

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2024 MTWCC 6

WCC No. 2024-00340

MICHAEL NEISINGER

Appellant/Claimant

vs.

NEW HAMPSHIRE INS. CO.

Appellee/Insurer.

**APPEALED TO MONTANA SUPREME COURT ON 05/28/24 – DA 24-0339
SUPREME COURT ORDER – DISMISSED WITHOUT PREJUDICE ON 06/11/24**

**ORDER GRANTING INSURER'S MOTION TO COMPEL
IME ATTENDANCE IN MISSOULA, MONTANA**

Summary: Insurer moves to compel Claimant to attend an IME in Missoula, Montana. Claimant argues the Workers' Compensation Court does not have jurisdiction over Insurer's motion, or if it does, he cannot be compelled to attend the IME in Missoula if that is where it is scheduled.

Held: Insurer's Motion to Compel IME Attendance in Missoula, Montana, is granted. The Workers' Compensation Court has jurisdiction over insurer's motion under § 39-71-605(2), MCA. And Claimant is required to attend the IME in Missoula if that is where it is scheduled, because Insurer's choice of provider has a practice there and neither party identified a qualified and willing physician to conduct the examination closer to Claimant's residence.

¶ 1 This matter is before the Workers' Compensation Court on New Hampshire Ins. Co.'s (New Hampshire) Motion to Compel IME Attendance in Missoula, Montana.

BACKGROUND

¶ 2 Presently, Michael Neisinger lives in Cascade, Montana.

¶ 3 Neisinger alleges on May 27, 2015, he sustained an industrial injury when a high-pressure water jetstream tore into his left leg, spun him around, and knocked him off a platform.

¶ 4 New Hampshire accepted liability for Neisinger's injury.

¶ 5 Following his physical injury, Neisinger alleges he developed post-traumatic stress disorder (PTSD), anxiety, and depression.

¶ 6 To determine causation, Neisinger had a two-day independent medical examination (IME) with William D. Stratford, MD. The IME report dated January 30, 2020, concluded Neisinger's PTSD, anxiety, major depression, and panic attacks were due to his work-related injury; concluded Neisinger was not at maximum medical improvement; recommended ongoing psychotherapy, medications, and Ketamine treatment; and cautioned against New Hampshire changing Neisinger's psychiatric providers because it would negate trust.

¶ 7 Neisinger began Ketamine treatment in April of 2021 for claim-related PTSD.

¶ 8 The following year, on November 17, 2022, New Hampshire required Neisinger to attend a psychological evaluation with Laura Kirsch, PhD.

¶ 9 On November 29, 2023, New Hampshire advised Neisinger it had scheduled him for another IME with Dr. Stratford on December 19 and 20, 2023, from 8:30 a.m. to 5:00 p.m. both days, at Clarus, 2415 Dearborn Ave, Missoula, MT 59801.¹

¶ 10 On December 6 and 11, 2023, counsel for Neisinger indicated to New Hampshire, he did not believe the Montana Workers' Compensation Act required Neisinger to attend another IME or travel as far as Missoula, and to "Please cancel the [IME] appointment."²

¶ 11 Thereafter, New Hampshire petitioned the Department of Labor & Industry (DLI) to approve a suspension of Neisinger's benefits under § 39-71-607, MCA, and ARM 24.29.1408, for unreasonably failing to attend a scheduled medical appointment.

¶ 12 On January 23, 2024, DLI issued an order allowing New Hampshire to suspend Neisinger's benefits for up to a period of 30 days pending the receipt of medical information.

¶ 13 On February 12, 2024, Neisinger filed a Notice of Appeal of Department Order before this Court.

¹ Appellee/Insurer's Reply in Supp. of Mot. to Compel IME Attendance in Missoula, Montana (Appellee's Reply), Docket Item No. 12, Exhibit A.

² Appellee's Reply, Exhibit C.

¶ 14 And on March 7, 2024, New Hampshire filed this motion to compel.

¶ 15 Although Neisinger has now conceded New Hampshire's entitlement to another IME,³ he maintains his objection to Missoula as its locale.

