day § 39-71-605, MCA, examination with a psychiatrist. Claimant asserts that this Court should affirm the Order but modify it to limit the IME to a single day and require the psychiatrist to disclose all raw data and testing materials related to his evaluation of Claimant. Claimant argues that since Insurer previously scheduled him to attend several one-day panel IMEs with the same psychiatrist, it is clear the psychiatrist can obtain all the information he needs in a single day. Claimant further argues that, to protect his ability to challenge the psychiatrist's opinions and cross-examine him at trial, he must have access to the raw data and testing materials related to the IME. Insurer asserts that this Court should affirm the Order as is. Insurer argues that a two-day IME is appropriate because Claimant has not presented any medical evidence that he is limited to a one-day evaluation, and because a single day with 15-minute breaks every hour is not enough time for the psychiatrist to administer the necessary standardized tests and conduct an interview and evaluation based on the testing responses. Insurer further argues that the psychiatrist is willing to produce all raw data and testing materials concerning his evaluation of Claimant, but, due to licensing agreements, cannot do so without a court order.

**Held:** The DLI's Order directing Claimant to attend a two-day IME is affirmed but modified to require the psychiatrist to disclose all raw data and testing materials related to his evaluation of Claimant when he issues his report. Insurer has presented evidence that the psychiatrist requires two days to both accommodate Claimant's demand for a 15-minute break every hour and complete the necessary testing, interview, and evaluation. The DLI should have addressed Claimant's request for the raw data and testing materials related to his IME. The failure to do so amounts to a denial which prejudices Claimant's substantial rights. Indeed, both parties need the raw data and testing materials concerning the psychiatrist's evaluation of Claimant to properly consider his 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 Order requires Neisinger to attend a two-day independent medical examination (IME) with William D. Stratford, MD, a psychiatrist. Appellee/Insurer New Hampshire Ins. Co. (New Hampshire) requests that this Court uphold the Order. Neither party requested a hearing.

### Issues

¶ 2 This Court considers the following issues:

Issue 1: Did the DLI err in requiring Neisinger to attend a two-day IME?

Issue 2: Did the DLI err in not requiring Dr. Stratford to disclose all raw data and testing materials from the IME?

### Procedural History and Facts

¶ 3 On June 13, 2018, this Court issued an Order Reversing in Part and Affirming in Part Order Directing A Medical Examination (2018 Order) in an earlier case filed by Neisinger arising from the same industrial injury as this one.<sup>1</sup>

¶ 4 In the 2018 Order, this Court held that New Hampshire did not have good cause for an IME with Dr. Stratford, and that it was required first to authorize a treating psychiatrist or psychologist.<sup>2</sup>

¶ 5 New Hampshire's appeal of the 2018 Order is currently pending before the Montana Supreme Court. However, both this Court and the Supreme Court denied New Hampshire's Motion to Stay the examination with a treating psychologist.

---

<sup>1</sup> *Neisinger v. N.H. Ins. Co.*, 2018 MTWCC 9. The facts recited in the 2018 Order are incorporated herein by reference.

<sup>2</sup> *Neisinger*, ¶ 33.

¶ 6 Subsequently, New Hampshire authorized Neisinger to see James P. Murphey, PhD, a Licensed Clinical Psychologist.

¶ 7 After an evaluation, including clinical interview and psychological testing in early 2019, Dr. Murphey determined that Neisinger is suffering from Post-Traumatic Stress Disorder, Major Depression, and Generalized Anxiety Disorder, “all of which directly stem from the industrial accident he had in late May, 2015, as well as its physical ramifications.”

¶ 8 Dr. Murphey strongly recommended that Neisinger obtain both psychopharmacological medication and psychotherapy.

¶ 9 Instead, on March 18, 2019, New Hampshire advised Neisinger by letter that it had scheduled him for a two-day IME with Dr. Stratford.

