

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 63

WCC No. 2003-0796

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner

vs.

ROBIN MARQUARDT

Respondent.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

Summary: Insurer petitions for an order directing claimant to submit to a second functional capacities evaluation (FCE). Based on a letter of its independent medical examiner requesting the FCE, the insurer moves for summary judgment regarding its request. In response to the insurer's summary judgment motion, the claimant moves for summary judgment prohibiting further FCEs. Claimant also requests summary judgment declaring her permanently totally disabled and awarding her an impairment award.

Held: The sole issue raised by the pleadings is the insurer's current request for an FCE. Other issues will not be considered. As to the FCE, while the insurer is not limited to a single FCE, its entitlement to an additional FCE or FCEs is not unlimited. An insurer is entitled to an FCE only if there are sound reasons for the procedure. In this case, the facts submitted to the Court are insufficient to determine whether or not a further FCE is necessary or reasonable, therefore an evidentiary trial is required. Claimant is not entitled to an order barring all further FCEs.

Topics:

Summary Judgment: Criteria. The moving party is not entitled to summary judgment unless it presents uncontroverted facts showing it is entitled to judgment as a matter of law. Where the moving party is an insurer seeking a judgment ordering a claimant to submit to an independent medical examination or a functional capacities evaluation, summary judgment will not be granted where the facts proffered with the motion fail to demonstrate good cause for the IME or FCE.

Summary Judgment: Generally. The Court will not consider issues raised in a motion for summary judgment which are outside the scope of the pleadings.

Independent Medical Examinations: Generally. An insurer is not entitled to independent medical examinations without limit. It is entitled to an IME only where there are sound reasons for conducting one. § 39-71-605, MCA (2003).

Independent Medical Examinations: FCE. An insurer is not entitled to functional capacity evaluations without limit. It is entitled to an FCE only where there are sound reasons for conducting one. § 39-71-605, MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-605(1), MCA (2003). An insurer is not entitled to independent medical examinations without limit. It is entitled to an IME only where there are sound reasons for conducting one.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-605(4), MCA (2003). An insurer is not entitled to functional capacity evaluations without limit. It is entitled to an FCE only where there are sound reasons for conducting one.

¶1 Liberty Northwest Insurance Corporation (Liberty) petitions the Court for an order directing claimant to submit to a Functional Capacities Evaluation (FCE). In her amended response to the petition, the claimant opposes the FCE and requests a penalty and attorney fees for having to defend against the petition.

The Motions

¶2 Liberty has moved for summary judgment with respect to its petition. In response, the claimant requests summary judgment (1) prohibiting petitioner from seeking any further FCEs and (2) declaring claimant permanently and totally disabled. Subsequent to briefing of the motions for summary judgment, claimant filed a further motion styled "Motion to Amend *Nunc Pro Tunc* Prayer [Conclusion] of Motion for Summary Judgment." The requested amendment would add a claim for a 12% impairment award.

Previous Petition

¶3 A previous petition involving these parties was before this Court in *Marquardt v. Liberty Northwest Insurance Corp.*, WCC No. 2001-0323. A trial of that case commenced in Butte on August 15, 2001. However, after extensive discussion among myself and counsel, an agreement disposing of that case was reached. The agreement, as set forth in the Court's minute entry of that date, was as follows:

The parties agreed that (1) Liberty will maintain the claimant on total disability benefits until and unless the Court orders otherwise or unless the claimant returns to work; (2) in any further court action, Liberty will bear the burden of proving claimant is not entitled to further total disability benefits; (3) claimant will cooperate in a work[-]hardening program and also with the doctors; (4) Liberty will have another FCE by a physician located in Butte, Missoula, or Bozeman; (5) Liberty will do a further vocational assessment after the

claimant completes the work[-]hardening program and may provide further rehabilitation benefits in accordance with the statutes; (6) the penalty and attorney fees issues are deferred for now; and (7) Liberty will authorize claimant to see Dr. Redwine for chiropractic treatments two times per week for up to three months.

Documents submitted in connection with the present motions show that subsequent to the agreement the claimant went through a work-hardening program, following which she underwent an FCE. The FCE took place on September 27 and 28, 2001.

Discussion

I.

¶4 The claimant argues that the insurer is entitled to no further FCEs. She submits, that the "legislature intended the FCE to be only an occasional affair." (Respondent's *Reply Brief* in Support of Her Motion for Summary Judgment at 1.) Second, she urges that the prior agreement is *res judicata* and bars all further FCE requests. (*Id.*)

A.

