IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2025 MTWCC 1

WCC No. 2024-00340

MICHAEL NEISINGER

Appellant/Claimant

vs.

NEW HAMPSHIRE INS. CO.

Appellee/Insurer.

ORDER REVERSING DEPARTMENT OF LABOR & INDUSTRY'S ORDERS FINDING CLAIMANT UNREASONABLE[1] AND APPROVING INSURER'S REQUEST TO SUSPEND CLAIMANT'S COMPENSATION BENEFITS[2]

Summary: Pursuant to ARM 24.5.350, the Claimant appeals two orders of the DLI, one finding him unreasonable for failing to keep scheduled IME and initial ketamine consultation appointments, and one approving the Insurer's request to suspend his TTD benefits between January 23, 2024, and February 22, 2024, under § 39-71-607, MCA, and ARM 24.29.1408.

Held: This Court reverses both orders. First, this Court reverses the DLI's order finding that the Claimant was unreasonable for failing to keep scheduled medical appointments. As the DLI applied an incorrect burden of proof to determine reasonableness as to the IME, and assumed there was statutory authority for the Insurer to schedule the initial ketamine consultation when there was not, both findings were affected by error of law. Second, because there are no affirmed findings of unreasonableness, this Court reverses

---

[1] Emp. Standards Div.'s Admin. R., Docket Item No. 28, Remand Ord. Susp. Comp. Benefits (Jun. 27, 2024).

[2] Emp. Standards Div.'s Admin. R., Ord. Suspending Temp. Total Comp. Benefits (Jan. 23, 2024). Although this order purports to ***suspend*** the Claimant's compensation benefits, the DLI is involved in this matter pursuant to the Insurer's request to ***approve*** a suspension of compensation payments under the protocols set forth in ARM 24.29.1408; indeed, because the Insurer writes the checks, only the Insurer can do the act of suspending the benefits. As a result, this Court refers to the January 23, 2024, order throughout as the DLI's order approving the Insurer's request to suspend the Claimant's compensation benefits.

the DLI's order approving the Insurer's request to suspend the Claimant's TTD benefits between January 23, 2024, and February 22, 2024, under § 39-71-607, MCA, and ARM 24.29.1408.

¶ 1 Pursuant to ARM 24.5.350, this matter is before the Workers' Compensation Court on the Claimant Michael Neisinger's appeal of two orders of the Department of Labor & Industry (DLI), one finding him unreasonable for failing to keep scheduled independent medical evaluation (IME) and initial ketamine consultation appointments, and one approving the Insurer New Hampshire Ins. Co.'s (New Hampshire) request to suspend Mr. Neisinger's temporary total disability (TTD) benefits between January 23, 2024, and February 22, 2024, under § 39-71-607, MCA, and ARM 24.29.1408.

BACKGROUND

¶ 2 Mr. Neisinger suffered a physical, workplace injury on May 27, 2015. As a result, he allegedly developed a number of mental health conditions for which New Hampshire accepted liability and paid benefits.

¶ 3 William D. Stratford, MD, performed a two-day IME of Mr. Neisinger in November of 2019. He dated his report of that IME January 30, 2020. Dr. Stratford diagnosed Mr. Neisinger with work-related post-traumatic stress disorder, major depression, anxiety, and panic attacks. He concluded Mr. Neisinger was not at maximum medical improvement at that time. Dr. Stratford recommended psychotherapy, medications, and treatment with ketamine.

¶ 4 In April of 2021, Mr. Neisinger began his current course of treatment with ketamine. The effectiveness of that treatment is in dispute, with physicians arguing for and against continuing the current treatment protocols.

¶ 5 On April 4, 2022, John C. Schumpert, MD, conducted a records review and drafted a report. Dr. Schumpert was not supportive of continuing ketamine therapy.

¶ 6 On November 17, 2022, Mr. Neisinger attended a two-day IME by Laura Kirsch, PhD. Dr. Kirsch was not supportive of continuing ketamine treatment and suggested a change in the treatment process based on Mr. Neisinger's failure to progress during months of treatment. New Hampshire provided this report and Dr. Schumpert's report to Robert N. Page, EdD, Mr. Neisinger's treating therapist, and Erin Amato, MD, his treating psychiatrist, for comment.

¶ 7 On May 8, 2023, Dr. Page responded to New Hampshire and opined that ketamine treatment was effective.

¶ 8 On August 9, 2023, Dr. Amato stated that she did not agree with the IME.

¶ 9 On August 24, 2023, Dr. Amato sent a letter supporting ketamine and cited studies supporting ketamine.

¶ 10 On August 29, 2023, Dr. Amato sent a letter supporting ketamine treatment.

¶ 11 On October 9, 2023, Dr. Amato sent a letter criticizing the IME and alleged misrepresentation of a medical record by Dr. Schumpert.

¶ 12 On October 31, 2023, Dr. Amato sent another letter supporting continuing ketamine treatment.