¶ 10 On April 12, 2019, counsel for Neisinger responded that, due to his painful back condition, for which he was still awaiting surgery, Neisinger would only be available for a one-day IME, and only if he would not be required to sit for more than 30 minutes at a time and be provided a 15-minute break each hour.

¶ 11 Neisinger further advised that he required confirmation, in advance of the IME, that New Hampshire would produce all of the information it was going to provide to Dr. Stratford, and that Dr. Stratford would produce his report to both parties simultaneously, as well as all raw data and testing materials from the IME.

¶ 12 On April 19, 2019, New Hampshire sought an Order from the DLI compelling Neisinger to attend the two-day IME.

¶ 13 In its letter to the Hearing Officer, counsel for New Hampshire indicates that Dr. Stratford could accommodate Neisinger’s demands that he not be required to sit for more than 30 minutes at a time, that he be provided a 15-minute break each hour, and that he be sent the IME report at the same time as New Hampshire.

¶ 14 The letter states, however, that Dr. Stratford could not complete the necessary testing, interview, and evaluation of the testing responses within a single day and is prohibited from disclosing the raw data and testing materials from the IME by various licensing agreements.

¶ 15 On April 24, 2019, Neisinger provided the Hearing Officer with a response; the letter indicates that Neisinger does not believe he could perform a two-day IME given his physical condition, and questions why Dr. Stratford requires two days when several previous panel IMEs New Hampshire scheduled Neisinger to attend with Dr. Stratford would have taken only one, and when Dr. Murphey was able to complete his testing and evaluation of Neisinger in only 4½ hours.

¶ 16 On April 26, 2019, the DLI issued its Order Directing Medical Examination, which states, in pertinent part:

The Department finds the Insurer has fulfilled their duty, outlined in MCA 39-71-605, to consider the physical condition of the Claimant as they have agreed to accommodate several modifications to address the [C]laimant's concerns. Considering the [C]laimant has not provided any medical evidence to support that he can only sit for a one day IME and Dr. Stratford's opinion that a one day restriction would invalidate the required testing, the Department finds the [C]laimant should attend the 2-day IME with the following restrictions;

- No sitting for longer than 30 minutes at a time
- 15-minute break every hour

¶ 17 Neisinger filed a Notice of Appeal from Department Order Directing Medical Examination with this Court on May 15, 2019.<sup>3</sup>

#### Standard of Review

¶ 18 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.

---

<sup>3</sup> Although Neisinger initially requested advanced confirmation that New Hampshire would produce all of the information it was going to provide to Dr. Stratford for the IME, see ¶ 11 above, he does not identify the DLI's failure to address this as a ground for his appeal. Thus, this Court does not discuss that issue.

## Law and Analysis

¶ 19 Section 39-71-605, MCA, provides in pertinent part:

(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. . . .

(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.

### **Issue 1: Did the DLI err in requiring Neisinger to attend a two-day IME?**

¶ 20 Neisinger essentially asserts that this Court should affirm the DLI's Order but modify it to limit the IME to a single day. As set forth in *Dodge v. Montana Ins. Guaranty Association*,<sup>4</sup> *Challinor v. Montana Ins. Guaranty Association*,<sup>5</sup> and *Mack v. Montana State Fund*,<sup>6</sup> he argues that New Hampshire must show cause why the particular condition, i.e., an examination over the course of two days, is necessary. He argues that since Dr. Murphey conducted his testing and evaluation in one day, and since New Hampshire previously scheduled Neisinger to attend several one-day panel IMEs with Dr. Stratford, it is clear Dr. Stratford can obtain all the information he needs in a single day.

---

<sup>4</sup> 2011 MTWCC 20 (motion to compel attendance at IME denied where insurer failed to show cause why third IME was necessary).

<sup>5</sup> 2008 MTWCC 21 (motion to compel attendance at IME denied where insurer failed to show cause why IME 175 miles from claimant's home was necessary).

<sup>6</sup> 2005 MTWCC 28 (informal request for out-of-state IME denied where, even if it had been timely, insurer failed to show cause why an out-of-state IME was necessary).

