

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 14

WCC No. 2017-4035

JODY ROSS

Appellant/Claimant

vs.

VICTORY INSURANCE CO., INC.

Appellee/Insurer.

ORDER REVERSING ORDER DIRECTING MEDICAL EXAMINATION

Summary: Claimant appeals an Order Directing Medical Examination, in which the DLI ordered her to attend a second IME with the insurer's chosen psychologist for the purpose of obtaining a neuropsychological evaluation to determine if she is a candidate for a spinal cord stimulator.

Held: The Order Directing Medical Examination is reversed. The Workers' Compensation Act does not allow an insurer to designate a psychologist to be both its independent medical examiner under § 39-71-605, MCA, and the consulting psychologist for claimant's treating physician under § 39-71-1101, MCA. At this time, the insurer has not established good cause for a second IME with its designated psychologist because claimant has not first undergone an evaluation with the treating physician's chosen psychologist.

¶ 1 Claimant Jody Ross appeals the Department of Labor and Industry's (DLI) Order Directing Medical Examination, made pursuant to § 39-71-605(2), MCA. Without explaining the reasoning for its decision, the DLI ordered Ross to attend a second independent medical examination (IME) with John Harrison, PhD, for the purpose of obtaining a neuropsychological evaluation to determine if Ross is a candidate for a spinal cord stimulator. This Court reverses the DLI's Order Directing Medical Examination.

Facts

¶ 2 The following facts are from the DLI's record,¹ statements of uncontested facts from the parties' briefs, and from the Exhibits the parties attached to their briefs on appeal.²

¶ 3 On April 10, 2013, Ross suffered shoulder and neck injuries in the course and scope of her employment. Victory accepted liability for her claim.

¶ 4 Ross treated with Kenneth Brewington, MD, who performed neck surgery on August 26, 2013. Because Ross continued to have shoulder pain, she treated with Larry Stayner, MD, who surgically repaired her left shoulder in September 2014. Dr. Stayner noted symptoms of complex regional pain syndrome (CRPS). Thus, Dr. Stayner referred Ross to Steve C. Kemple, DO, a pain specialist. Since the spring of 2014, Dr. Kemple has been Ross's treating physician for CRPS.

¶ 5 On May 11, 2015, Ross underwent an IME with John Schumpert, MD. Dr. Schumpert does not think Ross has CRPS. Instead, Dr. Schumpert believes Ross has somatic complaints.

¶ 6 On June 22, 2015, Dr. Stayner stated that while he agreed with Dr. Schumpert's opinion that Ross was at maximum medical improvement for her neck and shoulder injuries, he disagreed with Dr. Schumpert's opinions that Ross does not have CRPS and that her complaints are somatic. Dr. Stayner stated Ross clearly had signs of CRPS on her examinations.

¶ 7 In September 2015, Dr. Kemple considered a spinal cord stimulator for Ross and requested she undergo a neuropsychological evaluation with psychologist Terry Reed, PhD. Victory denied Dr. Kemple's request for a neuropsychological evaluation with Dr. Reed. Instead, Victory scheduled a neuropsychological IME with John R. Harrison, PhD.

¶ 8 Dr. Harrison conducted his IME on November 17, 2015. Dr. Harrison concluded that Ross has somatic complaints and was not then a candidate for a spinal cord stimulator. Dr. Harrison recommended additional counseling.

¶ 9 On January 8, 2016, Dr. Kemple agreed that Dr. Harrison's IME satisfied his request for a neuropsychological evaluation.

¶ 10 Ross underwent the counseling Dr. Harrison recommended.

¹ The DLI's record is filed as Docket Item No. 7, and also includes the DLI's record from Ross's petition for interim benefits under § 39-71-610, MCA, which Ross withdrew because the insurer Victory Insurance Co., Inc. (Victory), resumed paying temporary total disability benefits.

² In emails to the Clerk of Court dated July 31, 2017, and filed as Docket Item No. 11, the parties stipulated that, although they were not part of the DLI's record, this Court could review and rely upon these documents in making its decision.

¶ 11 On March 8, 2017, Dr. Kemple issued a Medical Status Form in which he stated his treatment plan for Ross included a neuropsychological evaluation and a spinal cord stimulator.