¶ 13 On November 29, 2023, New Hampshire notified Mr. Neisinger by letter that it had scheduled him for an IME with Dr. Stratford on December 19 and 20 in Missoula. In addition to including the type of appointment, the identity of the provider, and the dates and location of the evaluation, New Hampshire offered to provide transportation to Mr. Neisinger.

¶ 14 On November 29, 2023, New Hampshire also notified Mr. Neisinger by letter that it had scheduled him for a "consultation" with Luvita: Ketamine Therapy and Psychiatry of Montana (Luvita or Luvita Clinic) on December 13, 2023, and stated that Luvita was selected based on "geographical proximity to Mr. Neisinger's residence and the provider's willingness to bill and report directly to ESIS."[3,4] New Hampshire's letter contained the date, time, and location, including the address, of the appointment but not the name of any particular provider. The letter advised that a travel advance would be forthcoming. Finally, the letter stated that if Neisinger disagreed with "this decision concerning [his] claim,"[5] he should notify ESIS in writing, and, if he was dissatisfied with the response from ESIS, he could request mediation.

¶ 15 On December 6, 2023, Mr. Neisinger responded by letter, objecting to both appointments and refusing to attend either one. As to the IME, Mr. Neisinger's letter asked New Hampshire's claims examiner to cancel, objecting in pertinent part, because the Missoula appointment setting was neither as close as possible to his residence nor practical; several physicians in Great Falls would be closer, more practical, and more convenient.

¶ 16 As to the initial ketamine consultation, Mr. Neisinger's letter explained why he refused to attend. First, he made it clear that he did not want to see a new provider he did not know. Second, he stated that he believed an adverse medical opinion from Dr. Amato was driving ESIS to unconstitutionally interfere with his right to privacy by proceeding under § 39-71-1101, MCA, to terminate his ongoing psychiatric care with

---

[3] ESIS WC Claims (ESIS) is the third-party claim administrator for New Hampshire.

[4] Emp. Standards Div.'s Admin. R., Ex. 9.

[5] *Id*.

Dr. Amato and designate an unknown treating provider to replace her from Luvita Clinic.[6] New Hampshire's letter did not say that it specifically relied on this authority, and in fact is silent on the authority it relied upon to schedule the initial ketamine consultation.

¶ 17 On January 10, 2024, New Hampshire requested approval from the DLI to suspend Mr. Neisinger's TTD benefits for up to 30 days, while it awaited medical information, pursuant to § 39-71-607, MCA,[7] and ARM 24.29.1408.[8]

¶ 18 Notwithstanding Mr. Neisinger's opposition, the DLI ultimately[9] determined that it was unreasonable for Mr. Neisinger to fail to keep both scheduled appointments.[10]

¶ 19 As to the IME, the DLI's order states, in pertinent part:

---

[6] Section 39-71-1101(2), MCA, provides, in pertinent part, that: "Any time after acceptance of liability by an insurer, the insurer may designate or approve a ***treating physician*** who agrees to assume the responsibilities of the treating physician." Emphases added. Section 39-71-116(42), MCA, defines a "treating physician" as "***the person who***, subject to the requirements of 39-71-1101, is primarily responsible for delivery and coordination of the worker's medical services for the treatment of a worker's compensable injury or occupational disease . . . ." Emphases added. Subsection (42) contains an exhaustive list of individuals who may qualify as a treating physician, including a licensed physician, chiropractor, physician assistant, osteopath, dentist, or advanced practice registered nurse.

[7] Section 39-71-607, MCA, provides:

> 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. If, after a medical examination, the injured worker is released to return to work, the worker forfeits the right to any suspended benefits.

[8] ARM 24.29.1408 provides:

> (1) An insurer may suspend compensation payments under 39-71-607, MCA, for not more than 30 days pending the receipt of medical information, if:
>
> (a) the insurer submits to the department a detailed written statement indicating that the insurer is having difficulty in receiving medical information relating to a claimant's condition;
>
> (b) the department approves a suspension of compensation payments for not more than 30 days pending the receipt of medical information; and
>
> (c) after the department approves the suspension of payments, the insurer notifies the claimant in writing that biweekly payments are being suspended pending the receipt of medical information. A copy of the notification shall be furnished to the department.

[9] Prior to Mr. Neisinger's present appeal, he appealed a previous order of the DLI (Emp. Standards Div.'s Admin. R., Ord. Suspending Temp. Total Comp. Benefits (Jan. 23, 2024) , approving New Hampshire's request to suspend his TTD benefits. (Not. of Appeal of Dep't Ord. & Br. in Supp., Docket Item No. 1.) However, since that order did not determine whether Mr. Neisinger had been unreasonable in failing to keep his scheduled medical appointments, this Court remanded the case for the DLI to make those essential findings of fact. (Ord. Remanding Ord. Suspending Temp. Total Comp. Benefits, Docket Item No. 16.) Now that the DLI has done so (the June 27, 2024, order), Mr. Neisinger's appeal is complete, although in two parts and out-of-order, and ripe for consideration. (Not. of Appeal of Dep't's Ord. on Remand, Docket Item No. 26.).

