IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 61

WCC No. 2003-0895

LEON WADE BROYLES

Petitioner

vs.

ALBERTSON'S, INCORPORATED

Respondent/Insurer.

DECISION AND ORDER QUASHING IME AND FCE

Summary: Self-insured employer was dissatisfied with 5% impairment rating rendered by the treating physician following surgery and sought an Independent Medical Examination (IME) and Functional Capacities Evaluation (FCE). The claimant petitioned the Court to quash the IME and FCE and for a 5% impairment award.

Held: An insurer or self-insured employer is not entitled to an IME or FCE for the purposes of obtaining an impairment award, §§ 39-71-605(5) and -711(4), MCA (2001), therefore the IME and FCE notices are quashed.

Topics:

Independent Medical Examination: Impairment Rating. Insurer or self-insured employer is not entitled to an IME or FCE for the purposes of obtaining an impairment rating. §§ 39-71-605(5) and -711(4), MCA (2001).

Independent Medical Examination: FCE. Insurer or self-insured employer is not entitled to an IME or FCE for the purposes of obtaining an impairment rating. §§ 39-71-605(5) and -711(4), MCA (2001).

Constitutions, Statutes, Rules and Regulations: Montana Code Annotated: 39-71-605 (2001). Subsection (5) of section 39-71-605, MCA (2001), precludes an insurer or self-insured employer from obtaining either an IME or FCE for the purposes of obtaining an impairment rating.

Constitutions, Statutes, Rules and Regulations: Montana Code Annotated: 39-71-711 (2001). Subsection (4) of section 39-71-711, MCA (2001), precludes an

insurer or self-insured employer from obtaining either an IME or FCE for the purposes of obtaining an impairment rating.

Benefits: Impairment Awards. Insurer or self-insured employer is not entitled to an IME or FCE for purposes of an impairment rating. §§ 39-71-605(5) and -711(4), MCA (2001).

¶1 Claimant in this cause injured his right shoulder at work on October 8, 2002. (Petition for Hearing, ¶ 1.) The documents and briefs filed in this case indicate that liability was accepted by the respondent, which is self-insured under Plan I of the Workers' Compensation Act, and that benefits have been paid.

¶2 However, a dispute has arisen over an impairment rating rendered by Dr. James H. Chandler with respect to the claimant's shoulder injury. Dr. Chandler is a surgeon and performed surgery on claimant's shoulder. Following the surgery, the doctor rendered an impairment rating of 5% of the whole person based on "a residuum of ongoing pain in-and-about the operate area of mild to moderate severity, which has affected his residual strength in the right arm and proximal limb girdle." (Ex. A to Response to Petitioner's Motion to Quash.)

¶3 Albertson's was dissatisfied with the basis for the rating. Citing subsection (1)(d) of section 39-71-711, MCA (2001), which requires that an impairment rating "must be established by objective medical findings," the insurer wrote to Dr. Chandler advising him of the requirement of "objective medical findings" and asking him to "re-evaluate the impairment rating provided to Mr. Broyles and advise if the impairment rating will changed [sic] and what objective medical findings the impairment rating is based on." (Ex. C to Response to Petitioner's Motion to Quash.) Dr. Chandler replied that his impairment rating was unchanged and pointed out that the Fifth Edition Guides to Evaluation of Permanent Impairment "allow me to rate a residuum relevant to pain." (Ex. D to Response to Petitioner's Motion to Quash.)

¶4 Not satisfied by the reply, the insurer scheduled claimant for a Functional Capacities Evaluation (FCE) and an Independent Medical Examination (IME). Claimant then filed the present petition requesting payment of a 5% impairment award and objecting to the FCE and IME.

¶5 The immediate issue before the Court is claimant's Motion to Quash Functional Capacities Evaluation and Independent Medical Examination and Brief in Support. The motion has been briefed by both parties and the Court discussed it with both counsel in a telephone conference call held October 20, 2003.

Discussion

¶6 Entitlement to an FCE and IME is governed by statute, specifically by sections 39-71-711 and 39-71-605, MCA (2001). The text of these sections is set out in full at the end of this Decision and Order.

¶7 Section 39-71-605, MCA, permits an insurer to obtain an IME AND FCE and prescribes the procedures for doing so. However, subsection (5) expressly provides that the section has no application to impairment evaluations:

> (5) This section does not apply to impairment evaluations provided for in 39-71-711.

Section 39-71-711, MCA, which governs impairment ratings, contains a similar, redundant exception, providing in subsection (4):

> (4) Disputes over impairment ratings are not subject to 39-71-605.

These provisions could not be more clear: They provide that when an impairment rating has been rendered there is no right to either an IME or FCE to reevaluate that rating.

¶8 Albertson's attorney argued in the telephone conference that Albertson's is nonetheless entitled to an independent medical evaluation of claimant's impairment. He cited subsection (2) of section 39-71-711, MCA, as authority. The subsection provides:

> (2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.

Albertson's reads the subsection as permitting two impairment evaluations, one at the request of the claimant and another at the request of the insurer.

