

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 82

WCC No. 9209-6584

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JAMES HEDGER

Petitioner

vs.

MONTANA SCHOOLS GROUP AUTHORITY

Respondent/Insurer for

GREAT FALLS PUBLIC SCHOOLS

Employer.

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ORDER FOR INDEPENDENT PSYCHOLOGICAL EVALUATION

Montana Schools Group Insurance Authority (MSGIA) has requested the Court to authorize it to schedule an independent psychological evaluation of petitioner, James Hedger (Hedger). Hedger opposes this request.

Background

On December 15, 1989, Hedger suffered an industrial injury to his head and spine while employed with the Great Falls Public Schools. Following a hearing before a hearing examiner of this Court, Hedger was determined to be "presently permanently totally disabled". In his decision the hearing examiner further stated, "In the event the defendant does have medical and vocational evidence that the claimant no longer meets the definition of permanent total disability, an appropriate petition may be filed with this Court." **James Hedger v. Montana Schools Group Authority, WCC No. 9209-6584 (May 7, 1993).**

Thereafter, MSGIA scheduled Hedger for an independent medical examination [IME] by Dr. Robert Chambers. Hedger did not appear for the scheduled examination and MSGIA cut off benefits. Hedger then obtained an execution from the Court and attempted to levy. The Court then became involved in the IME dispute and ultimately ordered the IME by Dr. Chambers and a reinstatement of Mr. Hedger's benefits. Order Directing Reinstatement of Benefits and Medical Examination (October 19, 1993).

Dr. Chambers thereafter examined the claimant. In a November 17, 1993 report of his examination, Dr. Chambers states in part:

Improvement of his [Hedger's] condition would depend upon the success of psychological evaluation and counseling, with respect to many aspects of his personal life, including his suspected fear of reinjury. Based on this examiner's impression derived from the medical record and the encounter today, the prognosis for improvement is guarded.

...

Nonetheless, if psychological intervention proved effective, and Mr. Hedger could achieve a necessary degree of insight into the nature of his current life's problems, and be motivated to participate in the improvement of his own condition, a rehabilitation program might be successful, a detoxification program might be successful, and it is certainly conceivable that he could return to gainful employment for the remainder of his productive years.

The full report is attached to a February 14, 1994 Request for Telephonic Hearing made by MSGIA.

Subsequent to Dr. Chamber's examination and report, MSGIA scheduled Hedger for an IME by Dr. John Mendenhall, who is a psychiatrist. Hedger disputed MSGIA's authority for the examination and the dispute was brought to the Court's attention through MSGIA's February 14, 1994 Request for Telephonic Hearing. A conference call with counsel was held on February 23, 1994, and resulted in the Court directing that the matter be briefed.

On March 18, 1994, MSGIA filed a Request for Independent Medical Evaluation, along with a supporting brief. Hedger thereafter responded. He contends that MSGIA has had its IME and the doctrine of res judicata precludes any further IME. Brief in Opposition to Request for Independent Psychological Evaluation at 6.

### Discussion

The Court treats MSGIA's request as one for a declaratory ruling. Since the issue raised by the request follows on the heels of the Court's prior adjudication of Hedger's disability, and the present dispute concerns, in part, the effect of that adjudication, the matter has been docketed under the docket number of the original case.

The insurer's right to an IME is addressed in section 39-71-605, MCA. Section 39-71-605(1)(a), MCA,<sup>(1)</sup> provides:

Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, he shall, upon the written request of the insurer, submit from time to time to examination by a physician or panel of physicians, who shall be provided and paid for by such insurer, and shall likewise submit to examination from time to time by any physician or panel of physicians selected by the department.

Hedger argues that MSGIA has "had its statutory medical examination." Brief in Opposition to Request for Independent Psychological Evaluation at 6. However, section 39-71-605(1)(a), MCA, does not limit the number of examinations the insurer may

request. The language of the statute clearly contemplates the possibility of multiple examinations, providing that the employee shall "submit from **time to time** to examination." The right to an examination is not limited to the time prior to a determination of a claimant's disability. The statute broadly requires a claimant to submit to examination "whenever . . . the right to compensation under this chapter would exist."

Hedger further argues that "the only reason" MSGIA "is seeking additional medical evaluations is to relitigate a matter that has already been decided on the merits against ALEXSIS and the MSGIA." Brief in Opposition to Request for Independent Psychological Evaluation at 3. He invokes the doctrine of res judicata as barring both relitigation of his disability and any further IME.