ISSUES

¶ 16 Neisinger raises two issues with respect to New Hampshire's motion to compel, which are:

- a. Issue One: Does this Court have jurisdiction to decide New Hampshire's motion to compel at this time?
- b. Issue Two: Is Neisinger required to attend the IME in Missoula if that is where it is scheduled?

DISCUSSION

Does this Court have jurisdiction to decide New Hampshire's motion to compel at this time?

¶ 17 New Hampshire contends its motion to compel is properly before this Court under § 39-71-605, MCA.

¶ 18 Neisinger disagrees, citing the fact he filed his Appeal of a Department Order in this Court first and the appeal is still pending.

¶ 19 Section 39-71-605, MCA, controls in this situation and states, in pertinent part:

(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. 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

³ Rough Draft, Hearing April 10, 2024, p. 9 ("Neisinger [is] not disputing the insurance entitlement to an IME . . .").

requesting party shall pay the physician, psychologist, or panel for the examination.⁴

¶ 20 This Court has jurisdiction over New Hampshire's motion to compel.

¶ 21 Section 39-71-605(2), MCA, makes clear that the party seeking the IME may make such request of the department or the workers' compensation judge, either of which must, under the conditions set forth, require the claimant to submit to an examination as it determines appropriate.

¶ 22 In this case, New Hampshire chose to request an order compelling an IME from the Workers' Compensation Court and did so precisely because the parties were already before this Court on Claimant's Appeal of a Department Order, i.e., for the sake of efficiency. New Hampshire's choice is legitimate under the statute and, thus, its request is properly before this Court.

**Is Neisinger required to attend the IME in Missoula
if that is where it is scheduled?**

¶ 23 New Hampshire contends Missoula is a convenient and practical location in which to hold the IME and points out that Neisinger travels an even further distance for treatment.

¶ 24 Neisinger contends he should not have to go to Missoula to attend the IME. He argues New Hampshire is obligated to schedule the IME "with regard for the employee's convenience" and "as close to the employee's residence as is practical."⁵ Since Neisinger lives in Cascade, he asserts having to go to Missoula is inconvenient and Great Falls is a more appropriate location for the IME due to its proximity to his residence.

¶ 25 Consideration of the location of the IME is addressed in § 39-71-605(1)(b), MCA, which states, in pertinent part:

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.

¶ 26 Neisinger is required to attend the IME in Missoula if that is where it is scheduled.

⁴ All references to the Montana Code Annotated (MCA) are to the 2023 version, as " 'the statutes in effect at the time of trial control when the subject is procedural rather than substantive.' " *Murphy v. Westrock Co.*, 2018 MT 54, ¶ 10, 390 Mont. 394, 414 P.3d 276 (quoting *EBI/Orion Grp. v. Blythe*, 281 Mont. 50, 53-54, 931 P.2d 38, 40 (1997)). Here, the subjects at issue are whether this Court has jurisdiction over New Hampshire's motion and whether this Court can compel Neisinger's attendance at an IME in a particular location; both subjects are procedural.

⁵ § 39-71-605(1)(b), MCA.

¶ 27 This matter arises under § 39-71-605(2), MCA, rather than § 39-71-605(1), MCA. Assuming, without deciding, that the requirements of the earlier provision apply here, Missoula is an appropriate location for the IME under the current circumstances. When asked at the hearing, neither party was able to identify a qualified psychiatrist in Cascade County who was willing to perform this IME. Dr. Stratford is a qualified and willing psychiatrist. He practices in Missoula.

¶ 28 Moreover, the standard set forth in § 39-71-605(2), MCA, is that “the workers’ compensation judge . . . shall require the claimant to submit to an examination as it considers desirable.” For the same reasons Missoula is an appropriate location for the IME under § 39-71-605(1)(b), MCA, this Court considers an IME in Missoula to be “desirable.”

CONCLUSION

¶ 29 This Court has jurisdiction to decide New Hampshire’s motion to compel at this time.

¶ 30 Neisinger is required to attend the IME in Missoula if that is where it is scheduled.

DATED this 25th day of April, 2024.

(SEAL)

/s/ Lee Bruner
Judge Lee Bruner

c: Thomas J. Murphy and Thomas M. Murphy
Steven W. Jennings

Submitted: April 10, 2024