¶ 12 On April 3, 2017, Dr. Kemple sent a letter to Victory. *Inter alia*, Dr. Kemple explained that Ross should be evaluated by Dr. Reed, and not Dr. Harrison:

I also know that she is to follow back up with Dr. Harrison for another neuropsych evaluation. However, she has already been seen by him on 11/17/15 for a psych evaluation, so I would contend that we need to send her to Dr. Terry Reed whom I use for neuropsych evaluation and not send her back to Dr. Harrison whom she has seen once in the past and he thought that she had somatoform disorder. Let us see if the other psychologist feels that she has a somatoform disorder.

¶ 13 On June 5, 2017, Victory sent Ross a letter informing her it had scheduled her for another neuropsychological evaluation with Dr. Harrison. Victory stated the examination would last a day and a half.

¶ 14 Ross refused to attend the second IME with Dr. Harrison. Consequently, Victory petitioned the DLI for an order directing her to attend. Victory pointed out that the Montana Utilization and Treatment (U&T) Guidelines require a comprehensive psychiatric or psychological evaluation before a spinal cord stimulator trial. Because Dr. Harrison already knew Ross's history, Victory explained it "opted to stick with Dr. Harrison."

¶ 15 In her response, Ross argued, *inter alia*, that Victory cannot have Dr. Harrison be both an IME physician and a treating physician.

¶ 16 Without explaining its reasoning, the DLI ordered Ross to attend the IME, pursuant to § 39-71-605(2), MCA.

Law and Analysis

¶ 17 Section 39-71-605(1), MCA, provides that whenever "the right to compensation under this chapter would exist in favor of any employee, the employee shall . . . submit from time to time to examination by a physician, psychologist, or panel" However, an insurer's right to an IME is not absolute. This Court has stated that an IME is the most invasive form of discovery, that an IME implicates a claimant's constitutional rights, and, therefore, that an insurer must have good cause for an IME.³ This Court has previously explained: "an insurer is entitled to obtain a second, third, or even more IMEs . . . where there is an indication that claimant's medical condition has changed or there is some other sound reason for doing a repeat examination; for example, where the prior examination did not address the current medical issue."⁴

³ *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶ 25 (citations omitted).

⁴ *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

¶ 18 Victory asserts that good cause exists for a second IME with Dr. Harrison. First, Victory points to the U&T Guidelines, which require that a claimant undergo a neuropsychological evaluation before trying a spinal cord stimulator. Second, Victory cites § 39-71-605, MCA, and maintains it has the right to pick the psychologist who will conduct its IME. Third, Victory cites § 39-71-1101, MCA, and maintains it has the right to choose Ross’s treating physician. Taking these authorities together, Victory argues that it has the right to pick Dr. Harrison to be its IME examiner *and* Dr. Kemple’s consulting psychologist. Thus, it contends that the DLI correctly ordered Ross to attend the IME with Dr. Harrison, even though the order effectively allows him simultaneously to serve as its § 39-71-605, MCA, examiner and Dr. Kemple’s consulting psychologist, and which will give him the authority to determine whether Ross is a candidate for a spinal cord stimulator from a psychological standpoint.

¶ 19 Ross argues that Victory does not have good cause for a second IME with Dr. Harrison. *Inter alia*, Ross argues that Victory may not have a second IME with Dr. Harrison before she is seen by Dr. Kemple’s chosen psychologist, and that the Workers’ Compensation Act (WCA) does not allow Victory to designate Dr. Harrison to be both its IME examiner and Dr. Kemple’s consulting psychologist. This Court agrees.

¶ 20 Section 39-71-1101(2), MCA, imposes several responsibilities and duties upon a treating physician:

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. The designation or approved treating physician:

- (a) is responsible for coordinating the workers’ receipt of medical services as provided in 39-71-704;
- (b) shall provide timely determinations required under this chapter, including but not limited to maximum medical healing, physical restrictions, return to work, and approval of job analyses, and shall provide documentation;
- (c) shall provide or arrange for treatment within the utilization and treatment guidelines or obtain prior approval for other treatment; and
- (d) shall conduct or arrange for timely impairment ratings.