[10] Emp. Standards Div.'s Admin. R., Remand Ord. Susp. Comp. Benefits (Jun. 27, 2024).

> The insurer has shown that they considered location. Although Mr. Neisinger argues there should be closer qualified physicians he made no effort to recommend an equally qualified doctor[11] closer to his residence.[12]

The order continues: "Therefore, it is found Mr. Neisinger has not provided a reasonable explanation not to attend the IME."[13]

¶ 20 As to the initial ketamine consultation, the DLI's order states:

> An initial consultation visit is not a change in provider but a meeting to determine whether the potential provider and client are a good fit for each other. Mr. Neisinger has not provided a reasonable explanation for not attending. In fact, as argued earlier, this appointment is considerably "closer to the employee's residence" than treating in Billings, MT.[14]

The order continues: "However, if the intent is to begin transitioning treating physicians, mediation is an option if a worker disagrees with an insurer's change in provider."[15] Then, the order concludes: "Therefore, it was unreasonable for Mr. Neisinger to fail to attend the December 13, 2023, initial ketamine therapy consultation at Luvita."[16]

¶ 21 The DLI issued an order granting New Hampshire the approval it sought to suspend Mr. Neisinger's compensation benefits from January 23, 2024, through February 22, 2024.[17]

¶ 22 Mr. Neisinger's appeal with this Court concerns these suspended TTD benefits.

ISSUES

---

[11] Although it is not an issue here, because neither party ever identified a closer medical provider, the standard is not, as the DLI stated in its order, an "equally" qualified doctor. As noted infra, § 39-71-605(2), MCA, requires only that an IME shall be conducted by a physician with "adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute." *Perlinski v. Mont. Sch. Grp. Ins. Auth*., 2011 MTWCC 16, ¶ 8. The requirement is sometimes phrased alternately, e.g., "special expertise appropriate to claimant's case," *Am. Home Assur. Co. v. Thunstrom*, 2002 MTWCC 39, ¶ 8, or "requisite expertise," *Id*., but these have the same basic meaning as "adequate and substantial." On the contrary, being required to have "equal" qualifications means something different. *See* "*equal* . . . of the same rank, ability, merit," RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993).

[12] Emp. Standards Div.'s Admin. R., Remand Ord. Susp. Comp. Benefits at 4 (Jun. 27, 2024).

[13] *Id*.

[14] *Id*. at 5.

[15] *Id*.

[16] *Id*.

[17] Emp. Standards Div.'s Admin. R., Ord. Suspending Temp. Total Comp. Benefits (Jan. 23, 2024).

¶ 23 Mr. Neisinger raises several issues, which this Court rephrases as follows:

Issue 1. Were the DLI's findings – that Mr. Neisinger was unreasonable in failing to keep the scheduled medical appointments – in violation of the standards of appeal set forth in § 2-4-704(2), MCA?

> Issue 1a. Was the DLI's finding that Mr. Neisinger was unreasonable in failing to keep the scheduled IME with Dr. Stratford in violation of constitutional or statutory provisions, made upon unlawful procedure, affected by other error of law, or clearly erroneous?
>
> Issue 1b. Was the DLI's finding that Mr. Neisinger was unreasonable in failing to keep the scheduled Luvita consultation affected by error of law?

Issue 2. Was the DLI's approval of New Hampshire's request to suspend Mr. Neisinger's TTD benefits affected by error of law?

STANDARDS OF REVIEW

¶ 24 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.[18] Section 2-4-704(2), MCA, sets forth the standards of review:

> (2) 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.

[18] § 2-4-704(1), MCA; ARM 24.5.350(6).

DISCUSSION

¶ 25 Under § 39-71-607, MCA, for an Insurer to suspend the employee's compensation payments, the injured worker must unreasonably fail to keep their scheduled medical appointments.

¶ 26 Whether an action is reasonable is a question of fact.[19] It is a subjective question of fact and requires analysis on a case-by-case basis.[20].

Issue 1. Were the DLI's findings – that Mr. Neisinger was unreasonable in failing to keep the scheduled medical appointments – in violation of the standards of appeal set forth in § 2-4-704(2), MCA?

Issue 1a. Was the DLI's finding that Mr. Neisinger was unreasonable in failing to keep the scheduled IME with Dr. Stratford in violation of constitutional or statutory provisions, made upon unlawful procedure, affected by other error of law, or clearly erroneous?

¶ 27 At its core, the present dispute focuses on the language of § 39-71-605(1)(b), MCA. Mr. Neisinger contends that Missoula is not convenient and is not as close to his residence as practical. He argues that New Hampshire must uphold the safeguards listed in § 39-71-605(1)(b), MCA, like scheduling the IME as close as practical to his residence, or it will violate his right to individual privacy under Article II, Section 10 of the Montana Constitution. Mr. Neisinger points to *Robinson v. State Compensation Mutual Ins. Fund*,[21] in support of his position.

