

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 16

WCC No. 2011-2708

LINDA PERLINSKI

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

**ORDER GRANTING PETITIONER'S MOTION FOR PROTECTIVE ORDER AND
DENYING RESPONDENT'S MOTION TO COMPEL
AN INDEPENDENT MEDICAL EXAMINATION**

Summary: Respondent moved for an order compelling Petitioner to attend an IME with Dr. Emil Bardana in Portland, Oregon. Respondent contends that an out-of-state IME is justified because there are no Montana physicians with the same level of experience as Dr. Bardana. Petitioner moved for a protective order holding that she not be required to attend the out-of-state IME.

Held: Respondent's motion to compel the IME in Portland is denied. Petitioner's motion for a protective order is granted. Out-of-state IMEs should be viewed with disfavor when an adequate examination can be conducted in Montana. Section 39-71-605, MCA, requires that an IME shall be conducted at a place that is as close to the employee's residence as is practical by a physician with "adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute." Respondent has failed to demonstrate that an adequate IME cannot be conducted in Montana.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605. Section 39-71-605(1)(b), MCA, requires that an IME be set with regard for the employee's convenience and as close to the employee's residence as is practical. An IME located several hundred miles and two states away pays little, if any, regard to the employee's

convenience. While Respondent argues that the IME doctor it selected is the most experienced and qualified doctor available, it has failed to prove that no adequate examination could be conducted in Montana. Respondent cannot compel Petitioner's attendance at an out-of-state IME although it may choose to have the physician travel to Montana to complete the IME as close to Petitioner's residence as practical.

Independent Medical Examination: Out-of-State. Section 39-71-605(1)(b), MCA, requires that an IME be set with regard for the employee's convenience and as close to the employee's residence as is practical. An IME located several hundred miles and two states away pays little, if any, regard to the employee's convenience. While Respondent argues that the IME doctor it selected is the most experienced and qualified doctor available, it has failed to prove that no adequate examination could be conducted in Montana. Respondent cannot compel Petitioner's attendance at an out-of-state IME although it may choose to have the physician travel to Montana to complete the IME as close to Petitioner's residence as practical.

¶ 1 Respondent Montana Schools Group Insurance Authority (MSGIA) moves the Court for an order requiring Petitioner Linda Perlinski to attend an independent medical examination (IME) with Dr. Emil J. Bardana, Jr., in Portland, Oregon. Perlinski moves the Court for a protective order holding that she not be required to undergo an out-of-state examination. Because both motions deal with whether Perlinski should be required to attend the IME in Oregon, they are dealt with collectively in this Order.

BACKGROUND¹

¶ 2 Perlinski filed a First Report of Injury or Occupational Disease on December 20, 2010, alleging a lung condition arising out of her employment as a teacher with Bozeman Public Schools. MSGIA paid indemnity benefits under a reservation of rights pursuant to § 39-71-608, MCA, pending an investigation of Perlinski's claim. The investigation included industrial hygiene evaluations of Perlinski's workplace and home. The evaluations failed to identify a specific substance in Perlinski's workplace which may have caused her lung condition.

¹ Montana Schools Group Insurance Authority's Brief in Support of Motion to Compel Independent Medical Evaluation (Motion to Compel), Docket Item No. 8.

¶ 3 Perlinski's treating physicians, Drs. Robert Schoene and Kimberley Marquis of the Bozeman Deaconess Health Group, referred her to Harborview Occupational Medicine Clinic in Seattle "for help in identifying causative agent and documenting occupational exposure."² The Harborview Clinic failed to identify a specific substance or group of substances in Perlinski's workplace which may have caused her lung condition.

¶ 4 MSGIA scheduled an IME with Dr. Bardana at Oregon Health and Science University in Portland. MSGIA argues that an IME with Dr. Bardana is necessary because no Montana physicians are as experienced or qualified as Dr. Bardana to perform this type of evaluation. Perlinski argues that multiple Montana physicians have the experience necessary to conduct the IME.

DISCUSSION

¶ 5 The seminal decision regarding the appropriateness of allowing an out-of-state IME is *Simms v. Montana Eighteenth Judicial Dist. Ct.*³ MSGIA contends that the *Simms* decision "clearly has no application to the Workers' Compensation Act which has a specific statute addressing IMEs and a body of law directly addressing out-of-state IMEs."⁴ MSGIA argues: "The *Simms* Court's analysis centered heavily around Rule 35, which is not applicable in this matter."⁵ In fact, the *Simms* Court's analysis centered heavily around the Montana Constitution which *is* applicable in this matter. In *Simms*, the Montana Supreme Court held:

In Montana, the request for an ordered independent medical examination must be weighed against the right to privacy provided for at Article II, Section 10 of the Montana Constitution and the right to safety, health and happiness provided for at Article II, Section 3 of the Montana Constitution.

. . .

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

² Motion to Compel at 2; Ex. B to Motion to Compel at 6.

³ *Simms v. Montana Eighteenth Judicial Dist. Ct.*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678.

⁴ Montana Schools Group Insurance Authority's Brief in Opposition to Petitioner's Motion for Protective Order (MSGIA's Brief in Opposition to Protective Order) at 3, Docket Item No. 9.

