

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

**2024 MTWCC 5**

**WCC No. 2023-00278**

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**SONJA ROBERTS**

**Petitioner**

**vs.**

**ARCH INS. CO.**

**Respondent/Insurer.**

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**ORDER GRANTING RESPONDENT'S MOTION TO COMPEL IME**

**Summary:** Respondent moves to compel Petitioner to attend an IME and complete certain paperwork as part of the process. Petitioner agrees to attend the IME. However, she contends that nothing in § 39-71-605, MCA, requires her to fill out and/or sign IME-related documents and that forcing her to do so would violate her right to privacy under Article II, Section 10 of the Montana Constitution.

**Held:** Respondent's Motion to Compel is granted subject to the following conditions. Petitioner must attend the IME and is required to sign the provider's Informed Consent document as part of the IME process. However, Petitioner is not required to sign the Frequently Asked Questions document or take any action associated with the HIPAA Notice of Privacy Practices document.

¶ 1 Respondent Arch Ins. Co. moves to compel Petitioner Sonja Roberts to attend an independent medical examination (IME) with John C. Schumpert, MD, MPH, of Resources for Environmental and Occupational Health (REOH) in Missoula and to complete certain paperwork as part of the process.

¶ 2 Petitioner agrees to attend the IME. However, she contends that she is not required to fill out and/or sign any IME-related documents. Petitioner's argument is two-fold. First, she asserts that nothing in § 39-71-605, MCA, requires her to do paperwork in order to fulfill her obligation to submit to an examination. Second, she asserts that

forcing her to do so would violate her right to privacy under Article II, Section 10 of the Montana Constitution.

¶ 3 This matter was submitted for decision following a hearing in Helena on March 11, 2024, in which both parties made oral arguments on Respondent's Motion to Compel.

### **Background**

¶ 4 Petitioner alleges that she suffered injuries after slipping and falling in her employer's parking lot on February 21, 2023.

¶ 5 Petitioner further alleges that she aggravated those injuries while lifting at work on March 27, 2023.

¶ 6 Respondent, which insured Petitioner's employer at all relevant times, accepted liability for her claims.

¶ 7 The parties, however, dispute Petitioner's entitlement to indemnity benefits.

¶ 8 Petitioner filed a Petition for Hearing on December 21, 2023, seeking medical and indemnity benefits, as well as costs, attorney fees, and a penalty.

¶ 9 On January 4, 2024, Respondent notified Petitioner that she was scheduled for an IME with Dr. Schumpert in Missoula on January 23, 2024.

¶ 10 The same day, January 4, 2024, Petitioner sent Respondent a letter objecting to the Missoula IME on three grounds: the IME was not in her home city of Great Falls, Respondent had not given her enough advanced notice of the appointment, and Respondent must first allow her to see a treating provider prior to an IME.

¶ 11 On January 18, 2024, Respondent canceled the IME, and rescheduled it for February 22, 2024, in Great Falls.

¶ 12 On January 22, 2024, Petitioner agreed to attend the IME so long as all "raw data" would be preserved, Petitioner would not be required to sign any paperwork, and her personal physician would be allowed to attend.

¶ 13 On February 5, 2024, Respondent sent Petitioner the paperwork that Dr. Schumpert would require her to complete.

¶ 14 On February 9, 2024, Petitioner responded that she would not complete any paperwork.

¶ 15 On February 13, 2024, Respondent canceled the IME based on the parties' dispute over paperwork.

## Discussion

¶ 16 For the reasons that follow, Respondent's Motion to Compel is granted; Petitioner must attend the IME subject to the conditions set forth below.

### Location of the Examination

¶ 17 As Respondent has agreed to schedule the IME in Great Falls, this issue appears to be resolved.

### Attendance of Petitioner's Own Physician

¶ 18 As Respondent has agreed to an IME where Petitioner's physician may attend, this issue appears to be resolved.

### Preservation of All Raw Data

¶ 19 As Respondent has agreed to preserve all raw data, this issue appears to be resolved.

### Documents To Be Completed as Part of the IME Process

¶ 20 Respondent alleges that Dr. Schumpert cannot conduct the IME unless Petitioner completes three associated documents. Each of the documents at issue, including the "Frequently Asked Questions" document, the "HIPAA Notice of Privacy Practices" document, and the "Informed Consent" document, was prepared by REOH.<sup>1</sup>

¶ 21 Petitioner alleges that § 39-71-605, MCA, contains no requirement that a claimant fill out/sign authorizations, acknowledgements, or other paperwork.