¶ 28 In *Robinson*, the Montana Supreme Court concluded that, under the strict scrutiny analysis applicable to legislation impacting fundamental rights, like privacy, the provisions of § 39-71-605(1), MCA, that allow Insurers to take IMEs without having to petition the courts, show good cause, or get an order, are justified by the State's compelling interest in the orderly administration of the workers' compensation process, and sufficiently tailored to effectuate only that interest.[22] The court explained that the safeguards in § 39-71-605(1)(b), MCA, as well as the availability of interim benefits under § 39-71-610, MCA, are included in the statutory framework to protect Claimants from Insurers' abusive use of IMEs in the workers' compensation context and are what balance out the challenged provisions of § 39-71-605(1), MCA.[23]

---

[19] *Stordalen v. Ricci's Food Farm*, 261 Mont. 256, 258, 862 P.2d 393, 394 (1993) (citation omitted).

[20] *Chambers v. Cont'l Keil, Inc./Am. Motorists Ins. Co.*, 1990 WL 304007, * 4 (Mont.Work.Comp.Ct.).

[21] 2018 MT 259, 393 Mont. 178, 430 P.3d 69.

[22] *Robinson*, ¶ 25.

[23] *Robinson*, ¶¶ 23-25.

¶ 29 Here, Mr. Neisinger contends that, after notifying New Hampshire of his objection to the distance of the IME from his residence on December 6, 2023, § 39-71-605(1)(b), MCA,[24] and case law,[25] imposed a burden on New Hampshire to show that the IME, scheduled for December 19 and 20, 2023, could not be held at a location closer to Mr. Neisinger's residence in Cascade than Missoula, which burden New Hampshire did not meet.

¶ 30 New Hampshire, on the other hand, contends that it did meet its burden when it contacted Dr. Stratford's office in the Spring of 2024 and confirmed that Dr. Stratford did not then travel closer to Mr. Neisinger's residence in Cascade than Missoula to perform IMEs.

¶ 31 The DLI determined that Mr. Neisinger had not provided a reasonable explanation not to attend the IME because, although Mr. Neisinger objected that the IME was not as close to his residence as was practical, New Hampshire showed it considered location, and Mr. Neisinger made no effort to recommend an equally qualified doctor closer to his residence.

¶ 32 In a case such as this, where the Claimant's reasonableness in failing to keep a scheduled IME is based entirely upon whether the appointment was scheduled as close to the Claimant's residence as was practical, the answer is determined by applying the appropriate burdens of proof.

¶ 33 Here, the DLI applied the following burdens of proof: once the Claimant objects that the IME is too far from the Claimant's residence, the Insurer has the burden to show that it considered the location of the IME; once the Insurer meets that burden, it shifts to the Claimant to recommend an equally qualified doctor closer to the Claimant's residence.

¶ 34 However, these are ***not*** the correct burdens of proof.

¶ 35 Section 39-71-605, MCA, of the Workers' Compensation Act's section on IMEs, 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

---

[24] § 39-71-605(1)(b), MCA, provides, in pertinent part: "[t]he 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***. . . ." Emphases added.

[25] *See, e.g.*, *Stillwater Mining Co. v. Bunch*, 2006 MTWCC 43 (where the Claimant raises an objection to the distance of an out-of-state IME, the Insurer bears the burden to show that the proposed IME cannot be held at a closer location).

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.*** An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. The employee is entitled to have a physician present at any examination. ***If 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.*** Any physician, psychologist, or panel employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.[26]

¶ 36 Section 39-71-605(1)(b), MCA, clearly requires that the IME be scheduled at a place as close to the injured employee's residence as is practical. And case law, like the three Workers' Compensation Court matters detailed below, fills in the details, identifying the legal framework that applies when the injured employee objects to an IME based on its distance from their residence.

¶ 37 In *American Home Assurance Co. v. Thunstrom*,[27] the Petitioner, an Insurer paying benefits under a reservation of rights, sought an order directing the Claimant to submit to an out-of-state IME with a physician who specialized in her condition.[28] The Insurer moved for summary judgment.[29] Relying on the plain language of § 39-71-605(1)(b), MCA, the Claimant alleged she was entitled to have an IME as close to her place of residence as practical and that the scheduled location out-of-state "is not such a place."[30] The Insurer proffered no factual evidence demonstrating it could not secure an adequate IME from a physician closer to the Claimant's residence.[31] Reading § 39-71-605(2), MCA, together with § 39-71-605(1)(b), MCA, this Court determined that this Court was authorized to order an out-of-state IME when examination by an appropriate specialist could not be had in state.[32] Because the Claimant objected to the distance of the IME from the Claimant's residence, the burden was on the Insurer to show that an appropriate

---

[26] Emphases added.

[27] 2002 MTWCC 39.

[28] *Thunstrom*, ¶¶ 1, 2.

[29] *Id*.

[30] *Thunstrom*, ¶ 4.

[31] *Thunstrom*, ¶ 5.

[32] *Thunstrom*, ¶ 6.

