IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 5

WCC No. 2017-3961

RICHARD WAYNE SUMMERS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORP.

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR DECLARATORY RULING

Summary: Petitioner moves this Court to declare that Respondent is not entitled to an IME in this matter on the grounds that a medical records review which Respondent obtained constitutes an "IME" under § 39-71-605, MCA, and that Respondent has no good cause to obtain a second IME. Respondent objects to Petitioner's motion, contending that a records review is not an "IME" under the statute and arguing that it has good cause for an IME where there is a dispute as to the work-relatedness of Petitioner's carpal tunnel syndrome.

Held: Petitioner's motion is denied. This Court has previously ruled that a medical records review is not an IME, and the language of § 39-71-605, MCA, clearly contemplates a physical examination. Where causation is disputed, Respondent desires the IME for the purpose of obtaining a causation opinion, and Respondent has not previously obtained an IME, Respondent has demonstrated good cause.

¶ 1 Petitioner Richard Wayne Summers moves this Court for a ruling declaring that Respondent Liberty Northwest Insurance Corp. (Liberty) is not entitled to an independent medical examination (IME) in this matter. Liberty opposes Summers' motion.

Facts and Procedural History

¶ 2 On August 4, 2016, Summers filed an occupational disease claim, alleging that he developed bilateral carpal tunnel syndrome in the course of his employment as a truck driver for Selway Corporation.

¶ 3 On September 12, 2016, Liberty's claims adjuster Sandy Scholl informed Summers that pursuant to § 39-71-615, MCA,[1] Liberty would pay his medical bills without accepting liability at that time.

¶ 4 On September 14, 2016, Timothy Woods, MD, saw Summers for a "work related claim of bilateral carpal tunnel syndrome."

¶ 5 On September 29, 2016, electrodiagnostic testing confirmed Dr. Woods' diagnosis of bilateral carpal tunnel syndrome.

¶ 6 On October 4, 2016, Margaret Cook-Shimanek, MD, MPH, issued a Report of Medical Record and Literature Review pursuant to Scholl's request. Dr. Cook-Shimanek did not physically examine Summers. She reviewed Dr. Woods' September 14, 2016, medical record and investigated whether existing medical literature supported Summers' claim that his truck-driving job caused his carpal tunnel syndrome. Dr. Cook-Shimanek found "a paucity of literature specifically addressing truck driving as a risk factor," and further noted that additional information about Summers' medical history and a description of his time-of-injury job would be helpful in determining if his carpal tunnel syndrome was work-related.

¶ 7 On October 20, 2016, Scholl wrote to Dr. Woods and posed questions about whether Summers' carpal tunnel syndrome was work-related. Among other questions, Scholl asked Dr. Woods if he could state, with a reasonable degree of medical probability, that a causal relationship exists between Summers' employment and his carpal tunnel syndrome. Dr. Woods responded that he could not so state. Scholl used Dr. Woods' responses to justify denying liability for Summers' claim on November 4, 2016.

¶ 8 On December 21, 2016, Summers' counsel wrote to Dr. Woods and asked him to render opinions as to whether Summers' carpal tunnel syndrome was work-related. After Dr. Woods responded that it was, Liberty asked Summers to attend an IME with Emily Heid, MD. Summers refused to attend on the grounds that Dr. Cook-Shimanek's records review constituted an IME and argued that Liberty did not have good cause to seek "another" IME. This motion followed.

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[1] The 2015 Workers' Compensation Act applies to Summers' claim since that was the law in effect on the day he filed his occupational disease claim. *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8; *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

Analysis

¶ 9 An insurer's right to obtain an IME is controlled by § 39-71-605, MCA, which states in relevant part:

> (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 the written request of the insurer, submit from time to time to examination . . . .
>
> (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. . . . The employee is entitled to have a physician present at any examination. . . .
>
> (2) In the event of a dispute concerning the . . . cause or causes of the injury or disability, . . . 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 . . . .