⁵ *Id.*

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. Rule 35, M.R.Civ.P., does not empower a defendant to seek out and employ the most favorable "hired gun" available - no matter the inconvenience to the plaintiff and without regard to the plaintiff's rights.⁶

Although *Simms* involved an IME requested pursuant to M. R. Civ. P. 35, the inalienable rights against which the right to an IME is balanced are not suddenly alienated just because the insurer seeks an IME pursuant to § 39-71-605, MCA. MSGIA's argument that *Simms* has no application to the Workers' Compensation Act is without merit.

¶ 6 Absent the *Simms* analysis, MSGIA's reliance on § 39-71-605, MCA, is unavailing in any event. Section 39-71-605(1)(b), MCA, provides 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.

¶ 7 An IME located several hundred miles and two states away pays little, if any, regard to Perlinski's convenience, physical condition, and ability to attend. Moreover, MSGIA fails to establish that the suggested IME in Portland is as close to Perlinski's Bozeman residence as is practical. Instead, MSGIA argues that Perlinski must travel from Bozeman to Portland for an IME because, according to MSGIA, no doctors in Montana have the same length or breadth of experience as Dr. Bardana. MSGIA dismisses some of the alternative doctors suggested by Perlinski as lacking the requisite experience to perform the IME, noting that one of Perlinski's suggested doctors appears "well short of the years of experience of Dr. Bardana,"⁷ while another suggested doctor "graduated from medical school in 1979, approximately 18 years after Dr. Bardana."⁸ I note parenthetically that I find it difficult to consider a doctor who graduated from medical school when I was still in junior high school as being "too green for the job." More to the point, the Montana Supreme Court has held: "Out of state exams should be viewed with disfavor when an *adequate* examination can be

⁶ *Simms*, ¶¶ 32-33

⁷ Montana Schools Group Insurance Authority's Reply Brief in Support of Motion to Compel Independent Medical Evaluation (MSGIA's Reply Brief in Support of Motion to Compel IME) at 3, Docket Item No. 11.

⁸ *Id.*

conducted in Montana.”⁹ MSGIA would have this Court believe that the only Montana alternative to Dr. Bardana is Doogie Howser.¹⁰ Setting aside the several doctors suggested by Perlinski – some of which MSGIA has raised legitimate objections to – MSGIA has not established that an adequate examination cannot be conducted in Montana, nor has MSGIA established that the proposed IME is as close as practical to Perlinski’s residence.

¶ 8 MSGIA contends: “The reason for the out-of-state evaluation is conclusively established by the referral of Petitioner to the Harborview Clinic in Seattle for a similar evaluation by her Bozeman physicians.”¹¹ In fact, the only thing “conclusively established” by Perlinski’s referral to Harborview is that Perlinski was referred to Harborview. From a referral to Seattle by a treating physician, MSGIA makes the unsupported leap to the necessity of a Portland IME. As noted above, the Montana Supreme Court has held that out-of-state exams should be viewed with disfavor when an adequate examination can be conducted in Montana. Similarly, § 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.” The mere fact that Perlinski’s treating physicians referred her to the Harborview Clinic does not establish that the nearest doctor with the requisite experience to conduct an IME is in Portland.

¶ 9 MSGIA argues that this Court will unfairly limit MSGIA’s ability to present critical medical evidence if it does not require Perlinski to travel to Portland for an IME. MSGIA contends: “Insurers have been punished by the Court for not having a medical expert actually examine the injured worker.”¹² Although MSGIA fails to explain how the Court’s past weighing of medical testimony is punitive in nature, it cites *Petritz v. Montana State Fund*¹³ in support of this contention. It bears noting that *Petritz* was a case in which this Court “punished” the insurer with a favorable judgment.¹⁴

¶ 10 MSGIA’s claims that it will be unfairly limited from presenting critical medical evidence miss the mark. The Court is not denying MSGIA the right to an IME. MSGIA’s

⁹ *Simms*, ¶ 42 (emphasis added).

¹⁰ Teenage doctor played by Neil Patrick Harris in the 1989-93 TV comedy-drama, *Doogie Howser, M.D.*

¹¹ MSGIA’s Brief in Opposition to Protective Order at 4.

¹² *Id.* at 6.

¹³ *Petritz v. Montana State Fund*, 2010 MTWCC 17.

¹⁴ *Id.*, ¶ 44.

perceived unfairness appears to be grounded in its misapprehension that it has a “statutory right to an IME with the physician of its choice.”¹⁵ 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, MSGIA is not being denied an IME with Dr. Bardana 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. MSGIA can fly Dr. Bardana to Bozeman just as easily as it could have flown Perlinski to Portland.

ORDER

¶ 11 Petitioner’s motion for protective order regarding the out-of-state IME is **GRANTED**.

¶ 12 Respondent’s motion to compel the out-of-state IME is **DENIED**.

DATED in Helena, Montana, this 21st day of June, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Leo S. Ward/Morgan M. Weber
Submitted: June 2 & 3, 2011

¹⁵ MSGIA’s Reply Brief in Support of Motion to Compel IME at 3.