

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 51

WCC No. 9603-7523

LINDIA GROOMS

Appellant

vs.

PONDEROSA INN

Employer

STATE COMPENSATION INSURANCE FUND/
DEPARTMENT OF LABOR AND INDUSTRY

Respondents.

ORDER AND JUDGMENT

Summary: Claimant, who suffers from a skin condition, filed injury claim with State Fund. Insurer denied the injury claim, but referred claimant for a panel evaluation pursuant to procedures of the Occupational Disease Act. The panel physician could not conclude her condition was occupational and the Department of Labor and Industry notified her the claim was not established. Claimant filed an appeal on constitutional grounds, which the Court treated as a petition for declaratory judgment.

Held: The medical panel provisions of the Occupational Disease Act, including the requirement that claimant pay for a second evaluation if she makes the request for such, do not violate due process, equal protection, her right to select her own treating physician, or her right to full redress. (Note: WCC was affirmed in [Grooms v. Ponderosa Inn, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Constitution: Art. II, section 16. Claimant's constitutional right to full redress is not violated by provision of section 39-72-602, MCA, that she pay for a second panel evaluation conducted at her request. The provision that she pay for a second evaluation at her request does not deprive her of a hearing on her claim. (Note: WCC was affirmed on this ground in [Grooms v. Ponderosa Inn, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 33-22-111, MCA. The medical panel examination required by section 39-72-602(2)(a), MCA, to establish an occupational disease claim does not deny claimant her right to select a treating physician pursuant to section 33-22-111, MCA. The right to select a physician is limited to selection of a treating physician; examinations by panel physicians are in the nature of independent medical examinations used only for the purpose of assessing occupational disease status. Claimant is not required to undergo treatment with the physician, only examination if she wants to pursue an OD claim. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

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Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-602, MCA. Claimant's right to equal protection of the laws was not violated by the requirement of section 39-71-602, MCA, that she pay for a second panel examination if she is the party making the request for a second examination. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-602, MCA. Claimant's constitutional right to legal redress is not violated by provision of section 39-72-602, MCA, that she pay for a second panel evaluation conducted at her request. The provision that she pay for a second evaluation at her request does not deprive her of a hearing on her claim. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Constitutional Law: Due Process: Procedural Due Process. State Compensation Insurance Fund's denial of claim for skin condition as injury and referral to Occupational Disease Panel did not deny claimant due process rights. While claimant argues the insurer denied her injury claim without hearing, she fails to recognize she could have mediated that denial and filed a petition with the Workers'

Compensation Court. Instead, she went through a panel doctor examination and dropped the injury contention. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Constitutional Law: Equal Protection. Claimant's right to equal protection of the laws was not violated by the requirement of section 39-71-602, MCA, that she pay for a second panel examination if she is the party making the request for a second examination. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

Constitutional Law: Full Redress. Claimant's constitutional right to legal redress is not violated by provision of section 39-72-602, MCA, that she pay for a second panel evaluation conducted at her request. The provision that she pay for a second evaluation at her request does not deprive her of a hearing on her claim. (Note: WCC was affirmed on this ground in [*Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 \(1997\).](#))

This case comes to the Court by way of an appeal from an order of the Department of Labor and Industry (Department).

The appellant, Lindia Grooms (Grooms), underwent an occupational disease panel examination. Based on the report of the examining physician, on July 21, 1995, the Department entered an Order Referring Copy of Medical Reports to Parties. In that order the Department notified Grooms and the insurer, State Compensation Insurance Fund (State Fund), that:

Based on the attached report of the first examining physician, the Department's preliminary determination concerning the claimant's claim for occupational disease benefits is the claim would be denied and the claimant would not be entitled to receive benefits under the Occupational Disease Act.

The order went on to notify the parties that either of them could request a further examination by a second panel physician or they could request a hearing. Any second examination was to be paid for by the requesting party.

Grooms responded by requesting the Department to pay for a second examination. The Department declined. She then challenged the constitutionality of the medical panel statutes. She presented that challenge by way of a request for a hearing. However, she thereafter moved to dismiss her own petition on the ground that the Department did not have jurisdiction to consider constitutional issues. The Department's hearing officer agreed and dismissed the petition. This appeal followed.

