

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 21

WCC No. 9601-7468

KEVIN S. FOX

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

UNITED PARCEL SERVICE

Employer.

ORDER DENYING MOTION IN LIMINE

Summary: Petitioner filed motion in limine objecting to physician's testimony on grounds that he was not listed timely as a witness and did not personally examine claimant.

Held: Motion denied. The physician was listed as a witness in the response to petition, which is sufficient under the Court's rules and scheduling order. While *Linden v. Huestis*, 247 Mont. 383, 807 P.2d 185 (1991), relied on by claimant, holds that a physician who did not examine claimant may not testify at trial concerning claimant's motivation and potential secondary gain ("he was not qualified as a human polygraph"), the doctor is qualified to render various opinions based on his medical training and experience, including testimony concerning an impairment rating. Claimant may object to specifics of his testimony at trial.

Topics:

Witnesses: Experts: Disclosure. Where physician was listed in insurer's response to petition as potential witness, motion to exclude his testimony because he was not timely disclosed as a witness is denied.

Witnesses: Credibility. While *Linden v. Huestis*, 247 Mont. 383, 807 P.2d 185 (1991), holds that a physician who did not examine claimant may not testify at trial concerning claimant's motivation and potential secondary gain ("he was not qualified as a human polygraph"), the doctor is qualified to render various opinions

based on his medical training and experience, including testimony concerning an impairment rating.

Evidence: Expert Testimony: Physicians. While *Linden v. Huestis*, 247 Mont. 383, 807 P.2d 185 (1991), holds that a physician who did not examine claimant may not testify at trial concerning claimant's motivation and potential secondary gain ("he was not qualified as a human polygraph"), the doctor is qualified to render various opinions based on his medical training and experience, including testimony concerning an impairment rating.

Petitioner (claimant) objects and moves to exclude testimony by Dr. Robert Chambers on the ground that the doctor did not personally examine him. claimant's objection to medical record, motion in limine and supporting brief. He also suggests that Dr. Chambers was not timely listed as a witness. The objection and motion are frivolous and are denied.

The Court's scheduling order required both parties, on or before February 9, 1996, to exchange the names of all witnesses, including expert witnesses, not already identified in the pleadings" Dr. Chambers is identified as a potential witness in the response to petition for hearing. That response was filed January 26, 1996, long before the exchange date.

Claimant cites *Linden v. Huestis*, 247 Mont. 383, 807 P.2d 185 (1991), in support of his argument that Dr. Chamber's is unqualified to testify concerning any matter because he did not personally examine the petitioner. He argues that a "paper review" is an insufficient basis for physician testimony.

Neither *Linden* nor the Montana Rules of Evidence provide one iota of support for the argument. *Linden* held that it was error for a physician who had not examined the plaintiff to testify at trial concerning the plaintiff's motivation and possible secondary gain when he complained of pain. In holding the testimony inadmissible the Court said: "He was not qualified as a human polygraph. His testimony in this regard was not an appropriate expert opinion." 247 Mont. at 389, 807 P.2d at 188. But the Court held that the doctor was qualified as an expert to testify as to other matters:

By education, training and experience, Dr. Fisher was qualified as a medical expert. As such he was qualified to explain to the jury what kind of objective signs or subjective symptoms are associated with various injuries. Based upon his review of the plaintiff's records, he was qualified to give his opinion that those signs and symptoms were not present in this case and that, therefore, plaintiff was not at the present time suffering from an injury. . . .

247 Mont. at 388, 807 P.2d at 188. Rule 703, Mont.R.Civ.P., as well as *Linden*, permit an expert to testify based on facts "made known to the expert." There is no requirement for personal knowledge or personal examination.

Claimant has not limited his motion to the objectional testimony discussed in Linden but has sought to exclude all testimony of Dr. Chambers, especially testimony concerning an impairment rating. Dr. Chambers is certainly qualified to testify concerning the criteria for the impairment rating and, to the extent the information available to him allows, on whether the criteria were properly applied by the physician who rendered the rating. Whether some of his testimony might be objectionable will depend on the specifics of his testimony.

IT IS HEREBY ORDERED that the petitioner's objection and motion in limine are denied.

Dated in Helena, Montana, this 27th day of February, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Alan J. Lerner

Mr. Larry W. Jones

Submitted February 26, 1996