

DA 18-0400

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 275

MICHAEL NEISINGER,

Petitioner and Appellee,

v.

NEW HAMPSHIRE INS. CO.,

Respondent and Appellant.

APPEAL FROM: Montana Workers' Compensation Court, WCC No. 2017-4143
Honorable David M. Sandler, Presiding Judge

COUNSEL OF RECORD:

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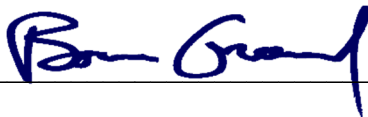
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Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 New Hampshire Insurance Company (New Hampshire) appeals from an Order of the Workers' Compensation Court (WCC) reversing in part and affirming in part the Montana Department of Labor and Industry (DLI) Order Directing Medical Examination.

¶2 We address the following issues:

Issue One: Whether Neisinger's complaints of anxiety and insomnia provide a basis to require a psychiatric examination pursuant to § 39-71-605, MCA, before it is established that the complaints are related to his workers' compensation claim.

Issue Two: Whether New Hampshire must authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary before it can obtain a psychiatric examination pursuant to § 39-71-605, MCA.

¶3 We affirm in part, reverse in part, and remand for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶4 On May 27, 2015, Michael Neisinger was injured in the course of his employment when a high-pressure stream of water hit his left thigh and knocked him off a platform. Neisinger suffered several injuries to his left leg, including a rupture of his quadriceps tendon.

¶5 New Hampshire provides workers' compensation insurance for Neisinger's employer. New Hampshire accepted liability for Neisinger's left leg injury. Neisinger sought treatment for his injury with Dr. John Ortiz and Dr. James Elliot.

¶6 On June 15, 2016, Neisinger underwent a medical examination pursuant to § 39-71-605, MCA, (§ 605 exam) with Dr. Joseph Erpelding, an orthopedist retained by

New Hampshire. Dr. Erpelding determined that Neisinger was at maximum medical improvement (MMI) for his leg injuries and assigned a five percent whole person impairment rating. On August 18, 2016, Dr. Elliot agreed with Dr. Erpelding's opinion that Neisinger had reached MMI and that Neisinger should limit his use of stairs and ladders and should avoid squatting.

¶7 On October 26, 2017, Neisinger returned to Dr. Elliot and reported an increase in left knee pain. Dr. Elliot noted that (1) Neisinger presented with knee pain since his leg surgery, and (2) Neisinger had a recent event at a grocery store where his knee gave out, resulting in severe pain. Dr. Elliot concluded Neisinger needed additional medication to control his pain and referred Neisinger to Dr. S. Dante Oriente, a pain management specialist. Dr. Elliot requested pre-authorization for Neisinger to be seen by a pain management doctor.¹ New Hampshire authorized the referral to a pain management specialist and, on February 8, 2018, Neisinger saw Dr. Oriente for pain management. Dr. Oriente assessed Neisinger, and in his treatment plan for Neisinger stated:

This is a case of a [] male being seen in clinic for chronic left knee pain status post left quadriceps surgical repair and chronic low back pain radiation down left leg greater than right. [Neisinger] also complains of anxiety disorder with sleep disturbance for which I recommended psychologist/psychiatrist referral.

¶8 In response to Dr. Oriente's recommendation that Neisinger undergo a psychological or psychiatric evaluation, New Hampshire declined to authorize such a

¹ In the interim, Neisinger asserted he had a lower back injury stemming from the 2015 workplace accident. New Hampshire denied liability for the lower back injury. On November 9, 2017, Neisinger filed a Petition for Hearing before the WCC. The WCC conducted a trial on July 11, 2018, and a decision is pending.

referral. Instead, on February 12, 2018, New Hampshire scheduled a § 605 exam with Dr. Spencer Greendyke, an orthopedist, and Dr. William Stratford, a psychiatrist.

¶9 On February 16, 2018, Neisinger notified New Hampshire that he would not attend the § 605 exam. New Hampshire then requested an order from DLI directing Neisinger to attend the exam with Dr. Greendyke and Dr. Stratford. Neisinger objected, asserting that (1) New Hampshire did not have good cause for a second § 605 exam, and (2) New Hampshire failed to address the statutory elements in its request for an order compelling a § 605 exam as required by § 39-71-605(1), MCA, including the requirement that it set forth the place and time for the exam and requiring a § 605 exam by a doctor (Dr. Greendyke) who does not have admitting privileges to any Montana hospital. New Hampshire cancelled the § 605 exam and, on March 19, 2018, DLI issued an Order denying New Hampshire's Request for Medical Examination as moot.