Factual Background

The record on appeal consists of the Department file. That file includes the Department's Order Referring Copy of Medical Reports to Parties; a petition (in the form of a letter) with attached correspondence between Grooms' attorney and the Department; Claimant's Affidavit to Proceed in Forma Pauperis; miscellaneous correspondence regarding the proceeding; a notice of a prehearing conference; a prehearing conference outline; a motion to join the Department as a party; Grooms' motion to dismiss; responses thereto; and the Dismissal Order. No hearing was ever held. Thus, the Department file sets forth only procedural facts.

Through their briefs on appeal, Grooms and the State Fund have informed the Court of additional facts. Those facts are not essential to the decision in this case because the issues raised by Grooms concern the facial constitutionality of various statutes and the applicability of section 33-22-111, MCA. However, the factual recitations provide the context in which the challenges are brought and are therefore adopted by the Court as background information.

On October 20, 1994, Grooms filed a workers' compensation claim on account of some sort of allergic reaction or dermatitis. The State Fund characterizes it as a claim for "chemical poisoning." (State Fund's Reply to Appellant/claimant's Opening Brief at 2, hereinafter State Fund's Brief.) In any event, the State Fund denied liability under the Workers' Compensation Act (WCA) and requested the Department to schedule an examination of the claimant with a member of the Montana Occupational Disease Panel. The Department designated Dr. Stephen Behlmer, a Helena dermatologist, as the examining physician. Dr. Behlmer examined claimant and reported that she suffered from "atopic dermatitis, a condition which is largely hereditary and which has environmental components also." (*Id.*) He noted that household products such as soap and ammonia may trigger her condition and indicated that he could not determine whether her condition was aggravated by her work. (*Id.*)

Based on Dr. Behlmer's report, the Department then issued its Order Referring Copy of Medical Reports to Parties. As noted earlier, the Department advised the parties of its preliminary determination, based on the report, that claimant did not suffer from an occupational disease and offered them the further options of requesting a second examination or a hearing.

Claimant responded by requesting a second examination. The Department designated Dr. Robert Neill to perform that examination. However, claimant balked at paying for the examination and requested that the Department do so. In connection with her request she submitted Claimant's Affidavit to Proceed in Forma Pauperis. (A copy is found in the Department file.) The Department denied her request and the second examination never took place.

Claimant then filed a request for hearing. In the petition, which is in the form of a letter, the claimant stated that she had notified the Legal Services Division of the Department of her contention that the occupational disease procedures are unconstitutional. The letter/petition then went on to state:

Since the Department cannot hold a statute unconstitutional, it appears little will be gained by a hearing, etc., in this case. Therefore, it is suggested that a telephone conference call be held at a mutually convenient time to all concerned to expedite an early disposition to this case.

(November 15, 1995 Letter of Don Burris to Hearings Unit.)

Thereafter, claimant, through her attorney, filed a motion to dismiss her own petition. (Claimant's Motion to Dismiss and Brief in Support.) In the motion she stated, "The sole issue at bar is the constitutionality of 39-72-602, MCA, as it is applied to indigent claimants." Noting that the Department lacked jurisdiction over constitutional issues, she then moved to "dismiss so that the case may be resolved by the Supreme Court." (*Id.* at 2.) Presumably she anticipated she would have to stop along the way to present the issue initially to this Court.

The Department's hearing officer then dismissed the petition for lack of jurisdiction. (Dismissal Order.) This appeal followed.

Discussion

This matter is more properly deemed a petition for declaratory judgment and not as an appeal. The only matter decided by the Department was its lack of jurisdiction. Claimant does not appeal from that decision, rather she requests the Court to consider matters within the Court's own original jurisdiction.

Claimant makes a broad spectrum attack on the occupational disease panel procedures. Those procedures are set forth in sections 39-72-602, - 608, -609, -610, -611, and 612, MCA, which provide in relevant part:

39-72-602. Insurer may accept liability-procedure for medical examination when insurer has not accepted liability. (1) An insurer may accept liability for a claim under this chapter based on information submitted to it by a claimant.

(2) In order to determine the compensability of claims under this chapter when an insurer has not accepted liability, the following procedure must be followed:

(a) The department shall direct the claimant to a member of the medical panel for an examination. The panel member shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational

disease. The panel member shall submit a report of the member's findings to the department.

(b) Either the claimant or the insurer may, within 20 days after the receipt of the report by the first panel member, request that the claimant be examined by a second panel member. If a second examination is requested, the department shall direct the claimant to a second panel member who shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of the member's findings to the department. The medical panel member may, in order to reach a conclusion, consult with the claimant's attending physician. The reports from the two examining physicians must be sent by the department to the presiding officer of the panel. The presiding officer shall issue a report concerning the claimant's physical condition and whether the claimant is suffering from an occupational disease.