¶ 21 New Hampshire asserts that this Court should affirm the Order as is. It argues that a two-day IME is appropriate because Neisinger has not presented any medical evidence that he is limited to a one-day evaluation, and because a single day with 15-minute breaks every hour is not enough time for Dr. Stratford to administer the necessary standardized tests and conduct an interview and evaluation based on the testing responses. It cites *Robinson v. State Compensation Mutual Ins. Fund*<sup>7</sup> for the proposition that § 605 “permit[s] an insurer to request an IME without first petitioning the court, proving good cause, and obtaining an order.”

¶ 22 An insurer can request an IME “without first petitioning the court, proving good cause, and obtaining an order” when “the right to compensation under this chapter would exist in favor of any employee.”<sup>8</sup> However, a petition, good cause, and an order are required when, as here, there is “a dispute concerning the physical condition of a claimant or the cause or causes of the injury or disability,”<sup>9</sup> and the insurer seeks to compel the claimant to attend an IME. This is because an insurer’s “right to an IME is not unlimited.”<sup>10</sup> This Court orders IMEs only when good cause is shown.<sup>11</sup> As to what is meant by “good cause,” the Montana Supreme Court has explained:

[G]ood 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, 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.<sup>12</sup>

¶ 23 Contrary to New Hampshire’s contention, Neisinger’s failure to produce medical evidence that he can only attend a one-day IME does not itself show that there is good cause for a two-day IME. Nevertheless, this Court agrees with the DLI that New Hampshire has affirmatively demonstrated good cause for a two-day IME. While it has offered no information as to why Dr. Stratford requires more time now than for a previously-scheduled panel IME, New Hampshire sufficiently explained, consistent with the insurer’s duty as described in *Dodge*, *Challinor*, and *Mack*, why a single day, i.e., approximately five hours once Neisinger’s hourly, 15-minute breaks are factored in, is not enough time for Dr. Stratford to complete the current evaluation, when it stated:

---

<sup>7</sup> 2018 MT 259, ¶ 28, 393 Mont. 178, 430 P.3d 69.

<sup>8</sup> § 39-71-605(1)(a), MCA.

<sup>9</sup> § 39-71-605(2), MCA.

<sup>10</sup> *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

<sup>11</sup> See *MacGillivray v. Mont. State Fund*, 2016 MTWCC 13, ¶ 32 & cases cited.

<sup>12</sup> *Simms v. Mont. Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678.

1. The tests necessary for the evaluation of Appellant have certain time requirements. These necessary tests also have time and control protocols that are required for complete and accurate results.

2. The two major tests Dr. Stratford will be utilizing in his evaluation of Appellant are the Minnesota Multiphasic Personality Inventory – 2 (“MMPI-2”) and the Battery for Health Improvement – 2 (“BHI-2”). These two tests are recognized by the Montana Utilization and Treatment Guidelines as appropriate tests for the evaluation of chronic pain and resulting conditions, as in Appellant’s case.

3. The MMPI-2 and BHI-2 tests require approximately three hours to administer, and this timeline can only be accomplished if there are very limited breaks and interruptions. The MMPI-2 and BHI-2 are only two of a total of five regular standardized tests with validity scales that are necessary and that Dr. Stratford will be utilizing in his evaluation of Appellant. Dr. Stratford cannot perform the remaining evaluation of Appellant, including the interview portion and remaining three tests, within approximately two hours.

4. Dr. Stratford consented to licensing agreements with the organizations/publishers controlling these tests and those licensing agreements contain specific administration protocols that he must follow to ensure the validity of the testing. Not following these specific protocols set forth in the individual testing materials is also a violation of the licensing agreements Dr. Stratford is bound by and may result in incomplete or inaccurate results.