¶10 On March 21, 2018, New Hampshire scheduled another § 605 exam for April 13, 2018, with Dr. Stratford and Dr. Mark Rotar, an orthopedist. New Hampshire requested that DLI order Neisinger to attend the § 605 exam panel. On March 27, 2018, DLI issued its Order Directing Medical Examination pursuant to § 39-71-605, MCA, stating in relevant part:

Upon a . . . review of the information submitted on [Neisinger], [DLI] concludes [Neisinger] should be examined by [Dr. Stratford and Dr. Rotar] for a diagnostic update of [Neisinger's] medical problems attributable to [his] industrial injury of 05/27/2015.

¶11 On April 2, 2018, Neisinger appealed DLI's Order to the WCC. On July 13, 2018, the WCC issued an Order Reversing in Part and Affirming in Part [DLI's] Order Directing

a Medical Examination. The WCC concluded that New Hampshire did not have good cause to require Neisinger to attend a § 605 exam with Dr. Stratford. The WCC's Order stated in relevant part:

The plain purpose of [§] 39-71-605, MCA, is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, his or her current medical condition and need for further treatment, ***and the relationship of the claimant's condition to the industrial injury or disease.***

[A]llowing New Hampshire to have (a § 605 exam) before Neisinger can see a psychiatrist or psychologist who would provide treatment, ***if the condition is claim-related*** and treatment is necessary, would tip the balance too far in New Hampshire's favor. By seeking an examination with Dr. Stratford at this stage, New Hampshire is asking Dr. Stratford to make the decision as to whether Neisinger's conditions are compensable, on which New Hampshire will rely. . . .

Thus, to balance Neisinger's right to an evaluation by a psychiatrist or psychologist who owes him a duty of care, and would provide treatment if necessary, and New Hampshire's right to obtain independent opinions and information, New Hampshire must first authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary.

(Emphasis added.)²

² The WCC also concluded DLI correctly determined that New Hampshire had good cause to require Neisinger to attend a § 605 exam with orthopedist Dr. Rotar. The WCC reasoned that Neisinger's leg condition had arguably changed, the previous § 605 exam was two years ago, and Neisinger's treating physicians could comment on Dr. Rotar's opinions, thereby balancing Neisinger's and New Hampshire's rights.

STANDARDS OF REVIEW

¶12 Pursuant to Admin. R. M. 24.5.350 (2019) and the Montana Workers' Compensation Act (WCA), a party may appeal a decision by DLI to the WCC. The WCC reviews DLI decisions under § 2-4-704(2), MCA. Although the WCC “may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact,” the WCC may reverse or modify a DLI decision if a party's substantial rights have been prejudiced because:

- (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (b) findings of fact, upon issues essential to the decision, were not made although requested.

Section 2-4-704(2), MCA.

¶13 This Court reviews the WCC's conclusions of law for correctness. *Mont. State Fund. v. Liberty Nw. Ins. Co.*, 2018 MT 188, ¶ 12, 392 Mont. 221, 425 P.3d 646; *Flynn v. Mont. State Fund*, 2011 MT 300, ¶ 9, 363 Mont. 55, 267 P.3d 23 (citations omitted). Interpretation and construction of a statute is a matter of law. *Madrid v. Zenchiku Land & Livestock*, 2002 MT 172, ¶ 5, 310 Mont. 491, 51 P.3d 1137.

DISCUSSION

¶14 *Issue One: Whether Neisinger’s complaints of anxiety and insomnia provide a basis to require a psychiatric examination under § 39-71-605, MCA, before it is established that the complaints are related to his workers’ compensation claim.*

¶15 Under the WCA, insurers are liable for the payment of compensation to the employee of an employer covered under a designated plan who sustains an injury arising out of and in the course of employment. Section 39-71-407(1), MCA. A claimant “bears the burden of proving by a preponderance of the evidence that he is entitled to the workers’ compensation benefits sought.” *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 34, 365 Mont. 405, 282 P.3d 687 (citing *Simms v. State Comp. Ins. Fund*, 2005 MT 175, ¶ 13, 327 Mont. 511, 116 P.3d 773). “This includes establishing a ‘causal connection’ between his injury and the right to benefits.” *Ford*, ¶ 34 (citing *Fellenberg v. Transp. Ins. Co.*, 2005 MT 90, ¶ 16, 326 Mont. 467, 110 P.3d 464; *Narum v. Liberty NW Ins. Co.*, 2009 MT 127, ¶ 28, 350 Mont. 252, 206 P.3d 964); *Best v. State Comp. Ins. Fund*, 276 Mont. 302, 305, 916 P.2d 108, 110 (1996) (citations omitted).