¶5 Section 39-71-605, MCA (2003), governs independent medical examinations (IMEs) and FCEs. Subsection (1) provides that a claimant must submit "from time to time" to an IME upon the request of the insurer or upon order of the Department or the Workers' Compensation Judge.⁽¹⁾ Subsection (4) governs FCEs, providing:

(4) A claimant is required, upon a written request of an insurer, to submit to a functional capacities evaluation conducted by a licensed physical or occupational therapist.

On its face, the subsection does not limit an insurer to a single FCE, and claimant does not contend otherwise. Rather, she argues that the language of the section indicates that the right to an FCE is not unlimited and should be "only an occasional affair."

¶6 I agree with claimant that the right to an FCE is not unlimited, indeed the right to an IME is not unlimited. Section 39-71-605, MCA, must be construed in the context of the purposes of those procedures. See *Hern Farms, Inc. v. Mutual Benefit Life Ins. Co.*, 280 Mont. 436, 441, 930 P.2d 84, 87 (1996) ("In interpreting a statute, the prime consideration must be defining the objectives the legislature sought to achieve."). The plain purpose of section 39-71-605, MCA, is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, his or her current medical condition and need for further treatment, and the relationship of the claimant's condition to the industrial injury or disease. In line with that purpose, they cannot be demanded for arbitrary or whimsical reasons. Thus, an insurer cannot compel repeated examinations simply because it does not like the results or opinions from the prior ones. On the other hand, an insurer is entitled to obtain a second, third, or even more IMEs or FCEs where there is an indication that claimant's medical condition has changed or there is some other sound

reason for doing a repeat examination; for example, where the prior examination did not address the current medical issue.

¶17 In this case, Liberty has attached a letter of its IME physician, Dr. John C. Schumpert, indicating his desire for an FCE to "expedite review of the Job Analyses that have been submitted to me and assignment of permanent restrictions if they are indicated." (Ex. A to Liberty's Motion for Summary Judgment.) It is not clear whether Dr. Schumpert was furnished a copy of the September 2001 FCE or why he believes a new FCE is required. However, Liberty argues that the prior FCE was insufficient because the FCE examiner "only performed [the] FCE to be aware of safety and abilities" and did not review actual job analyses. (Liberty's Brief in Opposition to Summary Judgment at 1-2.) I am not persuaded.

¶18 A copy of the September 2001 FCE report is attached to claimant's Response, Motions for Summary Judgment & Brief in Support. The report indicates that the FCE was a "standardized" FCE. It charts claimant's physical capacities in numerous respects in terms of pounds and duration. It provides specific restrictions and recommendations. The report also summarizes the claimant's significant abilities and deficits. The report does **not appear on its face** to be inadequate for purposes of determining whether particular jobs are appropriate for her. I am therefore unable to say, as a matter of law, that the report is insufficient or incomplete, or that there is sufficient justification to order another FCE. Nor am I able to say, as a matter of law, that Liberty is not entitled to a further FCE. Claimant has offered nothing by way of unrefuted evidence to show that her situation is unchanged or that the FCE is fully adequate to allow Dr. Schumpert to evaluate job analyses. Summary judgment for either party is therefore inappropriate and must be denied.

B.

¶19 Claimant urges that the FCE is barred by the doctrine of *res judicata*. The argument is based on the prior agreement reflected in the Court's minute entry of August 15, 2001. Assuming that the minute entry constitutes a judgment of the Court, the argument is without merit. The agreement certainly settled the insurer's right to an FCE *at that time* but did not purport to bar all future FCEs.

C.

¶10 Claimant further requests summary judgment barring any further FCEs. This request is also without merit. Whether a new FCE is appropriate depends on the facts and circumstances at the time of the request. Even if the insurer fails to demonstrate a justification for an FCE at the present time, an FCE at a future time may be justified if, for example, the claimant's condition changes or she is retrained.

II.

¶11 As to the claimant's summary judgment motion regarding disability status and an impairment award, those issues were not raised in either the petition or the response. Thus, they are outside the pleadings of the case and will not be considered.

ORDER

¶12 All motions for summary judgment are **denied**. The only issue framed by the pleadings is the question of Liberty's right to a further IME. The Court will hold an evidentiary trial regarding that issue. A new scheduling order shall issue setting a new trial date and fixing pretrial deadlines.

DATED in Helena, Montana, this 30th day of October, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Larry W. Jones

Mr. Robert C. Kelleher

Submitted: September 12, 2003

1. Subsection (1) of 39-71-605, MCA (2003), provides:

(1) (a) Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel that must be provided and paid for by the insurer and shall likewise submit to examination from time to time by any physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.