

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2024 MTWCC 7

WCC No. 2024-00340

MICHAEL NEISINGER

Appellant/Claimant

vs.

NEW HAMPSHIRE INS. CO.

Appellee/Insurer.

**ORDER REMANDING ORDER SUSPENDING TEMPORARY TOTAL
COMPENSATION BENEFITS (PER 39-71-607, MCA)**

Summary: The claimant appeals an order from the DLI approving the insurer's request to suspend compensation payments pending the receipt of medical information under § 39-71-607, MCA, and ARM 24.29.1408. The claimant argues that the DLI erred because, under § 39-71-607, MCA, an insurer may only suspend benefits if the worker unreasonably fails to attend scheduled medical appointments, and the DLI did not make a factual finding that the claimant's failure to attend his scheduled medical appointments was unreasonable. The insurer argues that the claimant's failure to attend his scheduled medical appointments was unreasonable but concedes that the DLI made no such finding.

Held: The instant case is remanded to the DLI. The DLI failed to make a factual finding as to whether the claimant's failure to attend scheduled medical appointments was unreasonable. Without making that essential finding, the DLI's approval of the insurer's request to suspend compensation payments was improper.

¶ 1 The claimant Michael Neisinger appeals an order from the Department of Labor & Industry (DLI).

¶ 2 This Court conducted an in-person hearing on Neisinger's appeal with counsel on April 10, 2024, at 10:00 a.m., in Helena, MT.

¶ 3 Following the hearing, this matter was fully submitted for decision.

¶ 4 When reviewing an order from the DLI, with the exception of an order for interim benefits under § 39-71-610, MCA, this Court bases its decision on the record.¹ As such, this Court will not consider additional documents attached to the parties' briefing, which were not part of the agency record at the time it made its decision.

BACKGROUND

¶ 5 On May 27, 2015, Neisinger alleges 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.

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

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

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

¶ 9 New Hampshire has significant questions as to whether Ketamine has been effective in treating Neisinger's claim-related psychological condition.

¶ 10 Thus, New Hampshire's adjuster scheduled him for an independent medical examination (IME) with William Stratford, MD, on December 19 and 20, 2023, from 8:30 a.m. to 5:00 p.m. both days, in Missoula. The adjuster notified Neisinger of the appointment in a letter dated November 29, 2023.

¶ 11 The adjuster also scheduled Neisinger for an initial Ketamine therapy consultation with Luvita Clinic in Helena on December 13, 2023, at 12:00 p.m., to get a second opinion on the necessity of Ketamine and, if needed, to determine if Luvita would accept Neisinger as a patient. The adjuster notified Neisinger of the consultation in a letter dated November 29, 2023.

¶ 12 Neisinger refused to attend the IME, stating that Missoula was an inconvenient location and that New Hampshire was not entitled to another IME since he already had them in 2019 and 2022.

¶ 13 Neisinger also refused to attend the Ketamine therapy consultation, stating that he had a good relationship with his current Ketamine provider and did not want to see someone he did not know and that New Hampshire's selection of a treating provider other than his current Ketamine provider was unconstitutional.

¹ § 2-4-704(1), MCA; ARM 24.5.350(6).

¶ 14 On January 17, 2024, New Hampshire petitioned the DLI for approval to suspend Neisinger's compensation payments for up to 30 days, while it awaited medical information, under § 39-71-607, MCA, and ARM 24.29.1408.

¶ 15 On January 18, 2024, Neisinger opposed New Hampshire's request to the DLI.

¶ 16 On January 23, 2024, the DLI issued an order pursuant to § 39-71-607, MCA, permitting New Hampshire to suspend Neisinger's compensation payments, for no longer than 30 days, pending the receipt of the medical information it requested.

¶ 17 On February 12, 2024, Neisinger appealed the DLI's order to the Workers' Compensation Court.

STANDARD OF REVIEW

¶ 18 Section 2-4-704(2), MCA, sets forth the standards 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.

DISCUSSION

¶ 19 The instant case is remanded to the DLI because the agency has made no factual finding on an essential issue.

¶ 20 Pursuant to § 39-71-607, MCA, "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."²

² Emphases added.

“Reasonableness is a question of fact.”³ According to Black’s Law Dictionary, “reasonable” means “[f]air, proper, or moderate under the circumstances; sensible” or “[a]ccording to reason,” while “unreasonable” means “[n]ot guided by reason; irrational or capricious.”⁴

¶ 21 It is undisputed that Neisinger failed to attend scheduled medical appointments. However, the parties dispute whether Neisinger’s actions were unreasonable and both parties concede that the DLI’s order contains no finding on this point. As the Montana Supreme Court noted in *In re Stewart v. Region II Child and Family Services*, “If a factual question is essential to an agency’s decision and the agency’s findings of fact are so insufficient that they cannot be clarified or are entirely absent, the [reviewing] court should remand the case to the agency for appropriate findings.”⁵

¶ 22 For the foregoing reason, this Court enters the following:

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³ *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996) (citation omitted). See, e.g., *Gordon v. Cont’l W. Ins. Co.*, 2020 MTWCC 13 (affirming the DLI’s order allowing Continental Western Ins. Co. to suspend Gordon’s temporary total disability benefits for unreasonably failing to attend an examination, citing grounds including that Gordon missed previous appointments, assured examiner and Continental Western Ins. Co. that he would attend the examination but was a “no call, no show,” and did not attempt to reschedule until part-way through the scheduled examination); *New Hampshire Ins. Co. v. Matejovsky*, 2015 MTWCC 15 (affirming the DLI’s order granting Matejovsky interim temporary total disability benefits after New Hampshire Ins. Co. suspended her benefits for refusing to attend her IME; Matejovsky’s demonstration that her refusal to attend the IME was reasonable – because the Montana Supreme Court has held that an IME can be videotaped under some circumstances and she gave sufficient notice of her intent to do so, whereas New Hampshire only gave her one week’s notice that the examiner would not permit videotaping – amounted to a strong prima facie case for reinstatement of benefits).

⁴ Black’s Law Dictionary (11th ed. 2019).

⁵ 242 Mont. 88, 93, 788 P.2d 913, 916.

ORDER

¶ 23 The DLI's Order Suspending Temporary Total Compensation Benefits (Per 39-71-607, MCA) is remanded to the agency to make a factual finding as to whether Neisinger's failure to attend scheduled medical appointments was unreasonable.

DATED this 22nd day of May, 2024.

(SEAL)

/s/ Lee Bruner
JUDGE LEE BRUNER

c: Thomas J. Murphy & Thomas M. Murphy
Steven W. Jennings
Quinlan O'Connor

Submitted: April 10, 2024