¶16 Section 39-71-605, MCA, of the WCA sets forth procedures for an insurer to obtain a medical examination of a claimant. It provides, in pertinent 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 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 [DLI] 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[, MCA]. 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, [DLI] or the [WCC], at the request of the claimant or insurer . . . 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. . . .

Section 39-71-605, MCA; *Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 24, 393 Mont. 178, 430 P.3d 69.

¶17 In *Robinson*, this Court affirmed the constitutionality of § 39-71-605, MCA, and emphasized the importance of § 605 exams to the orderly and effective administration of the workers' compensation process. *Robinson*, ¶¶ 23-25. The Legislature intended the WCA to be primarily self-administering, and insurers may "obtain [§ 605 exams] without having to petition the court, make a showing of good cause, and obtain an order." *Robinson*, ¶¶ 23-24 (citing §§ 39-71-105(4), -605(1)(b), MCA). This differs from the procedures for a party to obtain a physical or mental examination in civil litigation. *Robinson*, ¶ 23; M. R. Civ. P. 35 (requiring the requesting party to make a showing of "good cause" for the examination).

¶18 We also acknowledged in *Robinson* that the WCA balances the insurer’s right to a § 605 exam by providing protections for a claimant who believes an insurer is abusing the § 605 exam process. *Robinson*, ¶¶ 24-25. Among those statutory protections, we noted that “while an objecting claimant who refuses to attend an examination may be subject to suspension of her benefits, that suspension is a ‘termination of compensation benefits’ subject to an order by the [DLI] granting interim benefits to the claimant pending further review of the dispute by the [WCC].” *Robinson*, ¶ 24. If the WCC ultimately determines that the insurer unreasonably delayed, denied, or terminated benefits, the court may award costs and attorney fees, § 39-71-611, MCA, and increase the claimant’s award by twenty percent, § 39-71-2907, MCA. We further observed that a claimant may pursue a claim for bad faith against an abusive insurer. *Robinson*, ¶ 23 (citing *White v. State*, 2013 MT 187, ¶ 24, 371 Mont. 1, 305 P.3d 795).

¶19 In this case, the WCC held that New Hampshire did not have good cause at this juncture for a § 605 exam with psychiatrist Dr. Stratford. Because of the potential for bias, the WCC concluded that New Hampshire may not force Neisinger to attend a § 605 exam with a psychiatrist of its choosing before Neisinger is able to see a psychiatrist or psychologist who would evaluate him and provide treatment if necessary. The WCC speculated that if Neisinger saw a psychiatrist or psychologist who diagnoses him with a compensable condition, New Hampshire might then contest those conclusions and have good cause to obtain a § 605 exam.

¶20 New Hampshire argues that the WCC erred when it failed to apply the provisions of § 39-71-605(1), MCA, which expressly allow an insurer to obtain a medical evaluation “[w]henever in case of injury the right to a compensation would exist in favor of any employee.” New Hampshire argues the WCC erred when it relied on case law applying M. R. Civ. P. 35, rather than the language of § 39-71-605, MCA, which has no “good cause” requirement, and when it ruled that New Hampshire could not obtain a psychiatric evaluation until after it had first authorized and paid for treatment. Consequently, New Hampshire argues, the WCC exceeded its statutory jurisdiction by imposing a limitation on the insurer’s right to obtain a § 605 exam that is not contained in the WCA.

¶21 Neisinger responds that New Hampshire improperly scheduled a psychiatric § 605 exam before Neisinger knew if he even had a psychological condition. Accordingly, Neisinger argues any psychiatric or psychological issue was not ripe for a § 605 exam, and the WCC properly used its authority to redirect its timing. Neisinger also argues the WCC correctly rejected New Hampshire’s suggestion that it could accept liability for an injury and then use a § 605 exam to determine which, if any, treatments it would be liable for under § 39-71-704, MCA.