(c)(i) If a second examination is not requested, the department shall issue its order determining whether the claimant is entitled to occupational disease benefits based on the report of the first examining physician.

(ii) If a second examination is requested, the department shall issue its order based on the report of the presiding officer. [Effective 1995.]

39-72-608. Payment of medical examination, report, and autopsy expenses. The expense of the first medical examination and report as provided in 39-72-602 must be borne by the insurer. The expense of a reexamination and panel report must be borne by the dissatisfied party requesting the reexamination. The expense of the periodic medical examinations and reports, as provided in 39-72-607, must be borne by the party requesting the periodic medical examination. The expense of the autopsy, as provided for in 39-72-606, must be borne by the party requesting the autopsy. When the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination. [Effective 1993.]

39-72-609. Report of medical panel prima facie evidence. A report submitted to the department by the appropriate medical panel and placed in the department's records is prima facie evidence as to the matters contained in the report. [Effective 1989.]

39-72-610. Report of and examinations conducted by medical panel. (1) At a hearing held before the department or the workers' compensation judge, there is a rebuttable presumption that the report of the medical panel and any medical examination reports by members of the medical panel are correct.

(2) The claimant or the insurer may present additional medical information in order to rebut the medical examination report of a panel member or a panel report.

[Effective 1989.]

39-72-611. Hearing on determination -- when. Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the claimant's entitlement to occupational disease benefits, the department shall hold a hearing.

[Effective 1989.]

39-72-612. Hearing and appeal to workers' compensation judge. (1) Within 20 days after the department has issued its order of determination as to whether the claimant is entitled to benefits under this chapter, a party may request a hearing. In order to perfect an appeal to the workers' compensation judge, the appealing party shall request a hearing before the department. The department shall grant a hearing which may be conducted by telephone or by video conference. The department's final determination may not be issued until after the hearing.

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. The judge may overrule the department only on the basis that the department's determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. [Effective 1995.]

Claimant first argues that these statutes deny her due process because they permitted the State Fund to unilaterally determine that her claim should be processed under the ODA and thereby deprived her of an opportunity to be heard concerning her claim under the WCA. The contention has no merit. The workers' compensation claim was denied. Upon denial the claimant could have immediately requested mediation or petitioned the Court to ask it to determine that she suffered a compensable industrial accident, and she can still

do so. § 39-71-2905, MCA; *Brian Ostwald v. Plum Creek Manufacturing*, WCC No. 9508-7376, Order Denying Motion for Summary Judgment, (December 5, 1995). Claimant's belief that the State Fund has limited "the procedure to a claim for OD" is simply wrong. (Appellant's Opening Brief at 5.)

Relying on section 33-22-111, MCA, she further argues that the procedures permitting the Department to select a panel physician deprive her of her right to select her treating physician. Section 33-22-111, MCA, provides in relevant part:

(1) All policies of disability insurance, including individual, group, and blanket policies, must provide that the insured has full freedom of choice in the selection of any licensed physician . . . for **treatment** of any illness or injury within the scope and limitations of the person's practice. [Emphasis added.]

Panel examinations are in the nature of independent medical examinations and are for the purpose of ascertaining whether a worker suffers from an occupational disease. Claimant is not required to **treat** with a panel physician and is free to select another physician to treat her medical condition. Thus, her reliance on section 33-22-111, MCA, is misplaced.

Claimant next argues that her right to equal protection is violated because she was required to pay for the second examination, whereas she would not have to do so under the WCA. She cites section 39-71-605, MCA, for the latter proposition, and *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), for the proposition that "[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro* involved a one-year residency prerequisite to eligibility for welfare benefits, creating two separate classes of potential recipients, one consisting of those who satisfied the residency requirement and who were therefore entitled to benefits if otherwise eligible, and the other consisting of otherwise eligible persons who had not resided in the state for a year and were therefore barred from receiving benefits. The Supreme Court decision rested in large part on the constitutional right to travel and move from state to state, an interest that can be overcome only by a compelling state interest.

