

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 10

WCC No. 2011-2670

JUAN SALAZAR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR PROTECTIVE ORDER

Summary: Petitioner moved for a protective order to prevent Respondent from obtaining an IME, arguing that Respondent does not have an absolute right to a "Rule 35 Examination," and that Respondent could have Petitioner's treating physician address Respondent's questions instead. Respondent argues that it is entitled to an IME under § 39-71-605, MCA, because Petitioner's condition has changed since it obtained a previous IME.

Held: Respondent is entitled to an IME under § 39-71-605, MCA. Salazar does not deny that his condition has changed, nor has he explained why he believes the Court should look to the Rules of Civil Procedure to the apparent exclusion of § 39-71-605(1)(a), MCA, in determining State Fund's entitlement to an IME.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605. Where a claimant does not dispute that his condition has changed since a previous IME, but contends without explanation that the insurer is not entitled to a "Rule 35" examination without addressing why he believes the Court should look to the Rules of Civil Procedure to the exclusion of § 39-71-605, MCA, the claimant's motion for a protective order to prevent the insurer from obtaining the IME is denied.

Discovery: Protective Orders. Where a claimant does not dispute that his condition has changed since a previous IME, but contends without explanation that the insurer is not entitled to a “Rule 35” examination without addressing why he believes the Court should look to the Rules of Civil Procedure to the exclusion of § 39-71-605, MCA, the claimant’s motion for a protective order to prevent the insurer from obtaining the IME is denied

¶ 1 Petitioner Juan Salazar moves for a protective order to prevent Respondent Montana State Fund (State Fund) from obtaining an independent medical examination (IME) of Salazar.¹ Salazar argues that State Fund does not have an absolute right to a “Rule 35 Examination” and that any questions State Fund may have should instead be addressed to Salazar’s treating physician.² Salazar asks this Court to issue an order protecting him from the IME.³

¶ 2 State Fund responds that Salazar has not set forth any rationale as to why the IME would result in “annoyance, embarrassment, oppression, or undue burden or expense” as set forth as potential grounds to deny discovery under M. R. Civ. P. 26(c). More pertinent to Salazar’s workers’ compensation claim, State Fund argues that it is entitled to an IME under § 39-71-605, MCA.⁴ State Fund contends that, although Salazar attended an IME in 2008, this occurred prior to his placement at maximum medical improvement (MMI). State Fund argues it is entitled to a new IME because since the earlier IME, Salazar’s treating physician placed him at MMI and released him to return to work, but then subsequently rescinded that decision, after which State Fund reinstated temporary total disability (TTD) benefits.⁵

¶ 3 State Fund argues that it is entitled to a current IME due to Salazar’s “changed circumstances” and also because Salazar’s counsel sent an “inflammatory letter” to the treating physician which causes State Fund to question the treating physician’s ability to render objective medical opinions.⁶

¹ Motion for Protective Order Pursuant to Rule 26(c), Mont. R. Civ. P., Docket Item No. 5.

² Brief in Support of Motion for Protective Order Pursuant to Rule 26(c), Mont. R. Civ. P. (Opening Brief) at 3, Docket Item No. 6.

³ Opening Brief at 4.

⁴ Response to Motion for Protective Order Pursuant to Rule 26(c), Mont. R. Civ. P. (Response Brief) at 1-2, Docket Item No. 8.

⁵ Response Brief at 3.

⁶ Response Brief at 4.

¶ 4 Section 39-71-605(1)(a), MCA, states:

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 physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.

¶ 5 This Court has previously held:

[A]n insurer is entitled to obtain a second, third, or even more IMEs or FCEs 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.⁷

¶ 6 Salazar does not deny that his condition has changed, nor has he explained why he believes the Court should look to the Rules of Civil Procedure to the apparent exclusion of § 39-71-605(1)(a), MCA, in determining State Fund's entitlement to an IME. Under the facts presented, State Fund is entitled to an IME. Therefore, I am denying Salazar's motion for a protective order.

ORDER

¶ 7 Petitioner's motion for a protective order is **DENIED**.

DATED in Helena, Montana, this 15th day of March, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Greg E. Overturf
Submitted: March 2, 2011

⁷ *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.