¶ 24 This Court further agrees with the DLI that New Hampshire has fulfilled its duty to take Neisinger’s physical condition into account when fixing the time and date of the IME.<sup>13</sup> For example, New Hampshire has agreed to accommodate his need to not sit for longer than 30 minutes at a time and to take a 15-minute break every hour. Moreover, although it cannot accommodate a single-day IME, New Hampshire has offered to schedule the testing and evaluation so that they are not on back-to-back days, but Neisinger has declined.

**Issue 2: Did the DLI err in not requiring Dr. Stratford to disclose all raw data and testing materials from the IME?**

¶ 25 Neisinger asserts that this Court should modify the DLI’s Order to require Dr. Stratford to disclose all raw data and testing materials related to the IME. He argues that he must have access to this information to understand the bases of Dr. Stratford’s

---

<sup>13</sup> § 39-71-605(1)(b), MCA.

opinions, and to protect his ability to challenge those opinions and cross-examine Dr. Stratford at trial. He cites *Hegwood v. Montana Fourth Judicial District Court*,<sup>14</sup> Rule 705 of the Montana Rules of Evidence, *Clark v. Bell*,<sup>15</sup> and *Reese v. Stanton*<sup>16</sup> in support of his position. He further points out that this Court rejected the contention that licensing agreements prohibit Dr. Stratford from disclosing raw data and testing materials, which is the same contention New Hampshire makes here, in *Keller v. Montana State Fund*,<sup>17</sup> and that it ordered Dr. Stratford to produce all underlying data and test results in *Ward v. Victory Ins. Co.*<sup>18</sup>

¶ 26 New Hampshire asserts that Dr. Stratford is willing to produce the raw data and testing materials concerning his evaluation of Neisinger should this Court find this information relevant to the issues before it, but, due to licensing agreements, he cannot do so without a court order.

¶ 27 The DLI should have addressed Neisinger's request for the raw data and testing materials related to his IME; the failure to do so amounts to a denial, which prejudices his substantial rights. Indeed, both parties need the raw data and testing materials concerning Dr. Stratford's evaluation of Neisinger to properly consider his opinions.

¶ 28 With respect to New Hampshire, an adjuster may not blindly accept an IME examiner's opinion; instead, it must "fairly and reasonably evaluate all facts and opinions with respect to medical issues." <sup>19</sup> To fairly and reasonably evaluate Dr. Stratford's opinion, New Hampshire must take the raw data and testing materials related to Neisinger's IME into account.

¶ 29 With respect to Neisinger, the Montana Supreme Court has "repeatedly stated that Rule 705 [of the Montana Rules of Evidence] affords a party an essential right to cross-examine [an] expert witness regarding the basis of that expert's opinion."<sup>20</sup> Rule 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

---

<sup>14</sup> 2003 MT 200, ¶ 17, 317 Mont. 30, 75 P.3d 308.

<sup>15</sup> 2009 MT 390, ¶ 22, 353 Mont. 331, 220 P.3d 650.

<sup>16</sup> 2015 MT 293, ¶ 21, 381 Mont. 241, 358 P.3d 208.

<sup>17</sup> No. 2017-4177.

<sup>18</sup> No. 2017-4168.

<sup>19</sup> *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 61 (quoting *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 59 (finding insurer's practice of accepting IME physician's opinion in every claim unreasonable)).

<sup>20</sup> *Clark*, ¶ 22.



¶ 30 By its plain language, Rule 705 contemplates that a court may, in the exercise of its discretion, require an expert to disclose the facts or data underlying his opinion prior to his testimony. This Court exercises its discretion accordingly with respect to Dr. Stratford.

#### ORDER

¶ 31 The DLI's Order Directing Medical Examination, requiring Neisinger to attend a two-day IME with Dr. Stratford, is **affirmed but modified** to require Dr. Stratford to disclose all raw data and testing materials related to his evaluation of Neisinger at the time he issues his report.

¶ 32 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 6th day of September, 2019.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Thomas J. Murphy  
Kelly M. Wills

Submitted: July 2, 2019