¶22 As noted above, Neisinger’s treating physician, Dr. Elliot, referred Neisinger to a pain specialist, Dr. Oriente. New Hampshire approved that referral. After examining Neisinger, Dr. Oriente noted that Neisinger complained of “anxiety disorder with sleep disturbance for which I recommended psychologist/psychiatrist referral.” Nothing in Dr. Oriente’s notes, however, even remotely suggest a causal relationship between Neisinger’s

anxiety and insomnia and his industrial injury. In fact, as New Hampshire correctly notes—and Neisinger does not dispute—“Dr. Oriente did not actually diagnose anxiety, depression, or insomnia.” Just because Neisinger’s anxiety and insomnia were noted during an examination that was paid for by the insurer, without more, does not provide a basis for a § 605 exam. As we noted in *Robinson*, 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.” *Robinson*, ¶¶ 27, 30 (citations omitted). An insurer is not entitled to a § 605 exam where, as is the case here, nothing indicates a condition or diagnosis is related to the accepted claim. *See* § 39-71-605, MCA.

¶23 The WCC incorrectly imputed the “good cause” requirement of M. R. Civ. P. 35 to the standard applicable under § 39-71-605, MCA. *See Robinson*, ¶ 23. However, a § 605 exam must nevertheless be “for purposes relevant to [the] claim” and “appropriate to the handling of the claim.” *Robinson*, ¶ 30. Because nothing at this juncture suggests that Neisinger’s complaints of anxiety and insomnia are causally related to his accepted claim, we affirm the WCC’s denial of New Hampshire’s request for a § 605 exam. *See State v. Ellison*, 2012 MT 50, ¶¶ 8, 20, 364 Mont. 276, 272 P.3d 646 (this Court will affirm a lower court when it reaches the right result, even if it reaches the right result for the wrong reason).

¶24 *Issue Two: Whether New Hampshire must authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary before it can obtain a psychiatric examination pursuant to § 39-71-605, MCA.*

¶25 Under the WCA, an insurer must provide medical benefits for conditions that are a direct result of the compensable injury. Section 39-71-704(1)(a), MCA. *See also* § 39-71-105(6)(a), -119(1), MCA (defining scope of “injury” under WCA); *Narum*, ¶¶ 28-29 (affirming a WCC decision that a claimant’s hip surgery was covered under the WCA after claimant showed his work accident aggravated his degenerative hip condition); *Meidinger v. W. Energy Co.*, 254 Mont. 18, 23-24, 834 P.2d 1382, 1385-86 (1992) (affirming a WCC decision that a claimant who suffered a compensable work-related physical injury was also entitled to compensation for the resulting psychological condition). An insurer is liable for an injury if the claimant’s injury is established by “objective medical findings” that “contain sufficient factual and historical information concerning the relationship of the [claimant’s] condition to the original injury.” Section 39-71-407(3)(a), (10), MCA. “Objective medical findings” are medical evidence, “including . . . diagnostic evidence, substantiated by clinical findings.” Section 39-71-116(22), MCA.

¶26 In this case, the WCC held that to balance Neisinger’s rights with New Hampshire’s rights, New Hampshire should have first authorized Neisinger to see a treating psychiatrist or psychologist who could evaluate him and provide treatment if necessary. The WCC concluded that allowing New Hampshire’s psychiatrist, Dr. Stratford, to evaluate Neisinger

at this stage would serve only to bias the diagnostic result and to delay Neisinger's treatment—a result that runs counter to the policies undergirding the WCA.

¶27 New Hampshire argues the WCC erred when it reversed DLI's Order and ruled that New Hampshire must first pay for a medical examination and treatment of a disputed condition—Neisinger's complaints of anxiety and insomnia—prior to obtaining a § 605 exam. New Hampshire also argues that the WCC's "balancing" of Neisinger's and New Hampshire's rights was fundamentally flawed because a claimant is not entitled to any benefits, including a medical evaluation, until he satisfies his burden of proof. *See Ford*, ¶ 34.

¶28 New Hampshire also argues its due process rights were violated. In concluding that New Hampshire must first pay for evaluation and treatment of Neisinger's complaints of anxiety and insomnia before it can obtain a § 605 exam, the WCC essentially made a judicial determination that New Hampshire was liable for the disputed condition without a hearing or fact-finding process. New Hampshire argues the WCC's determination constituted an impermissible deprivation of New Hampshire's liberty and property interests in violation of its constitutional right to due process.