IME could not be had closer.[33] This Court determined that such a showing might have been made by presenting evidence that the out-of-state physician had special expertise appropriate to the Claimant's case which was unavailable among physicians in Montana, or that Montana physicians with the requisite expertise were unwilling to perform an IME.[34] However, no such evidence was presented with the Insurer's motion.[35]

¶ 38 In *Challinor v. Montana Ins. Guaranty Association*,[36] the Respondent moved to compel the Petitioner, an Idaho resident, to attend an IME it scheduled 175 miles away in Montana.[37] The Petitioner objected on the ground that the location of the IME was not as practical to his residence as required by § 39-71-605(1)(b), MCA.[38] This Court ruled that the Insurer bears the burden of demonstrating that an appropriate IME cannot be had closer to the Claimant's residence and denied the Respondent's motion for failing to meet this burden because it did not show that the IME could not be had in the Petitioner's own community or one of several larger communities between the Petitioner's residence and the current Montana site.[39] The Respondent had argued since the Petitioner regularly drove 145 miles to Washington for treatment, the Petitioner should be precluded from objecting to driving just 30 miles further for the IME.[40] This Court was not persuaded and ruled that a person's willingness to travel a long distance for treatment has no bearing on whether the person should be made to travel for an IME.[41]

¶ 39 In *Perlinski v. Montana Schools Group Ins. Authority*,[42] the Respondent, an Insurer paying benefits under a reservation of rights, sought an order requiring the Petitioner, who was alleging a lung condition arising out of employment for which no causative agent had yet been identified and no occupational exposure had yet been documented, to attend an IME in Portland, Oregon.[43] The Petitioner moved for a protective order that she not be required to undergo the out-of-state IME.[44] The Respondent argued that the Oregon IME was necessary because "no Montana physicians [were] as experienced or

---

[33] *Thunstrom*, ¶ 8.

[34] *Id*.

[35] *Id*.

[36] 2008 MTWCC 21.

[37] *Challinor*, ¶¶ 1, 2.

[38] *Challinor*, ¶ 1.

[39] *Challinor*, ¶¶ 3, 10.

[40] *Challinor*, ¶ 2.

[41] *Challinor*, ¶ 4 (relying on *Simms v. Mont. Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶ 39, 315 Mont. 135, 68 P.3d 678).

[42] 2011 MTWCC 16.

[43] *Perlinski*, ¶¶ 1-3.

[44] *Perlinski*, ¶ 1.

qualified as [the Oregon physician] to perform this type of evaluation."[45] The Petitioner argued that multiple Montana physicians had the necessary experience.[46]

¶ 40 This Court granted the Petitioner's motion for protective order[47] and denied the Respondent's motion to compel the out-of-state IME,[48] explaining:

> An IME located several hundred miles and two states away pays little, if any, regard to [the Petitioner's] convenience, physical condition, and ability to attend [as required by § 39-71-605(1)(b), MCA]. Moreover, [the Respondent] fails to establish that the suggested IME in Portland is as close to [the Petitioner's] Bozeman residence as is practical. . . . [T]he Montana Supreme Court has held: "Out of state exams should be viewed with disfavor when an adequate examination can be conducted in Montana."[49]

Noting that § 39-71-605(2), MCA, requires only that an IME shall be conducted by a physician with "adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute,"[50] this Court concluded that although the Respondent raised legitimate objections to some of the doctors suggested by the Petitioner it had not established that an adequate examination could not be conducted in Montana or that the proposed IME was as close as practical to the Petitioner's residence.[51]

¶ 41 Finally, this Court stated:

> [The Respondent's] perceived unfairness appears to be grounded in its misapprehension that it has a "statutory right to an IME with the physician of its choice." Section 39-71-605, MCA, does not provide MSGIA with the right to an IME with the physician of its choice. Even in that regard, [the Respondent] is not being denied an IME with [the Oregon physician] even though it has failed to satisfy the statutory and common law criteria for an out-of-state IME. The beauty of air travel is that the planes fly in both directions. [The Respondent] can fly [the Oregon physician] to Bozeman just as easily as it could have flown [the Petitioner] to Portland.[52]

---

[45] *Perlinski*, ¶ 4.

[46] *Id.*

[47] *Perlinski*, ¶ 11.

[48] *Perlinski*, ¶ 12.

[49] Perlinski, ¶ 7 (emphasis omitted) (citation omitted).

[50] Perlinski, ¶ 8.

[51] Perlinski, ¶ 7.

[52] *Perlinski*, ¶ 10.

¶ 42 Arising from these cases, then, is a burden-shifting rule, whereby the Claimant has the burden to object to the distance of the IME, after which the Insurer has the burden to show that an appropriate IME could not be had closer. Although this rule is often applied in out-of-state IME cases, where the number of miles between the Claimant's residence and the proposed location for the IME tends to be high, Montana is a big state. Not infrequently, the distances between the Claimant's residence and the proposed location for the IME, though both in Montana, are nearly as long as those at issue in the out-of-state cases.[53] Thus, the principles set forth in those cases have a wider reach than may first appear.