The doctrine of res judicata prohibits a party from relitigating a matter that the party has already had an opportunity to litigate. *Whirry v. Swanson*, 254 Mont. 248, 250, 836 P.2d 1227 (1990). However, the legislature has specifically provided the Workers' Compensation Court with continuing jurisdiction concerning disability determinations. Section 39-71-2909, MCA provides:

The judge may, upon the petition of a claimant or an insurer that the disability of the claimant has **changed**, review, diminish, or increase, in accordance with the law on benefits as set forth in chapter 71 of this title, any benefits previously awarded by the judge. [Emphasis added.]

A court determination that a claimant is permanently totally disabled does not preclude the possibility that the claimant's disability status may change. *Jesse Estrada v. Intermountain Insurance Co.*, WCC No. 8603-3519 (July 10, 1986). In *Hart [sic] v. J.J. Newberry Co.*, 179 Mont. 160, 587 P.2d 11 (1978), a claimant was found to be permanently disabled. The insurer appealed the finding, contending that there was a possibility that the claimant would recover her work ability. Explaining that the Workers' Compensation Court has continuing jurisdiction to review, diminish or increase any benefits awarded, the Supreme Court upheld the finding. *Id.* at 166. Thus, it is clear that an adjudication of permanent total disability does not preclude this Court from determining that the claimant's condition has changed and that he or she is no longer permanently totally disabled.

The rub in this case is MSGIA's reliance on language in this Court's original decision which appears to invite relitigation of the disability issue without proof of any change in the claimant's condition. MSGIA quotes the following paragraph from the original decision:

There is no evidence that the defendants or their adjustors ever requested a rehabilitation evaluation of the options under section 39-71-1012, MCA. The claimant therefore is presently permanently totally disabled as defined in section 39-71-701, MCA (1989). *In the event the defendant does have medical and vocational evidence that the claimant no longer meets the definition of permanent total disability, an appropriate petition may be filed with this Court.* [Italics added.]

*James Hedger v. Montana Schools Group Authority*, WCC No. 9209-6584 (May 7, 1993) at 10-11 (quoted at page 2 of MSGIA's opening brief). Insofar as the italicized

language suggests that MSGIA may reopen and relitigate the disability matter without proving a change in claimant's condition, it is overruled. As set forth in section 39-71-2909, MCA, the Court's authority to review a prior disability determination is limited to cases in which "the disability of the claimant has **changed**." "[A]wards can be reopened by the compensation board for modification to meet changes in claimant's condition, such as increase, decrease or termination of disability. . . . On a reopening for changed condition, *no other issues may be relitigated*, and the claimant's evidence must bear directly upon the comparison between his former and present disability." ***Wheeler v. Carlson Transport***, 217 Mont. 254, 258-59, 704 P.2d 49 (1985) (citing Larson, *Workmen's Compensation Law*, Vol. 3, Sec. 81.00 (1983 ed.) (emphasis added)). Without that limitation, endless litigation would ensue: any party dissatisfied with the Court's disability determination could merely obtain additional expert opinions, collect overlooked evidence, and bring the matter back to court for a second or even third trial.

MSGIA is, however, entitled to a medical examination to determine whether there has been any change in Hedger's condition or whether further treatment might improve his condition. One of the purposes expressed by MSGIA for requesting the examination by Dr. Mendenhall is to determine whether Hedger would benefit from further treatment:

Hedger apparently has psychological barriers which may be overcome with diagnosis and treatment. Hedger may have mental limitations, but those limitations have never been objectively assessed. Programs may be available to address whatever barriers may exist to Hedger's gainful employment.

Reply Brief in Support of Request for Independent Psychological Evaluation at 3. Since 1987 one of the express purposes of the Workers' Compensation Act has been to return the injured worker to gainful employment and to do so as quickly as possible. § 39-71-105 (2), MCA (enacted by 1987 Montana Laws, ch. 464, § 1). Evaluation of claimant's psychological condition to determine if treatment might improve his condition and enable him to return to employment is consistent with that goal. MSGIA has therefore established a sufficient and reasonable basis for the requested examination.

## ORDER

MSGIA's request for an independent psychological evaluation is **granted**.

DATED in Helena, Montana, this 16th day of September, 1994.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Tom L. Lewis  
Mr. Leo S. Ward

1. Hedger was injured in December 1989. Subsection (1)(a) of the statute is the same now as in 1989.