¶ 21 In contrast, § 39-71-605(2), MCA — the statute setting forth an IME examiner’s duties — provides that an examiner’s only duty is to “file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved.” Dr. Harrison indicated he will not assume the duties in § 39-71-1101, MCA. In his first IME report, Dr. Harrison used language, some version of which appears in nearly every IME report, indicating that he was not responsible for providing Ross with any treatment: “The patient was informed and understands that no doctor-patient relationship was established and that I cannot prescribe any medications or treatment.”

¶ 22 In this case, Dr. Kemple is Ross’s treating physician for her CRPS and, therefore, has the responsibility of coordinating Ross’s care and the duty to provide and arrange for

treatment within the U&T Guidelines. It is clear that Victory is not actually designating Dr. Harrison to be Ross' treating physician under § 39-71-1101, MCA, as Dr. Harrison is a psychologist and not a physician,⁵ and Victory does not intend for Dr. Harrison to become responsible for treating her, coordinating her care, or arranging for treatment within the U&T Guidelines. Rather, Victory is attempting to designate Dr. Harrison to be its § 39-71-605, MCA, examiner *and* Dr. Kemple's consulting psychologist, and to give Dr. Harrison the sole task of determining whether Ross is a candidate for a spinal cord stimulator from a psychological perspective.

¶ 23 Notwithstanding, because § 39-71-1101, MCA, states that the treating physician has the responsibility of coordinating the claimant's care and the duty to provide and arrange for treatment within the U&T Guidelines, an insurer may not dictate the provider who the treating physician must use for a required consultation nor designate a physician as both the claimant's treating physician and its § 39-71-605, MCA, examiner. Indeed, because of the conflicts that arise when a physician serves dual roles, this Court has previously rejected the opinions of physicians who did so.⁶ Accordingly, contrary to Victory's position, the WCA does not grant it the right to appoint Dr. Harrison to serve dual roles. Victory chose Dr. Harrison to conduct an IME, and that is his sole role. Because Dr. Kemple remains Ross's treating physician for her CRPS, he is "primarily responsible" for delivery and coordination of Ross's medical services and required to "provide or arrange for treatment within the utilization and treatment guidelines,"⁷ which includes choosing Ross's consulting psychologist.

¶ 24 Victory's claim that Dr. Kemple has not withdrawn his prior approval of Dr. Harrison is without merit. Dr. Kemple did not approve Dr. Harrison to be Ross's psychologist for the entirety of her claim. Rather, after Dr. Harrison opined that Ross was not then a candidate for a spinal cord stimulator and needed additional counseling, Dr. Kemple merely agreed that Dr. Harrison's examination satisfied his request for a neuropsychological evaluation at that time. Moreover, in a terse letter to Victory dated April 3, 2017, Dr. Kemple unambiguously set forth that he wants Dr. Reed, not Dr. Harrison, to be his consulting psychologist.

⁵ See § 39-71-116(41), MCA (defining "treating physician" as a licensed physician with admitting privileges at a hospital; a licensed chiropractor, a licensed physician's assistant if there is not a physician in the area; a licensed osteopath, a licensed dentist, and a licensed advanced practice registered nurse).

⁶ See *Rice v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 73 (noting the problem of a physician who started as a treating physician but then became an IME physician because the physician was "wearing two different hats and speaking out of both sides of his mouth"); *State Comp. Ins. Fund v. Vannett*, 1999 MTWCC 66, ¶¶ 26 – 30 (rejecting the opinion of a physician because of his obvious conflict of interest where the physician, in his role as a consultant to the Montana State Fund [State Fund], recommended an independent panel evaluation, and then served on the panel and sided with State Fund); see also *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, ¶ 9, 317 Mont. 30, 33, 75 P.3d 308, 311 (recognizing the bias that exists with some examiners: "Most certainly, the IME procedures of years past have experienced marked permutation. The mounting prevalence of the proverbial 'hired gun' has increasingly strained the 'nonadversarial' nature of court-ordered examinations."); and R. Rondinelli, M.D., Ph.D., *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (6th Edition Guides) (stating a treating psychologist should avoid serving as an IME examiner because, "The dual role can be detrimental to the therapeutic relationship, can be a considerable source of bias for the examiner, and can compromise the patient's legal claim.").