¶ 10 The plain purpose of § 39-71-605, MCA, is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, current medical condition, need for further treatment, and the relationship of the condition to the occupational disease.[2] However, an insurer's right to an IME is not unlimited.[3] This Court, pursuant to § 39-71-605(2), MCA, and M.R.Civ.P. 35(a), will order an IME only for good cause shown.[4]

¶ 11 Summers argues that Dr. Cook-Shimanek's review of Dr. Woods' treatment note constitutes an "IME" within the meaning of § 39-71-605, MCA, and that this Court should not permit Liberty to seek "another" IME at this time. Summers relies on *MacGillivray v. Montana State Fund*, in which this Court ruled that an insurer's pursuit of a second IME was not warranted where the claimant's condition had not changed since the previous IME and this Court found that the insurer was motivated to seek a second IME merely to bolster the opinions of the first IME physician.[5] Summers argues that *MacGillivray* is applicable here, because Liberty is seeking "another" IME in order to bolster the opinions of Dr. Cook-Shimanek.

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[2] *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

[3] *Id*.

[4] *MacGillivray v. Montana State Fund*, 2016 MTWCC 13, ¶ 32 (citing *Whitford v. Montana State Fund*, 2006 MTWCC 11, ¶ 6).

[5] *MacGillivray*, ¶ 34.

¶ 12 However, Summers' reliance on *MacGillivray* is misplaced. As Liberty points out in its response brief, this Court has previously ruled that a records review is not an IME.[6] Furthermore, the language of § 39-71-605, MCA, indicates that the legislature contemplated a physical examination of the claimant as part of the IME. Section 39-71-605(1)(a), MCA, requires a claimant to "submit . . . to [an] examination," while § 39-71-605(1)(b), MCA, specifies the conditions under which such examination may be had – none of which conditions would be necessary if the "examination" did not include a physical examination of the claimant.

¶ 13 In *Whitford v. Montana State Fund*, this Court considered § 39-71-605(2), MCA, and the requirements of M.R.Civ.P. 35(a) and found good cause existed to order the claimant to submit to an IME where: a dispute existed regarding causation; the insurer had requested an IME for the purpose of obtaining a causation opinion; and the insurer had not previously sought an IME.[7] The same facts exist in the present case.

¶ 14 Summers attempts to raise factual disputes as grounds to disallow Liberty's requested IME. For example, Summers points out that Scholl sent Dr. Cook-Shimanek only a single treatment note, and that objective medical findings support Dr. Woods' diagnosis of carpal tunnel syndrome. None of these contentions change Liberty's entitlement to obtain an IME for the purpose of investigating causation. Furthermore, although Summers complains about the propriety of certain questions Liberty posed to Dr. Woods, this goes to the issue of whether Liberty's handling of Summers' claim was reasonable; it does not negate Liberty's right to obtain an IME pursuant to § 39-71-605, MCA.

¶ 15 Finally, although Liberty argues in response that Summers' counsel's position exceeds the bounds of legitimate advocacy in accordance with § 39-71-2914, MCA, this Court disagrees. While Summers' position is unconvincing, this Court sees no evidence that the legal argument was made in bad faith, nor that the motion was interposed for any improper purpose so as to meet the criteria of § 39-71-2914(3), MCA.[8]

¶ 16 For the foregoing reasons, this Court will not issue the declaratory ruling Summers seeks.

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[6] *See In re Estate of Hirth*, 2012 MTWCC 47, ¶ 6.

[7] *Whitford*, ¶ 5.

[8] *See Briese v. Ace Am. Ins. Co.*, 2009 MTWCC 5, ¶ 24 (Court characterized party's arguments as "plausible" and saw no evidence that such arguments were interposed for an improper purpose); *Chippewa v. Uninsured Employers' Fund*, 2012 MTWCC 39, ¶ 16 (although Court did not find party's position well-founded and counsel could have conducted better research prior to making such arguments, Court did not believe party made such argument for the purpose of causing unnecessary delay or a needless increase in the cost of the litigation).

Order

¶ 17 Summers' motion for declaratory ruling is **DENIED**.

DATED this 1st day of May, 2017.

(SEAL) /s/ DAVID M. SANDLER
JUDGE

c: Eric Rasmussen
Kelly M. Wills

Submitted: April 21, 2017