¶9 As an initial matter, the subsection cannot be read in isolation of the other subsections, and in particular in isolation from subsection (4). *Montco v. Simonich,* 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997) ("All parts of a statute must be construed together and reconciled. In construing a statute, a court must reject a construction that would leave any part of the statutory language without effect--the court must give effect to all provisions of the statute."). Reading subsections (2) and (4) of section 39-71-711, MCA, together, it is clear that once an impairment rating is rendered the claimant cannot be required to submit to a second, independent evaluation for purposes of obtaining a second impairment rating.

¶10 Moreover, *whether or not an impairment rating has already been rendered by the treating physician or some other physician the claimant has sought out or agreed to see*, subsection (5) of section 39-71-605, MCA, expressly precludes the insurer from obtaining a non-consensual IME or FCE for purposes of establishing an impairment rating. Again, the

language of subsection (5) is plain on this point: "This section [39-71-605] does not apply to impairment evaluations provided for in 39-71-711." (Emphasis added.)

¶11 While I have not reviewed the legislative history behind the subsections at issue, one of the conceivable if not obvious purposes of the provisions is to avoid endless examinations and litigation over impairment ratings, in other words to avoid the very sort of thing that is occurring in this case. The subsections were inserted in 1987 at the same time there was a reduction of permanent partial disability (PPD) benefits. While impairment awards were preserved by the 1987 amendments, they became more significant in light of the other reductions in PPD benefits. Through the subsections in question the legislature may have intended to reduce disputes over the awards and assure their prompt payment.

¶12 Counsel for Albertson's also urged that the Rules of Civil Procedure allow the Court to order the IME and FCE. Even though this Court has looked to the Rules of Civil Procedure for guidance in matters not covered by its own rules, *see Murer v. State Compensation Ins. Fund,* 257 Mont. 434, 849 P.2d 1036, 1037 (1993), it cannot do so in the face of explicit legislation inconsistent with those rules. The argument is therefore unavailing.

¶13 During the telephone conference the attorney for Albertson's also complained that the statutory interpretation reflected above will deprive Albertson's of its due process rights. The Court presently does not have a constitutional challenge to the statutes before it, however, I note that the statutes do not restrict Albertson's ability to cross-examine Dr. Chandler or present expert testimony, albeit without further examination of claimant. It will have an opportunity to persuade me that Dr. Chandler's rating was deficient and should be diminished or even rejected outright.

¶14 Finally, I note that the cost in securing the contemplated IME and FCE in this case, and employing attorneys to secure them, is likely to exceed the 5% impairment award sought by claimant. That in itself should make all of us pause and reflect. As set forth in section 39-71-105(3), MCA, one of the express purposes of the Workers' Compensation Act is to provide certainty in calculating benefits, reduce reliance on attorneys, and reduce the costs of administration. Subsection (3) provides:

> (3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

In the case of impairment awards, the AMA Guides to Evaluation of Permanent Impairment provide the specific guidelines for assessing impairment. The Guides are specifically written for physicians and were used by Dr. Chandler in this case. With that in mind, it is not

surprising that the legislature may well have deemed it unnecessary to authorize IME examinations. While there may be some exceptions, ratings will fall in a narrow range outlined in the Guides and it is not unreasonable to expect that physicians giving ratings will follow the Guides. Thus, in tune with the purposes expressed in section 39-71-105(3), MCA, challenges to ratings should be rare and should be made only for sound and compelling reasons.

ORDER

¶15 The notices of IME and FCE examinations issued by Albertson's in this case are quashed. Albertson's is not entitled to either an IME or an FCE.

DATED in Helena, Montana, this 22nd day of October, 2003.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Steven S. Carey
Mr. Kelly M. Wills
Addendum Attached
Submitted: October 20, 2003

ADDENDUM

39-71-605. Examination of employee by physician -- effect of refusal to submit to examination -- report and testimony of physician -- cost. (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 department 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. 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, the department or 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 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. The physician, psychologist, or panel making the examination shall file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved. The requesting party shall pay the physician, psychologist, or panel for the examination.

(3) As used in this section, a panel includes a practitioner having substantial experience in the field of medicine concerned with the matters presented by the dispute and whose licensure would qualify the practitioner to act as a treating physician, as defined in 39-71-116, and may include a psychologist.

(4) A claimant is required, upon a written request of an insurer, to submit to a functional capacities evaluation conducted by a licensed physical or occupational therapist.

(5) This section does not apply to impairment evaluations provided for in 39-71-711.

39-71-711. Impairment evaluation -- ratings. (1) An impairment rating:

(a) is a purely medical determination and must be determined by an

impairment evaluator after a claimant has reached maximum healing;
(b) must be based on the current edition of the Guides to Evaluation

of Permanent Impairment published by the American medical association;

(c) must be expressed as a percentage of the whole person; and

(d) must be established by objective medical findings.

(2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.

(3) An evaluator must be a physician licensed under Title 37, chapter

3, except if the claimant's treating physician is a chiropractor, the evaluator

may be a chiropractor who is certified as an evaluator under chapter 12.

(4) Disputes over impairment ratings are not subject to 39-71-605.