IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 24

WCC No. 2001-0478

CONNIE GRYTTENHOLM

Petitioner

vs.

FREMONT INDUSTRIAL INDEMNITY COMPANY

Respondent/Insurer for

TOWN PUMP, INCORPORATED

Employer.

ORDER REGARDING FURTHER PROCEEDINGS

Summary: Claimant moved to exclude testimony and opinions by a physician who examined claimant at the insurer's request. Claimant was told that she would be examined by a neurologist, and the insurer initially contacted a neurologist to examine her, however, the neurologist declined the examination. The insurer then set up an examination with Dr. Scott Ross, a physician specializing in occupational disease without telling claimant that fact. The examination took place and the physician opined that claimant was at MMI and the insurer cut off her temporary total disability benefits. She then filed her present petition for reinstatement of TTD benefits.

Held: Dr. Ross' opinions are inadmissible. Claimant submitted to examination based on the representation that the physician was a neurologist or neurosurgeon. The representation was material and vitiated her consent to the examination by a physician in another specialty, especially where the nature of the examination was unclear. Accurate information concerning the nature of the examination (an IME versus treatment), and the specialty of the physician, were critical to claimant's rights to select a treating physician and her rights regarding an IME examination. The insurer's failure to accurately inform claimant was fatal. However, in light of the lateness of the motion to exclude Dr. Ross' testimony, the insurer will be allowed to depose another IME physician post-trial.

Topics:

Evidence: Expert Testimony: Physicians. Testimony of a physician will be excluded where the claimant submitted to an examination by a physician procured by the insurer under the pretense that the physician specialized in an area of medicine different than represented to the claimant and where the nature of the physician's role (treatment versus independent medical examination) is ambiguous or not fixed.

Insurers: Duties. Insurers have a duty to accurately inform claimants of the nature and purpose of any medical examination arranged by the insurer, as well as the specialty of the examiner. Failure to properly inform a claimant of those matters may result in the Court excluding evidence regarding the examination and the opinions of the examiner.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-605, MCA (1999). Insurers have a duty to accurately inform claimants of the nature and purpose of any medical examination arranged by the insurer, as well as the specialty of the examiner. Failure to properly inform a claimant of those matters may result in the Court excluding evidence regarding the examination and the opinions of the examiner.

¶1 The claimant filed a Motion in Limine seeking to exclude the testimony of Dr. Scott Ross because she was "tricked" into seeing him. The Court reviewed the motion, briefs, and affidavits of both parties and then held a teleconference with the parties' attorneys - Mr. Kelly M. Wills, representing the insurer, and Mr. Paul E. Toennis, representing the claimant. During the teleconference I issued my ruling on the Motion in Limine and also on other matters raised by counsel during the conference. This Order will record my rulings and the rationale for them.

Factual Background

¶2 The controversy regarding Dr. Ross stems from the manner in which claimant was sent to him, as well as questions concerning his role in examining the claimant. The insurer obtained a prior independent medical examination (IME) of claimant by Dr. M. Clay Vaughn, an orthopedic surgeon. Claimant understood from Dr. Vaughn and from Dr. Carmen Johnson, who had treated her, that she needed to be seen by a neurosurgeon. According to the affidavit of one of the claims adjusters who handled the claim on behalf of the insurer, a claims adjuster told her he would schedule an appointment for her with a neurologist in Billings, Montana. (Affidavit of Laura Steinhoff, ¶ 5.) Another claims adjuster then advised claimant that she was attempting to set up an appointment for her with Dr. Joav Kofman, who is a neurologist in Billings. According to the adjuster's affidavit, the claimant approved the appointment and "expressed her belief that she did not feel the evaluation by Dr. Vaughn was thorough." (Affidavit of Laura Steinhoff, ¶ 6.) Claimant apparently believed that the appointment was with a neurosurgeon. The Court notes that she may not have understood the difference between a neurologist and a neurosurgeon. In any event, it

makes no difference to my decision whether the appointment was supposed to be with a neurologist or a neurosurgeon, both specialties involve disorders of the nervous system.

¶3 According to the insurer's adjuster, the appointment with Dr. Kofman was scrubbed because she was unwilling to treat claimant and would only perform an IME. (*Id.* at ¶ 7.) According to the adjuster's affidavit, she wanted to have claimant evaluated by a physician willing to provide follow-up treatment. (*Id.*) The adjuster then scheduled an appointment for claimant with Dr. Scott Ross, who specializes in Occupational Medicine. (*Id.*) According to the adjuster, Dr. Ross was recommended by one of Dr. Kofman's office staff. (*Id.*)

¶4 The adjuster's letter to Dr. Kofman requesting her to evaluate the claimant makes no mention of follow-up treatment or her acting as treating physician. After reciting claimant's medical history, it says:

> Please review the following medical records.[(1)] I would greatly appreciate the opportunity for you to examine Ms. Gryttenholm. If you have any questions, or ways I may assist, please feel free to call me. I look forward to hearing from you and your staff.

(Ex. 4 to Brief in Support of Motion in Limine.) The letter does not indicate that claimant was sent a copy.

¶5 The adjuster did not discuss the change in physicians with claimant, rather she sent a letter notifying claimant that she had been scheduled to see Dr. Ross. The letter began, "Just a quick note to let you know that an appointment has been scheduled for your [sic] with Dr. Scott Ross at his office . . . ." (Ex. 5 to Brief in Support of Motion in Limine.) The letter went on to give additional information regarding the place of the appointment and advised claimant she would be reimbursed $194.80 for her travel expenses.