¶ 43 The mileage at issue in Mr. Neisinger's case, i.e., approximately 162 miles between his residence and the proposed location for the IME, places his case within the reach of the rule discussed. Thus, while Missoula may very well have been a reasonable location for the IME, once Mr. Neisinger objected to the distance from Cascade to Missoula, New Hampshire had the burden to show – with evidence in the record – that it had appropriately met the requirements of § 39-71-605(1)(b), MCA.

¶ 44 The record does not contain evidence sufficient to satisfy New Hampshire's burden in this regard. The only record evidence concerning the location of the IME is New Hampshire's Spring 2024 call to Dr. Stratford's office, which confirmed that Dr. Stratford did not then travel any closer to Cascade than Missoula to perform IMEs. This evidence is problematic for several reasons, one of which is that Mr. Neisinger's failure to keep the scheduled IME, which is the action the reasonability of which is in question, occurred in December of 2023. Thus, evidence that was created and concerned events several months later, in the Spring of 2024, is irrelevant.

¶ 45 Even if this phone call had occurred at a relevant time, however, evidence of it would have little persuasive value to this Court in the resolution of the issue at bar. What is offered is an attorney representing in a brief, that an unnamed representative of "the Insurer" told him that an unnamed representative of "Dr. Stratford's office" previously told it, months after the appointment was set and refused, that the closest to Cascade that Dr. Stratford then did IMEs was Missoula. No sworn statements nor affidavits were provided to give foundation for this tenuous chain of hearsay. Although § 39-71-204(1), MCA, allows hearsay to be relied upon in hearings before the DLI, that statute does not erase the very concerns that underly the exclusion of hearsay in litigation. Here, where this is the sole fact relied upon to establish an essential element, its probative value is low.

---

[53] Compare, for example, the distance between the Claimant's residence and the proposed IME in this case, Emp. Standards Div.'s Admin. R., Appellee/Insurer's Resp. to Appellant/Claimant's Initial Br., Ex. 12 at 17 (approximately "162 miles" between Cascade and Missoula, Montana) with that in *Challinor*, 2008 MTWCC 21, ¶¶ 1, 2 (approximately "175 miles" between Orofino, Idaho, and Missoula, Montana) and *Perlinski*, 2011 MTWCC 16, ¶ 7 ("several hundred miles" between Bozeman, Montana, and Portland, Oregon).

¶ 46 Moreover, New Hampshire's phone call showed, at most, that an IME ***with Dr. Stratford*** could not be had closer to Mr. Neisinger's residence. But the Insurer's burden is to show that an appropriate IME cannot be had closer, not that an IME with its provider-of-choice could not be had closer. In *Perlinski*, this Court said, "Section 39-71-605, MCA, does not provide [an Insurer] with the right to an IME with the physician of its choice."[54] All that is required of an IME provider is that the provider have "adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute."[55] As this Court noted in *Thunstrom*, a showing that an appropriate IME could not be had closer to the Claimant's residence might be made by presenting evidence that special expertise appropriate to the Claimant's case was unavailable among closer physicians, or that closer physicians with the requisite expertise were unwilling to perform an IME.[56] But here, no such evidence exists in the record.

¶ 47 Where, as here, the Insurer has the burden but fails to show that an appropriate IME could not be had closer, the Claimant does not have to go to the appointment.[57] And if the Claimant does not have to go, then failing to keep the scheduled IME is reasonable.

¶ 48 Because the DLI applied the wrong burden of proof to New Hampshire and there is insufficient evidence in the record for New Hampshire to meet the correct burden of proof, DLI's determination that Mr. Neisinger's failure to keep the scheduled IME was unreasonable was affected by error of law. As a result, this Court reverses the DLI's determination as to the IME.

¶ 49 This Court is not persuaded by any additional arguments New Hampshire offers as to why Mr. Neisinger's failure to attend the IME was unreasonable.

¶ 50 First: New Hampshire argues that if Mr. Neisinger travels for treatment, he can travel for an IME. As mentioned above, whether a person's actions are reasonable normally depends on the facts and circumstances and requires case-by-case analysis. The Montana Supreme Court has held that a person's willingness to travel for treatment has no bearing on whether he should be required to travel for an IME.[58] Notwithstanding, other facts about the Claimant's travel may be pertinent. For example, evidence that the Claimant's injuries make travel uncomfortable, or that the Claimant routinely travels for leisure without difficulty may be considered. The fact that a Claimant travels for treatment would be probative if the issue were the Claimant's ability to travel. That is not the issue here.

---

[54] *Perlinski*, ¶ 10.

[55] *Perlinski*, ¶ 8; § 39-71-605(2), MCA.

[56] *Thunstrom*, ¶ 8.

[57] *See, e.g.*, *Perlinski*, ¶¶ 11, 12.

[58] *Simms*, ¶ 39; *see Challinor*, ¶ 4 (relying on *Simms*, ¶ 39).

