IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 43

WCC No. 2006-1614

STILLWATER MINING COMPANY

Petitioner/Insurer

vs.

KEITH BUNCH

Claimant/Respondent.

ORDER DENYING MOTION TO COMPEL IME

Summary: Petitioner moves to compel Respondent, who resides in Vail, South Dakota, to travel to Billings, Montana, for an independent medical examination.

Held: Petitioner's motion is denied. Petitioner may renew its motion provided it submits information to the Court consistent with the four factors set forth previously by this Court in *Mack.*

¶ 1 Petitioner moves this Court to compel Respondent, who resides in Vail, South Dakota, to travel to Billings, Montana, for an independent medical examination (IME).[1, 2] Respondent asserts that Billings is 290 miles from his home, while Rapid City, South Dakota, is approximately 50 miles from his residence and is the location of qualified medical providers who could conduct an IME if necessary.[3]

¶ 2 Petitioner argues that it is entitled to an IME because conflicting medical opinions exist as to the cause of Respondent's injury and his physical condition.[4] Petitioner asserts

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[1] A conference call was conducted on this matter on July 12, 2006, at which time the Court, in an oral ruling, denied Petitioner's motion to compel an IME of Respondent. This written Order follows the Court's oral ruling.

[2] Motion to Compel Independent Medical Examination and Brief in Support ("Motion to Compel").

[3] Respondent's Brief Opposing Independent Medical Examination ("Response").

[4] Motion to Compel at 4.

that under § 39-71-605, MCA, Billings is the appropriate venue for the IME because the law contemplates that the IME will take place in Montana and Billings is the closest Montana city to Respondent's residence which has qualified physicians available.[5] Petitioner further asserts that Respondent has been a patient of at least one Rapid City medical provider within each practice group of the three specialties from which Petitioner seeks an IME.[6]

¶ 3 Respondent argues that Petitioner misreads § 39-71-605, MCA, in that the statute does not state that a claimant may be required to travel to Montana to submit to an IME, but only that the claimant may be required to go to a panel of doctors "within the state." Respondent argues that "the state" is the state in which a claimant is located, and not necessarily the State of Montana. Respondent argues that if the Legislature had intended non-resident claimants to travel to Montana for their IMEs, the statute would so read. Respondent further argues that to insert such language where it does not exist would lead to absurd results, forcing claimants who live in even more distant parts of the country to travel to Montana for IMEs.[7]

¶ 4 The Court agrees with Petitioner that the only reasonable reading of the words, "the state," would be a reference to the State of Montana. However, this alone is not determinative since a complete reading of § 39-71-605(2), MCA, requires that an IME be conducted "within the state ***or elsewhere*** . . . ."[8] Essentially, this language poses no restrictions on where an IME may be conducted. Conversely, § 39-71-605(1)(b), MCA, mandates that the "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." In the present case, Petitioner argues that Billings is as close to the employee's residence as is practical. Petitioner asserts, among other reasons, that it cannot locate a suitable physician in Respondent's area of residence because, when scheduling an IME, it is Petitioner's practice not to use a doctor in the same office as a doctor with whom the claimant has treated. Although this may be Petitioner's practice, it is not a good cause criteria that has been recognized in prior case law in this Court, and the Court is not willing to adopt such a criteria in the present case.[9]

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[5] Motion to Compel at 5.

[6] Motion to Compel at 6; Stillwater Mining Co.'s Reply Brief in Support of Its Motion to Compel Independent Medical Examination ("Reply") at 1.

[7] Response at 4-5.

[8] (Emphasis added.)

[9] Minute Book Hearing No. 3726.

¶ 5 Petitioner relied upon *American Home Assurance Co. v. Thunstrom*[10] for the proposition that only a Montana physician may perform an IME barring a special showing that an out-of-state IME is necessary. Petitioner's reliance is misplaced. In *Thunstrom*, the claimant resided in Montana, and the insurer wished to compel the claimant to travel to Portland, Oregon, to undergo an IME.[11] This Court held that an out-of-state examination may only be ordered when examination by an appropriate specialist cannot be had in-state.[12] The Court further held that in attempting to compel an out-of-state IME, the burden is on the insurer to demonstrate that an appropriate IME cannot be had closer to the claimant's place of residence.[13] In the present case, Petitioner has failed to demonstrate that an appropriate IME cannot be had closer to Respondent's residence.

¶ 6 In *Mack v. Montana State Fund*,[14] this Court set forth four factors which it would like a party requesting an out-of-state IME to address to facilitate the Court's determination. Petitioner argues that the *Mack* factors are dicta, and furthermore apply only in situations in which the requested IME is to take place outside of Montana. Irrespective of whether these factors, as set forth in *Mack*, would constitute dicta, the Court finds them to be well-reasoned. Accordingly, the Court adopts them in the present case in determining whether the mandates of § 39-71-605(1)(b), MCA, have been complied with.[15]

¶ 7 Consistent with the adoption of the *Mack* factors, this Court requires a showing as to the nature of the examiners' expertise and how that expertise is related and important to the medical issues in this case. It is also necessary to show why all three of the IME doctors selected by Petitioner are necessary. Regarding the second *Mack* factor, Petitioner must explain how, if there are physicians located in Respondent's area of residence or closer than the location of the IME with the same specialty, the particular IME doctors chosen have additional expertise or qualifications which would make them more qualified than examiners nearer to Respondent's residence. Regarding the third *Mack* factor, the Court requires the proposed IME doctors to set forth a statement explaining why an actual examination, as opposed to a records review, is necessary. Regarding the fourth *Mack* factor, Petitioner must set forth information regarding the experience of the proposed IME doctors as expert witnesses to assist this Court in assessing their impartiality.

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[10] *American Home Assurance Co. v. Thunstrom*, 2002 MTWCC 39.

[11] *Thunstrom*, ¶ 1.

[12] *Thunstrom*, ¶ 6.

[13] *Thunstrom*, ¶ 8.

[14] *Mack v. Montana State Fund*, 2005 MTWCC 28, ¶ 10.

[15] Minute Book Hearing No. 3726.

¶ 8 Petitioner has not addressed the *Mack* factors in this case. However, the Court will entertain a renewed motion to compel if Petitioner sets forth information sufficient to satisfy these factors.[16] Regarding the present motion, however, Petitioner's motion is **DENIED**.

ORDER

¶ 9 The motion to compel the Respondent to submit to an IME is **DENIED**.

DATED in Helena, Montana, this 21st day of December, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Joe C. Maynard
Heather A. McDowell
Chris J. Ragar
Submitted: July 12, 2006

[16] Minute Book Hearing No. 3726.