¶6 Claimant asserts that she was "tricked" into seeing Dr. Ross, believing he was a neurosurgeon and would be treating her condition. (Affidavit of Connie Gryttenholm, ¶ 6.) She would not have agreed to see him had she known otherwise. Not knowing Dr. Ross' specialty, she presented herself for examination at his office. After examining her, Dr. Ross concluded the claimant was at maximum medical improvement (MMI) and the insurer then cut off her temporary total disability benefits. (Ex. 3 to Respondent's Answer Brief in Opposition to Petitioner's Motion in Limine and Petitioner's Objection to Medical Report.)

Discussion

¶7 Claimant asks the Court to exclude Dr. Ross' opinions and testimony as ill gotten gains from an impermissible examination. While they have argued the issue in terms of estoppel, I view the issue as involving informed consent and the statutory requirements for an IME.

¶8 Independent medical examinations are governed by section 39-71-605, MCA (1999).[(2)] That section gives the insurer the right to an IME but also provides the claimant with

specific rights in connection with any such examination, including the right "to have a physician present at any examination," § 39-71-605 (1)(b), and, in some cases, the right to have the examination by a physician "in a particular field of medicine concerned with the matters presented by the dispute," § 39-71-605(2). Moreover, the insurer does not have an unlimited right to IMEs. *Stacey v. Plum Creek Lumber,* 2001 MTWCC 64, ¶ 3.

¶9 Accurate information concerning a proposed IME is essential to the claimant's rights under the IME provisions. A claimant cannot intelligently exercise her rights or resist an improper examination where the insurer misleads her as to the nature of the examination or the speciality of the examiner. In the present case the claimant was misled as to the specialty of the examining physician and probably his role.

¶10 It is of no help to the insurer that the claimant learned she had been misled when she was being examined by Dr. Ross. It is unreasonable to expect that she would have walked out after the examination began.

¶11 The insurer argues that the adjuster intended Dr. Ross to become a treating physician. If so, the adjuster failed to communicate her intention. There is nothing in her affidavit or correspondence communicating her intention to the claimant or to Dr. Ross. Dr. Ross noted that he was examining claimant at the insurer's request. The insurer's own attorney initially, and quite reasonably, believed that the examination by Dr. Ross was an IME. (Ex. 2 to Respondent's Answer Brief in Opposition to Petitioner's Motion in Limine and Petitioner's Objection to Medical Report.)

¶12 Moreover, if Dr. Ross was to be a treating physician, it was all the more critical for the adjuster to inform claimant of Dr. Ross' specialty, especially after telling her that she would be examined by a neurologist. Dr. Ross could not become claimant's treating physician without claimant's consent. Her consent to his examination was vitiated[(3)] by the fact she had been misled as to his medical specialty.

¶13 The adjuster's blurring of the line between an IME and a treating physician in this case is unacceptable not only with respect to the claimant but also with respect to the chosen physician. The testimony of dozens of physicians over the past eight years convinces me that physicians' opinions *may* be affected by whether they view themselves as treating or IME physicians. Indeed, in one recent case an IME physician declined to treat a claimant even though requested because he viewed treatment as conflicting with his IME role. Some IME physicians claim they are more objective than treating physicians, while treating physicians claim a better understanding of their patients' injuries. I am convinced that by and large physicians attempt to be as objective as humanly possible, however, it is also apparent to me that it is at least possible a physician's opinion may be affected by whether the physician perceives himself or herself as a treating or IME physician. Where the insurer refers the claimant to a physician, this makes it all the more important for the insurer to clearly inform the claimant **and** the physician.

¶14 I am also troubled by the fact that the adjuster initially determined that claimant should be examined by a neurologist, then sent her to a physician specializing in occupational disease. While the specialties may overlap to some extent, if claimant's problems were thought to be primarily neurological, why not send her to another neurologist when the first one declined?

¶15 I reaffirm the ruling I conveyed to counsel that Dr. Ross' testimony and records will be excluded.

¶16 As a result of my ruling, counsel raised several other matters which I addressed. First and foremost, Mr. Wills requested the opportunity to depose Dr. Paul Cederberg, who conducted an IME on March 22, 2001. In light of the fact that the insurer was going to rely at trial on testimony by Dr. Ross, and the recency of the claimant's Motion in Limine, I find the insurer's request is reasonable. Therefore, the deposition of Dr. Cederberg may be taken. I have not set a deadline for the deposition. If counsel cannot agree upon a date, they can contact me and I will fix one.

¶17 Mr. Wills also raised the question as to whether my suppression of Dr. Ross' opinion invalidates the insurer's termination of benefits, which was based on Dr. Ross' MMI determination. I did not rule on the matter, indicating only that the question is significant and merits further consideration. The issue will be considered in my ultimate decision concerning claimant's entitlement to further benefits.

¶18 Mr. Wills also requested that Dr. Ross' report be considered with respect to any request for attorney fees, however, no such request for attorney fees was made in the petition. The attorneys will confer and Mr. Toennis will notify the Court whether he wishes to move to add the issue. In discussion with counsel, I noted that the fact that I am excluding testimony by Dr. Ross does not necessarily indicate that the insurer acted unreasonably in cutting off benefits. If a motion to amend is tendered and I allow it, I will certainly admit Dr. Ross' report in connection with the reasonableness issue.

¶19 I think I have covered everything. If counsel disagree, they should notify me of my omissions on or before April 24, 2002.

SO ORDERED.

DATED in Helena, Montana, this 19th day of April, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis - Mailed & Faxed
Mr. Kelly M. Wills - Mailed & Faxed

1. This apparently refers to records attached to the letter. No list of records is set out in the letter.

2. The injury in this case occurred on March 11, 2000, therefore the 1999 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

3. As an aside, the Court is delighted in being able to use the word "vitiate." One of the Maxims of Jurisprudence near and dear to every lawyer's heart, but rarely used, is found in section 1-3-228, MCA, which provides, succinctly, "Superfluity does not vitiate." I will not try to explain what the maxim means.