

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 11

WCC No. 2006-1540

JAMES WHITFORD

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

**ORDER GRANTING MOTION TO REQUIRE
INDEPENDENT MEDICAL EXAMINATION**

Summary: Respondent has requested Petitioner to submit to an independent medical examination pursuant to § 39-71-605(2), MCA (2005), and Petitioner has refused. The basis for Petitioner's refusal is his contention that his occupational disease claim predated the repeal of § 39-72-602, MCA (2003), which, Petitioner contends, controls in the present case. Petitioner also contends that Respondent should be precluded by the doctrines of waiver or estoppel from seeking an IME pursuant to § 39-71-605(2), MCA (2005), because Respondent was aware that Petitioner had sought an evaluation through the Department of Labor and Industry pursuant to § 39-72-602, MCA (2003), and failed to object to this process.

Held: Respondent's motion is granted. Because the law pertaining to independent medical examinations is procedural, the current statute applies and Respondent is entitled to an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Respondent was under no affirmative obligation to object to the panel examination and its failure to do so neither constitutes a waiver of Respondent's right to seek an independent medical examination nor does it estop Respondent from seeking an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Although an insurer's right to an independent medical examination is not unlimited, good cause exists in the present case to require Petitioner to submit to one.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: § 39-71-605. Although Petitioner claimed Respondent cannot avail itself of this statute because occupational disease claims allegedly were not brought under the purview of this section until 2005, the *Buckman* rule has been specifically rejected as it pertains to IMEs. The Montana Supreme Court has held that the law in effect as to the date of the trial is controlling for IMEs.

Independent Medical Examination: Law in Effect. Although Petitioner claimed Respondent cannot avail itself of this statute because occupational disease claims allegedly were not brought under the purview of this section until 2005, the *Buckman* rule has been specifically rejected as it pertains to IMEs. The Montana Supreme Court has held that the law in effect as to the date of the trial is controlling for IMEs.

Independent Medical Examination: Generally. Respondent, who had not previously sought an IME, is therefore entitled to one under § 39-71-605(2), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: § 39-71-602. Petitioner's initiation of the evaluation process under this statute does not oblige Respondent to object to the process in order to entitle Respondent to an IME.

¶ 1 The salient facts regarding this controversy are not in dispute. Respondent, Montana State Fund (State Fund), has moved the Court for an Order requiring Petitioner to attend an independent medical examination (IME) pursuant to § 39-71-605(2), MCA (2005). Respondent requested Petitioner to submit to an IME with respect to the issue of medical causation for his current claim. Petitioner has refused.¹

¶ 2 Petitioner contends he suffers from an occupational disease (OD) that was the result of chemical exposure he sustained while working as a welder. However, all of Petitioner's potentially injurious exposure occurred before July 1, 2005, the date on which the Occupational Disease Act was repealed in its entirety. Therefore, Petitioner argues that Respondent cannot avail itself of the provisions of § 39-71-605(2), MCA (2005), because, Petitioner contends, "OD claims were not brought under the purview of Section 39-71-605,

¹ Motion to Require Petitioner to Attend an Independent Medical Examination and Brief in Support at 1.

MCA until July 1, 2005.”² In support of this contention, Petitioner relies principally on *Buckman v. Montana Deaconess Hosp.*³ for the general proposition that “[t]he law in effect at the date of the injury controls.”⁴ Petitioner’s reliance upon *Buckman* in the present case is misplaced.

¶ 3 In *EBI/Orion Group v. Blythe*,⁵ the Montana Supreme Court specifically rejected the application of the *Buckman* rule as it pertained to the issue of IMEs in the Workers’ Compensation Court.⁶ The Court noted that the *Buckman* rule only applies to substantive rights of a claimant, such as the right to benefits allowed at the time of injury.⁷ However, with respect to the application of § 39-71-605(2), MCA, the same statute at issue in the present case, the Court held that “the law in effect as to IMEs as of the date of the trial is controlling.”⁸

¶ 4 Petitioner alternatively argues that Respondent should be precluded by the doctrines of waiver or estoppel from seeking an IME pursuant to § 39-71-605(2), MCA (2005).⁹ The gravamen of Petitioner’s arguments regarding both estoppel and waiver is that Respondent was aware of the fact that Petitioner had sought an evaluation through the Department of Labor and Industry (Department) pursuant to § 39-72-602, MCA (2003), and failed to object to this process. The Court is not persuaded by Petitioner’s arguments.

¶ 5 Petitioner initiated the evaluation process pursuant to § 39-72-602, MCA (2003). Petitioner offers no authority, either statutory or case law, for the proposition that Respondent was obligated to object to this process. Moreover, irrespective of Respondent’s acquiescence to this process, the fact remains that the terms of § 39-71-605(2), MCA (2005), apply to the instant situation. A dispute exists concerning the cause of Petitioner’s disability. The insurer has requested that Petitioner submit to an IME for purposes of obtaining an opinion regarding the cause of Petitioner’s disability. Respondent has not previously sought an IME. Pursuant to § 39-71-605(2), MCA (2005), therefore, Respondent is entitled to an IME.

² Petitioner’s Brief Opposing Montana State Fund’s Motion for an IME at 2-3.

³ 224 Mont. 318, 321,730 P.2d 380, 382 (1986).

⁴ Petitioner’s Brief Opposing Montana State Fund’s Motion for an IME at 2.

⁵ 281 Mont. 50, 931 P.2d 38 (1997).

⁶ 281 Mont. at 54, 931 P.2d at 40.

⁷ *Id.*

⁸ *Id.*

⁹ Petitioner’s Brief Opposing Montana State Fund’s Motion for an IME at 3.

¶ 6 This Court has previously recognized that the right to an IME is not unlimited.¹⁰ Section 39-71-605(2), MCA (2005), must be construed in the context of the purposes of those procedures. In that vein, Rule 35(a), Mont. R. Civ. P. provides that an IME may be ordered only for good cause shown.¹¹ In the present case, Dr. Hansen, the doctor who was selected by the Department to conduct Petitioner's panel examination, is also Petitioner's treating physician for an earlier workers' compensation claim. The Court would find this alone to be sufficient to determine that good cause exists to order an IME.

ORDER

¶ 7 IT IS ORDERED that Montana State Fund's Motion to Require Petitioner to Attend an Independent Medical Examination is **GRANTED**.

DATED in Helena, Montana, this 23rd day of March, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Mr. Victor R. Halverson
Mr. Daniel B. McGregor
Submitted: March 14, 2006

¹⁰ *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

¹¹ ARM 24.5.352 provides that if no express provision is made in the Workers' Compensation Court Rules regarding a matter of procedure, the Court will be guided, where appropriate, by considerations and procedures set forth in the Montana Rules of Civil Procedure. See also, *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993).