As with her other arguments, claimant misapprehends the nature of the statutory provisions involved in this case. Section 39-71-605, MCA, which she cites as entitling her to free medical examination under the WCA, concerns independent medical examinations by physicians hired by and for the insurer. An occupational disease panel examination is different. It provides an impartial medical opinion by a physician designated by an impartial agency; thus, the examining physician is beholden to neither the insurer nor the claimant. Under the WCA a claimant is not entitled to such an impartial examination and cannot compel the insurer to seek an IME. Thus, under the WCA she must muster her own medical evidence at her own cost. Under the ODA she is entitled to at least one examination and may benefit from a favorable opinion. If the initial opinion, or for that matter a further panel opinion, is unfavorable, she is not bound by it and may seek out her own medical evidence

to support her claim. Section 39-72-610(2), MCA, provides that "[t]he claimant or the insurer may present additional medical information in order to rebut the medical examination report of a panel member or a panel report." Thus, there is no invidious classification. Indeed, the Court has not been cited to any case which holds that a workers' compensation or occupational disease claimant must be provided with free medical examinations to enable her to muster proof for her claim.

Next, claimant argues that the Department's Order Referring Copy of Medical Reports to Parties effectively excluded her "from the only forum empowered to settle the issue involving interests of basic importance in society or fundamental rights." (Appellant's Opening Brief at 6.) She points specifically to the Department's stated intention to adopt Dr. Behlmer's opinion if no second opinion was requested.

Once again, claimant misapprehends the occupational disease process. Under section 39-72-611, MCA, claimant could have requested a hearing following the initial examination. The Department's Order Referring Copy of Medical Reports to Parties expressly advised her of that right. At any hearing she was entitled to present her own evidence, which the hearing officer would have to consider prior to reaching any final conclusion. § 39-72-610(2), MCA. Thus, contrary to her contention, an impartial forum for resolving her claim was immediately available to her. She was not required to request or pay for a second examination in order to access that forum. Thus, *Ball v. Gee*, 243 Mont. 406, 795 P.2d 82 (1990), which is cited by claimant and which held that an indigent cannot be required to deposit the amount of taxes as a prerequisite to challenging a tax sale of real property, is inapposite.

In conjunction with her argument that she is excluded from litigating her claim unless she orders and pays for a second panel examination, claimant also relies on equal protection principles requiring that a legislatively enacted classification must be rationally related to some legitimate governmental interest. She cites *Goldberg v. Kelly*, 397 U.S. 254 (1970), for the proposition that receipt of "welfare benefits," and presumably occupational disease benefits, is an important right, and *Medora v. Colautti*, 602 F.2d 1149, 1154 (3rds Cir. 1979), for the proposition that where there is disparate treatment involving "denial of all aid, the courts will more closely examine the rationality of the underlying classification." *Medora* involved state welfare regulations disqualifying certain otherwise eligible applicants from receiving benefits. The Court of Appeals found that the disqualification did not rationally further any legitimate governmental interest.

Initially, there may be some question as to whether workers' compensation and occupational disease benefits are properly characterized as social benefits similar in nature to welfare benefits. However, we need not consider the nature of the benefits or the possible equal protection implications based on that nature.

As with her other arguments, claimant misapprehends the statutes she challenges. Unlike *Medora* and other cited cases, claimant is not disqualified from seeking or receiving occupational disease benefits. She was entitled to a hearing and was entitled to muster her own evidence to support her claim. A second examination, and payment therefore, was not a prerequisite to her pursuing her claim. Equal protection principles prohibit discriminatory classifications which do not rationally further legitimate governmental objectives, they do not require the legislature to pay for, or order insurers to pay for, medical examinations to enable a claimant in a disputed liability case to develop evidence supporting her claim.

Finally, claimant has requested the Court to award her workers' compensation benefits. (Appellant's Opening Brief at 8.) That request is beyond the scope of her appeal. Moreover, she has presented no evidence in support of a claim for workers' compensation benefits.

ORDER AND JUDGMENT

1. The designation of medical panel physicians by the Department of Labor and Industry for purposes of determining whether a worker is suffering from an occupational disease does not violate a worker's right to choose her own treating physician.
2. The requirement that the party requesting a second examination by an occupational disease panel pay for such examination does not violate a worker's rights to equal protection and due process.
3. The claimant is not entitled to attorney fees, costs, a penalty or any other relief. Her petition is **dismissed with prejudice**.
4. This order and judgment is certified as final for purposes of appeal.
5. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 16th day of July, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Don Edgar Burris
Ms. Ann E. Clark
Mr. Robert J. Campbell
Ms. Christine L. Noland
Mr. Brian McCullough - Zip Mail
Submitted: June 26, 1996