⁷ §§ 39-71-116(41), -1101(a), (c), MCA.

¶ 25 Victory's reliance on *Thompson v. Liberty Northwest Ins. Corp.*,⁸ for its argument that it has the right to choose the psychologist is misplaced because it does not address the situation in Ross's case. Thompson demanded that Liberty send him to a second IME because he disagreed with his treating physician's and the IME physician's opinions.⁹ This Court held that a claimant cannot force an insurer to obtain and pay for a second IME because it is the insurer that decides whether to obtain an IME under § 39-71-605, MCA.¹⁰ The opposite situation exists here. Victory seeks a second IME with Dr. Harrison, who it wants to be its IME examiner and Ross's consulting psychologist, because it disagrees with Ross's treating physician's choice. It is Ross who agrees with her treating physician and is opposed to a second IME with Dr. Harrison.

¶ 26 Likewise, Victory's reliance upon *Young v. Liberty Northwest Ins. Corp.*¹¹ is misplaced. Young's treating physician was a member of Liberty's managed care organization.¹² However, Young began treating with another physician who was not a member, and argued that Liberty should recognize that physician as her treating physician and provide the treatment he recommended.¹³ Applying the statutes regarding managed care organizations, this Court held that Young did not have the right to change treating physicians.¹⁴ However, this case does not involve a managed care organization. And, unlike the claimant in *Young*, Ross is not attempting to change treating physicians. Rather, she wants to follow her treating physician's recommendation.

¶ 27 Victory also argues that Dr. Reed should not be the consulting neuropsychologist because the U&T Guidelines state that the psychologist should not be an employee of the physician who proposes to implant the spinal cord stimulator, or otherwise affiliated with the physician. Aside from the fact that there is no evidence that Dr. Reed is employed by or affiliated with Dr. Kemple, the issue before this Court is limited to whether Victory is presently entitled to have a second IME with Dr. Harrison, not whether Dr. Reed is the psychologist who should perform the neuropsychological evaluation. If a dispute arises as to whether Dr. Reed is the appropriate psychologist to conduct the evaluation, this Court will decide it when it is properly before this Court.

¶ 28 In sum, Victory has not shown good cause, at this time, for a second IME with Dr. Harrison. Dr. Kemple is Ross's treating physician for CRPS. Dr. Kemple initially chose Dr. Reed to conduct the neuropsychological evaluation. Victory, however, refused to authorize a neuropsychological evaluation with Dr. Reed and instead chose Dr. Harrison as its § 39-71-605, MCA, examiner. While Victory argues that Ross cannot insist upon a new neuropsychologist "simply because she is hoping for a different opinion," she is not

⁸ 2004 MTWCC 16.

⁹ *Thompson*, ¶ 13.

¹⁰ *Thompson*, ¶ 17. *But see* § 39-71-605(2), MCA (stating that claimant can request this Court to order an IME for which claimant shall pay).

¹¹ 2000 MTWCC 51.

¹² *See Young*, ¶¶ 71 – 73.

¹³ *Young*, ¶¶ 5, 73.

¹⁴ *Young*, ¶¶ 80, 81.

doctor shopping. Rather, Ross asserts that she is not required to see Dr. Harrison for a second IME before she is first evaluated by a consulting psychologist. Ross's points are well taken, as an insurer may not deny a treating physician's request for authorization for a consultation required by the U&T Guidelines and dictate that a treating physician use the opinion of the insurer's § 39-71-605, MCA, examiner when determining whether a particular treatment is appropriate. Accordingly, the DLI erred in ordering Ross to attend a second IME with Dr. Harrison.¹⁵

Order

¶ 29 The DLI's Order Directing Medical Examination requiring Ross to attend an evaluation by Dr. Harrison is **reversed**.

¶ 30 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.

¶ 31 DATED this 21st day of September, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Dave P. Whisenand and Adrianna Potts
Thomas J. Murphy

Submitted: July 24, 2017

¹⁵ § 2-4-704(2), MCA (stating court may reverse when substantial rights of appellant have been prejudiced because, *inter alia*, the administrative decision is in violation of constitutional or statutory provisions, affected by other error or law, or clearly erroneous based on the record).