¶ 22 The question becomes, what of the REOH offered documents are a necessary part of the IME examination.

¶ 23 Petitioner phrases the issue as follows. "The only issue presented for the Court's consideration is whether Roberts must sign 'all required paperwork associated with an IME,' which according to Arch, is determined by REOH and is non-negotiable."<sup>2</sup>

¶ 24 Section 39-71-605, MCA, is clear that Respondent is entitled to an IME as part of the claims process. The statute provides:

(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

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<sup>1</sup> The documents are located at Exhibit 6 of the Affidavit of Marina Tucker (Docket Item No. 13).

<sup>2</sup> Pet'r's Resp. in Opp'n to Resp'ts Mot. to Compel Rule 605 Exam. at 2 (Docket Item No. 14).

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. 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.

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

(3) As used in this section, a panel includes a practitioner having substantial experience in the field of medicine concerned with the matters presented by the dispute and whose licensure would qualify the practitioner to act as a treating physician, as defined in 39-71-116, and may include a psychologist.

(4) A claimant is required, upon a written request of an insurer, to submit to a functional capacities evaluation conducted by a licensed physical or occupational therapist.

¶ 25 The Montana Supreme Court has provided general guidance, which is applicable to the question of what information Petitioner is required to provide as part of the IME process. The court has previously held that, "a workers' compensation claimant waives

confidentiality to his healthcare information ‘for purposes relevant to [his] claim’ and, within that framework, the claimant agrees to submit to medical examinations ‘appropriate to the handling of the claim.’”<sup>3</sup>

¶ 26 Thus, paperwork attendant to an IME that asks for Petitioner’s healthcare information must have a purpose appropriate to the handling of the claim.

¶ 27 We turn now to examine the three documents at issue.

¶ 28 Petitioner alleges that the Frequently Asked Questions document asserts facts that Petitioner does not agree with. For example, the document states that the examination is “unbiased [and] impartial.” This Court sees no requirement that the Petitioner sign this document prepared by REOH as a prerequisite to the IME examination. Petitioner is not required to sign this document as part of the IME process.

¶ 29 The HIPAA Notice of Privacy Practices document contains, within it, no requirement that Petitioner agree to the notice, sign that she has read and understands it, or take any other action. Respondent alleges that it is federal law that the notice be provided. That may be true. However, if documentation of the fact that it was provided to Petitioner is needed, this may be met by the provider noting in the medical record that it was provided. There is no issue here preventing an IME. A copy may be offered to Petitioner. Petitioner is not required to accept it nor agree to it.

¶ 30 As to the substance of the HIPAA form, Petitioner argues in her brief as follows:

. . . REOH admits that each examinee has the right to “tell us your choices about what to share.” (Exhibit B, pg.1). With this provision, REOH concedes that all examinees have the right to inform them of their choice regarding their PHI. If true, Roberts should be able to inform REOH (as she did) that she objects to any dissemination of her PHI not explicitly provided for by the Montana Workers’ Compensation Act. REOH of course did not accept Roberts[’] choice illuminating a glaring inconsistency in REOH’s forms versus its actions.<sup>4</sup>

¶ 31 In retort, Respondent states “The HIPAA Notice also says that Petitioner has the ‘right to request restriction or limitation on the health information we use or disclose.’ Exhibit 6 to *Tucker Aff.* Petitioner could have simply advised REOH of the limitations that she wanted, which the form already allows.”<sup>5</sup>

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<sup>3</sup> *Neisinger v. New Hampshire Ins. Co.*, 2019 MT 275, ¶ 22, 398 Mont. 1, 452 P.3d 909 (citation omitted) (alteration in original).

<sup>4</sup> Pet’rs Resp. in Opp’n to Resp’ts Mot. to Compel Rule 605 Exam. at 7 (Docket Item No. 14).

<sup>5</sup> Resp’ts Reply in Supp. of Mot. to Compel IME at 5 (Docket Item No. 16).

¶ 32 There is no witness testimony before the Court on this discrepancy. There is no exhibit in evidence whereby REOH stated it rejected Petitioner's request limiting disclosure of information. Because the only evidence before the Court on this issue is the HIPAA form itself, which clearly states Petitioner may notify REOH of her request limiting disclosure.