¶29 Neisinger responds that New Hampshire accepted liability for his employment-related injury, and the WCC was right to reject New Hampshire's proposal that it could use a § 605 exam to determine which, if any, treatments it would be liable for under § 39-71-704, MCA. Neisinger argues his case is similar to a differential diagnosis

situation in which a medical professional utilizes a myriad of tests and treatments to rule out other potential injuries.³

¶30 Neisinger argues that the cost of the psychiatric evaluation is “miniscule” in comparison to the cost of denying a claim, and that New Hampshire failed to offer evidence or argument that the financial burden of the cost of an initial psychological evaluation would be significant. Finally, Neisinger argues New Hampshire did not raise constitutional issues below and should not be allowed to bring a due process claim at this stage.

¶31 A workers’ compensation claimant has the statutorily imposed burden of proving he is entitled to benefits. Section 39-71-407(3)(a), MCA. This includes proving an injury or condition is causally related to the workplace injury. *See Ford*, ¶ 34; *Best*, 276 Mont. at 305, 916 P.2d at 110. Neither party disputes that, at this juncture, nothing suggests that Neisinger’s anxiety and insomnia are in any way causally related to his work-related injury. Indeed, in his briefing before this Court, Neisinger maintains that he does “not know if he [has] a psychological condition, whether it [is] claim[-]related, or if it require[s] treatment.” Just as that lack of established causal relationship does not provide New Hampshire with a

³ Despite Neisinger’s suggestion, his case is distinguishable from a differential diagnosis situation, whereby medical professionals consider the possible causes of a patient’s clinical findings before making a final diagnosis. *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003) (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (a differential diagnosis is a “standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. . . .”); *Otto v. Newfield Explor. Co.*, CV15-66-BLG-SPW, 2016 U.S. Dist. LEXIS 176775, *6 (D. Mont. Dec. 21, 2016); *Young’s Case*, 833 N.E.2d 646, 649 (Mass. Ct. App. 2005) (citations omitted). At this stage, Neisinger does not have a diagnosis, only a referral, and there is no established condition, much less a condition that is potentially claim-related.

basis to require Neisinger to undergo a § 605 psychological exam, it also does not obligate New Hampshire to pay for treatment of a condition that is unrelated to the accepted claim. Section 39-71-407(3)(a), (10), MCA; *Ford*, ¶ 34. The WCC sought to fashion an equitable remedy that would “balance Neisinger’s right to an evaluation by a psychiatrist or psychologist who owes him a duty of care, and would provide treatment if necessary, [with] New Hampshire’s right to obtain independent opinions and information.” However, because nothing suggests that Neisinger’s anxiety and insomnia are causally related to his industrial injury, the WCC had no basis within the framework of the WCA to order New Hampshire to “first authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary.”⁴

¶32 Finally, Neisinger suggests that the “miniscule” cost of the psychiatric evaluation in comparison to the cost of denying a claim should weigh in favor of coverage at this initial stage. Although, in this instance, the cost of the psychiatric evaluation may be small in comparison to the larger claim cost, the cost of treatment is not the issue. The question, rather, is whether the treatment is claim-related. *See* § 39-71-704, MCA. If it is established that the treatment is ultimately for a claim-related injury, New Hampshire would be responsible for coverage, for which cost is not the determining factor. *See* §§ 39-71-407(10), -704(1)(a), MCA; *Meidinger*, 254 Mont. at 23-24, 834 P.2d at 1385-86.

⁴ Because it has not yet been established whether Neisinger’s anxiety and insomnia are at all causally related to his workers’ compensation claim, he obviously does not need New Hampshire’s “authorization” to seek evaluation and treatment regarding these conditions outside the framework of his workers’ compensation claim.

¶33 The WCC erred when it concluded that New Hampshire must first pay for a medical examination and treatment of Neisinger's complaints of anxiety and insomnia before New Hampshire could obtain a § 605 exam. We reverse the WCC's decision on this issue.

¶34 We decline to analyze New Hampshire's due process arguments because we reverse the WCC on statutory grounds. *See State v. Ellerbee*, 2019 MT 37, ¶ 21 n. 1, 394 Mont. 289, 434 P.3d 910; *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1079 (courts should avoid constitutional issues whenever possible).

CONCLUSION

¶35 The WCC correctly held that Neisinger should not be compelled to attend a psychiatric examination pursuant to § 39-71-605, MCA, before it is established that his complaints of anxiety and insomnia are causally related to his workers' compensation claim. The WCC erred when it held that New Hampshire must authorize Neisinger to see a psychiatrist or psychologist who will evaluate him and provide treatment if necessary before it can obtain a psychiatric examination pursuant to § 39-71-605, MCA.

¶36 The WCC's Order is affirmed in part and reversed in part. We remand for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON