IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 19

WCC No. 2003-0895

LEON WADE BROYLES

Petitioner

vs.

ALBERTSON'S, INCORPORATED

Respondent/Insurer.

ORDER GRANTING RECONSIDERATION AND WITHDRAWING DECISION AND ORDER QUASHING IME AND FCE

Summary: Respondent moves for reconsideration of this Court's prior Decision and Order Quashing IME and FCE.

Held: The motion is granted; the prior Order is vacated; and further briefing is ordered. The original Order was issued after a telephone conference and did not provide the parties with an opportunity to file written briefs. After further discussion with counsel and further consideration, I have serious doubts as to the correctness of the decision and find that the original decision should be vacated and the matter further briefed.

Topics:

Statutes and Statutory Interpretation: No Meaningless Provisions. Statutes should be construed, if possible, to give them meaning since the legislature is presumed not to have enacted meaningless legislation.

Statutes and Statutory Interpretation: Implied Repeal. A finding that a statute has been impliedly repealed by other legislation is disfavored.

Impairment: Impairment Ratings. Based on prior testimony of physicians appearing before the Court over many years, the Court takes notice that an impairment rating often requires actual physical testing of the claimant, such as range of motion testing, in order to render an impairment rating under the Guides to Impairment.

Statutes and Statutory Interpretation: Extrinsic Aids. Where statutes are ambiguous, the Court may consider extrinsic sources, especially legislative history, in interpreting them.

Statutes and Statutory Interpretation: Conflicting Provisions. The provisions of a statute should be reconciled, if possible, in a manner which gives effect to all provisions.

¶1 On October 22, 2003, this Court entered a Decision and Order Quashing IME and FCE. The decision is reported at 2003 MTWCC 61, and holds that an insurer is not entitled to an independent medical examination (IME) or functional capacities evaluation (FCE) for the purpose of obtaining an impairment rating. My decision was issued despite specific language stating that "[a] claimant **or insurer, or both, may obtain an impairment rating** from an evaluator who is a medical doctor . . ." § 39-71-711(2), MCA (2001), and was based on another section stating that provisions entitling insurers to an IME and FCE do "not apply to impairment evaluations provided for in 39-71-711." § 39-71-605(5), MCA (2001). Respondent moves for reconsideration.

Discussion

¶2 I have had previous discussions with counsel for both parties concerning this matter. In a minute entry of January 23, 2004, I indicated that the matter warrants further consideration and that upon the filing of a motion for reconsideration I would vacate the prior decision and order further briefing.

¶3 A motion for reconsideration has now been filed. After reviewing the motion, I am vacating my prior decision and allowing further briefing. My rationale for doing so is as follows:

¶3a My prior decision was issued after a telephone conference with counsel and without an opportunity for written briefs.

¶3b Further discussion with counsel and a further review of my original decision have raised doubts as to the correctness of the decision.

¶4 In reviewing this matter, I am persuaded that there are significant arguments I did not consider in reaching my prior decision. Initially, it may be argued that my construction of section 39-71-605(5), MCA precluding any sort of IME amounts to a nullification of the right granted the insurer in section 39-71-711(2), MCA to obtain an impairment rating. Of course, the insurer can always request the treating physician to render an impairment rating, but it could not do so without statutory authorization. Thus, such a limited reading of the section may well render it meaningless in contradiction to the basic tenet of statutory construction which "presumes that the legislature would not pass meaningless legislation . . . ." *Albright v. State By and Through State,* 281 Mont. 196, 206, 933 P.2d 815, 821(1997)(quoting from

Montana Contractors' Ass'n v. Department of Hwys. (1986), 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986)).

¶5 If the section indeed grants the insurer a substantive right to obtain its own impairment evaluation, the evaluation most probably includes an actual physical examination since the Guides to Impairment utilize physical testing, such as *range of motion*, in assessing impairment. The Court takes notice of prior testimony it has heard from physicians over the years concerning the need for actual physical testing to accurately determine impairment ratings. Some physicians refuse to render impairment ratings based on a "paper review" of medical records. Thus, it can be cogently argued that my decision in effect holds that section 39-71-605(5), MCA, impliedly repeals the right granted to insurers in section 39-71-711(2), MCA. "Repeal or amendment of a statute by implication is not favored," *State et al. v. Board of Com'rs et al.* 89 Mont. 37, 76, 296 P. 1, 11 (1931), and for that reason alone the matter warrants more thorough consideration.

¶6 As noted in my original decision, sections 39-71-711(2), MCA, and 39-71-605(5), MCA, must be construed together and reconciled, if possible, so as to give effect to all parts of the statutes. *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997). When considering the two sections together, at best there is ambiguity. (At worst there is implied repeal - see the previous paragraph.) Where there is ambiguity, a Court may not only consider intrinsic aids in construing the provisions, i.e., basic rules of statutory construction, but may also consider extrinsic sources, especially legislative history. *State ex rel. Missoulian v. Montana Twenty-First Judicial Dist. Court, Ravalli County,* 281 Mont. 285, 292, 933 P.2d 829, 834 (1997) ("When legislative intent cannot be determined from the plain words of a statute the court must examine the legislative history of the statute."). In its motion for reconsideration, the respondent cites legislative history as supporting its contention that it is entitled to an impairment examination and evaluation by a physician of its choosing. That history merits further elucidation and consideration.

¶7 Finally, I note that sections 39-71-711(2), MCA, and 39-71-605(5), MCA, should be construed, if possible, in a manner which reconciles and gives effect to both provisions. *State ex rel. DePuy v. District Court of Sixth Judicial Dist. In and For The County of Park,* 142 Mont. 328, 332, 384 P.2d 501, 503 (1963). In issuing my prior decision, I did not give the respondent an opportunity to offer other possible reconciling interpretations of the two statutes in question. One possible manner of reconciliation which now comes to mind is to construe section 39-71-711(2), MCA, to allow a physical examination of the claimant which is limited to testing of only those physical factors set forth in the Guides to Impairment which are relevant to the particular impairment. Such examination would not amount to a full IME.

ORDER

¶8 For the reasons set forth in the foregoing discussion, the Decision and Order Quashing IME and FCE which was filed in this case on October 22, 2003, and reported at 2003 MTWCC 61, is **vacated** and the motion for reconsideration is **granted**.

¶9 The following schedule for further briefing is fixed as follows:

March 29, 2004	Respondent's Opening Brief
April 28, 2004	Petitioner's Answer Brief
May 14, 2004	Respondent's Reply Brief

¶10 The trial date which is currently set on the next Missoula docket is **vacated.**

DATED in Helena, Montana, this 27th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Steven S. Carey
Mr. Kelly M. Wills
Submitted: February 9, 2004