¶ 51 In this matter the only reason Mr. Neisinger gave for failing to keep the scheduled IME was that it was not scheduled as close to his residence as was practical. Thus, whether his conduct was reasonable depended entirely upon whether New Hampshire met its burden of proof that an appropriate IME could not be held closer to his residence. I.e., if New Hampshire had met its burden by showing that an appropriate IME could not have been had closer, then Mr. Neisinger's failure to keep the scheduled IME would have been unreasonable. Since New Hampshire did not meet its burden to show that an appropriate IME could not have been had closer, Mr. Neisinger's failure to keep the scheduled IME was reasonable. As a result, no other facts and circumstances or types of arguments could have changed the outcome.

¶ 52 Second: New Hampshire argues that the Workers' Compensation Court has already issued an order disagreeing with Mr. Neisinger that the Insurer's request for him to attend an IME with Dr. Stratford violates safeguards in § 39-71-605, MCA, and stating that Missoula was an appropriate location for the IME.

¶ 53 The question presented in this appeal is not whether Dr. Stratford in Missoula was a reasonable choice. He probably was. The issue here comes down to whether New Hampshire, once notified that Mr. Neisinger objected to an IME in Missoula, met its burden under § 39-71-605(1)(b), MCA, to show that an appropriate IME could not be had closer to Mr. Neisinger's place of residence. New Hampshire did not meet that burden with evidence in the record before the DLI. Thus, Mr. Neisinger did not have to attend the IME in Missoula.

¶ 54 While this Court did, previously, order Mr. Neisinger to attend an IME with Dr. Stratford in Missoula, this was at a different time, specifically April 25, 2024, and at that point, neither party could identify a qualified physician in Cascade County who was willing to perform the IME. In addition, in that decision, this Court was guided by § 39-71-605(2), MCA, which allows it to order an IME "as it considers desirable."

Issue 1b: Was the DLI's finding that Mr. Neisinger was unreasonable in failing to keep the scheduled Luvita consultation affected by error of law?

¶ 55 Mr. Neisinger contends that when New Hampshire scheduled him for an initial ketamine consultation at Luvita Clinic, it was attempting to designate a new treating physician under § 39-71-1101, MCA, but that such attempt failed for a variety of reasons, thereby obviating any requirement for him to keep the appointment.

¶ 56 New Hampshire contends that its goals in scheduling the initial consultation were twofold:

> First, it wanted a second opinion from another Ketamine provider to determine the effectiveness (and therefore, the necessity) of further Ketamine treatment. Second, in the event that Luvita determined that

> further Ketamine treatment was necessary, to determine if Luvita would accept Mr. Neisinger as a patient. Only in that event would New Hampshire consider exercising its right to change the treating physician to a doctor at the Luvita [C]linic.[59]

¶ 57 The DLI pointed out that Luvita Clinic was closer to Mr. Neisinger's residence than the location where he treated in Billings, Montana. Further, the DLI determined that the purpose of the initial consultation was just to see if Mr. Neisinger and the clinic were a good fit; however, if it were the start of a transition to a new treating physician, Mr. Neisinger could have objected by filing for mediation. The DLI concluded that Mr. Neisinger had not provided a reasonable explanation, and was, therefore, unreasonable for not attending the initial consultation at Luvita Clinic.

¶ 58 This Court is aware of only two statutes potentially providing authority for New Hampshire to schedule the Luvita appointment. The first statute is § 39-71-605, MCA.

¶ 59 Under § 39-71-605, MCA, an Insurer can, in some cases, require a Claimant to participate in an IME. However, the letter setting the Luvita appointment does not meet the requirements of § -605, MCA. This statute allows for an examination by a "physician, psychologist, or panel." Luvita Clinic is neither a physician, a psychologist, nor a panel. As such, § -605, MCA, does not give New Hampshire the authority to schedule an appointment with Luvita.

¶ 60 The second statute is § 39-71-1101, MCA. Under § 39-71-1101, MCA, an Insurer can, under certain conditions and subject to certain restrictions, designate, and in some cases change, a treating physician. However, the letter setting the Luvita appointment does not meet the requirements of § -1101, MCA, either. New Hampshire did not designate a "treating physician," defined in § 39-71-116, MCA, as a "person" or indicate that Luvita is a managed care organization or preferred provider organization under § 39-71-1101(1), (2), or (8), MCA.

¶ 61 Moreover, the letter does not say anything about changing Neisinger's treating physician but instead specifically states that the appointment is a consultation. In fact, New Hampshire affirmatively states the Luvita consultation is not an attempt to change a treating physician: "Neisinger's entire argument regarding the Luvita Clinic is based on his manufactured claim that New Hampshire improperly attempted to change his treating physician, when in fact New Hampshire simply scheduled him for a consultation at Luvita."[60] New Hampshire does not rely on § -1101 for the authority to schedule this consultation and that provision does not provide it.

---

[59] Appellee's Resp. to Appellant's Br. in Supp. of Appeal of Dep't's Ord. on Remand at 5-6, Docket Item No. 34.

[60] *Id.* at 5.