¶ 33 Analysis of the Informed Consent document prepared by REOH is more complex. The top half of the first page contains space for Petitioner to provide basic information that could be used to verify her identity, to contact her, and to schedule diagnostic tests on her preferred days/times. This is information appropriate and relevant to the handling of the claim. Therefore, Petitioner's privacy rights are not implicated and she is required to provide this information.

¶ 34 The first full paragraph is a statement explaining that the IME physician is not assuming care or future treatment. This is correct and important to establish an understanding between the parties of their respective roles.

¶ 35 The final paragraph on page 1 sets forth Petitioner's consent to participate in the IME under the listed conditions. This is a reasonable and necessary part of the examination. Petitioner may refuse to agree to these conditions, which is equivalent to refusal to attend an IME, with the associated consequences regarding benefits.

¶ 36 The first paragraph on page 2, which sets forth Petitioner's consent to release information, generated much of the substance during oral argument, and justifiably so. The language is confusing. Notwithstanding, the information sought to be released is specifically identified as healthcare information related to Petitioner's claim.

¶ 37 The first sentence reads, "You consent to our reviewing and/or furnishing of your claim related medical record information requested by your workers' compensation insurance carrier, attorneys, and/or healthcare providers." The Court interprets this to say that the IME provider may give claim related medical record information to the carrier, the attorneys of record in the case, and Petitioner's healthcare providers. This is consistent with the purposes of § 39-71-605, MCA, and in fact is the basic purpose of an IME, i.e., to provide medical information to the carrier and attorneys (on both sides) handling the case. Petitioner could notify REOH that she did not want her healthcare information released to her personal healthcare providers. Absent evidence to the contrary, presumably, REOH would comply with that request. This sentence is acceptable.

¶ 38 The second sentence reads, "You also consent to the release of your medical record information concerning your occupational or environmental injury/illness to REOH from your treating physician, other healthcare providers, and/or your employer." Petitioner was concerned that this allowed REOH to give healthcare information to her former employer. It does not. This sentence only authorizes the flow of information from the named entities to REOH.

¶ 39 The Court finds the information requested in the second sentence relevant and necessary for the IME physician to review in assessing Petitioner's condition. Petitioner may contact her treating physician or other healthcare providers and instruct them to limit the disclosure to information concerning her injury if she chooses. If relevant information is withheld pursuant to Petitioner's request, that will be considered by the eventual finder of fact. This sentence is acceptable.

¶ 40 The next section on page 2 sets forth information regarding diagnostic studies. Neither party raised a concern about this language in the briefing nor at oral argument. The Court finds that this section informs Petitioner of the process of obtaining, reviewing, and reporting on diagnostic studies. The Court finds that these studies may be a necessary part of the IME process, and that the language does not infringe on any privacy right of the Petitioner. This section is acceptable.

¶ 41 The final piece of this puzzle is the signature block. The first clause states that Petitioner may revoke consent at any time by written request, and that the consent automatically expires in one year. This does not impact Petitioner's privacy rights in any way. This clause is acceptable.

¶ 42 The next sentence asks Petitioner to state that she understands the above statements, and that she has reviewed the HIPAA Notice of Privacy Practices. The Court determines that Petitioner's signature is limited to those concepts. It means that she understands the language in the consent form, and that she has reviewed the HIPAA notice. Her signature does not mean that she agrees with the HIPAA notice, only that she has reviewed it. This clause is acceptable.

¶ 43 The above analysis leads to the conclusion that Petitioner is not being required to take any actions not reasonably necessary to complete an exam under § 39-71-605, MCA. Or, stated differently, the only action required by the Informed Consent document is relevant and appropriate to the handling of her claim. Accordingly, Petitioner is required to sign the provided Informed Consent document as part of the IME process.

### **Order**

¶ 44 Petitioner must attend an IME. Petitioner raised important privacy concerns as part of the IME process. Petitioner is required to sign the Informed Consent document as part of the IME process. However, Petitioner is not required to sign the Frequently Asked Questions document or take any action associated with the HIPAA Notice of Privacy Practices document.

DATED this 16<sup>th</sup> day of April, 2024.

(SEAL)

/s/ Lee Bruner  
Judge Lee Bruner

c: Matthew J. Murphy  
Steven W. Jennings and Marina A. Tucker

Submitted: March 11, 2024