¶ 62 Neither party has identified any other statutory authority allowing an Insurer to require attendance at a consultation of the type at issue in this case, i.e., one unilaterally scheduled by the Insurer with a healthcare entity rather than an individual physician. This Court has also undertaken independent research and located none. Accordingly, Mr. Neisinger's refusal to attend this appointment was not unreasonable.

¶ 63 DLI's determination that Mr. Neisinger was unreasonable in failing to attend the consultation at Luvita was affected by error of law. Although the Montana Workers' Compensation Act does provide for attendance at an IME under § -605 and does provide a process for designating or changing a treating physician under § -1101, the Act does not authorize an Insurer to unilaterally compel attendance at a consultation appointment under the facts of this case. Therefore, Mr. Neisinger was not unreasonable in declining to attend this appointment.

¶ 64 This Court is not persuaded by any additional arguments New Hampshire offers as to why Mr. Neisinger's failure to keep the Luvita consultation was unreasonable.

¶ 65 First: New Hampshire argues that Claimants have a duty to cooperate with their Insurers or risk having their benefits terminated under § 39-71-1106, MCA. To the extent that New Hampshire is arguing that Mr. Neisinger's failure to keep the Luvita consultation violated a duty to cooperate and provided grounds to suspend his TTD benefits under § 39-71-1106, MCA, that argument is untimely. New Hampshire chose to pursue suspension of Mr. Neisinger's benefits under § 39-71-607, MCA. To the extent that New Hampshire is arguing that although it was not attempting to change Mr. Neisinger's treating physician, it would have been reasonable to do so and Mr. Neisinger would have had a duty to cooperate, this Court need not answer questions that are not before it.[61]

¶ 66 Second: New Hampshire argues that Insurers may also terminate benefits when a Claimant refuses reasonable medical treatment. The record gives no indication that any treatment was to take place during the consultation.

¶ 67 Third: New Hampshire argues that it is entirely reasonable for it to seek to resolve a conflict in medical opinions through the means of an additional opinion from Luvita Clinic. If an additional opinion is what New Hampshire seeks, the appropriate mechanism to obtain it would be an IME.[62] And as discussed above, the letter setting the Luvita consultation did not meet the requirements of § 39-71-605, MCA.

---

[61] *See Robinson v. Mont. State Fund*, 2005 MTWCC 33, ¶ 21 (citation omitted) (explaining that this Court does not resolve hypothetical questions, give advisory opinions, nor "provide for contingencies which may hereafter arise.").

[62] *See Liberty Nw. Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6 ("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.").

¶ 68 Fourth: New Hampshire argues that it has the statutory right to assign a treating physician at any time after acceptance without a showing of good cause but that it also has good cause. Whether it has that right, here, New Hampshire denies it was assigning a treating physician when it notified Mr. Neisinger of an initial ketamine consultation at Luvita Clinic. Nor, as discussed above, did the letter meet the requirements of § 39-71-1101, MCA.

¶ 69 Fifth: New Hampshire argues that any claim that § 39-71-1101, MCA, is unconstitutional fails under the rational basis test. The level of review this Court would apply to a statute depends on the constitutional right allegedly affected.[63] In any case, where Mr. Neisinger argues that § 39-71-1101, MCA, is unconstitutional ***if*** it allows New Hampshire to interfere with his choice of treating physician in the midst of psychiatric treatment, and New Hampshire represents that it has not terminated Mr. Neisinger's treatment with Dr. Amato, this Court need not address the statute's constitutionality at this time.[64]

Issue 2: Was the DLI's approval of New Hampshire's request to suspend Mr. Neisinger's TTD benefits affected by error of law?

¶ 70 Under § 39-71-607, MCA, and ARM 24.29.1408, an insurer may only suspend compensation payments when an injured worker unreasonably fails to keep scheduled medical appointments and, after the insurer supplies the DLI with specific information, the DLI approves the request for suspension. Here, because the DLI's findings – that Mr. Neisinger's failure to keep scheduled medical appointments was unreasonable – were affected by errors of law, so too was the DLI's approval of New Hampshire's request to suspend Mr. Neisinger's TTD benefits.

¶ 71 For all of the foregoing reasons, this Court enters the following:

ORDER

¶ 72 The DLI's order finding that Mr. Neisinger was unreasonable for failing to keep the scheduled IME with Dr. Stratford and the scheduled Luvita consultation is **reversed**.

¶ 73 The DLI's order approving New Hampshire's request to suspend Mr. Neisinger's TTD benefits between January 23, 2024, and February 22, 2024, under § 39-71-607, MCA, and ARM 24.29.1408, is **reversed**.

¶ 74 New Hampshire shall pay Mr. Neisinger the TTD benefits to which he was entitled between January 23, 2024, and February 22, 2024.

---

[63] *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) ("[T]he nature of the individual interest affected dictates which standard of review to apply.") (citation omitted).

[64] *See Robinson,* ¶ 21.

¶ 75 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 25th day of March, 2025.

(SEAL)

/s/ Lee Bruner
JUDGE LEE BRUNER

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

Submitted: November 20, 2024