

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 38

WCC No. 9803-7938

JOHN SLOAN

Petitioner

vs.

AMERICAN HOME ASSURANCE COMPANY

Respondent/Insurer for

HERITAGE PROPANE CORPORATION

Employer.

PROTECTIVE ORDER

Summary: Claimant, who seeks permanent total disability benefits on the basis of injury to his ankle, foot, shoulders and back, also has a heart condition and underwent triple bypass surgery. Contending any disability suffered by claimant results from his heart condition, respondent scheduled an independent medical examination with claimant's cardiac surgeon. Claimant sought a protective order against the IME.

Held: Protective order granted where *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995) establishes that even if a worker is totally disabled on account of a pre-existing non work-related heart condition, the worker is still entitled to workers' compensation total disability benefits if his industrial injury is also totally disabling. Petitioner must, however, prove that his work-related injuries are in fact totally disabling. Where evidence indicates that the heart condition may have caused memory loss, WCC notes that if claimant is contending the industrial injury caused memory loss, then the insurer would be entitled to an IME.

Topics:

Injury and Accident: Causation. Protective order granted against IME with cardiac surgeon where *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995) establishes that even if a worker is totally disabled on account of a pre-existing non work-related heart condition, the worker is still entitled to workers' compensation total disability benefits if his industrial injury is also totally disabling. Petitioner

must, however, prove that his work-related injuries are in fact totally disabling. Where evidence indicates that claimant's heart condition may have caused memory loss, WCC notes that if claimant is contending the industrial injury caused memory loss, then the insurer would be entitled to an IME.

Independent Medical Examination (IME). Protective order granted against IME with cardiac surgeon where *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995) establishes that even if a worker is totally disabled on account of a pre-existing non work-related heart condition, the worker is still entitled to workers' compensation total disability benefits if his industrial injury is also totally disabling. Petitioner must, however, prove that his work-related injuries are in fact totally disabling. Where evidence indicates that claimant's heart condition may have caused memory loss, WCC notes that if claimant is contending the industrial injury caused memory loss, then the insurer would be entitled to an IME.

¶1 The petitioner in this case seeks a determination that he is permanently totally disabled on account of orthopedic injuries he suffered in a 1993 industrial accident. The injuries involved his right ankle and foot, one of his shoulders, and his back.

¶2 Petitioner also has a heart condition and underwent triple bypass surgery. Respondent urges that if claimant is permanently totally disabled it is on account of his heart condition, not on account of his industrial injuries. In pursuit of its theory, respondent has scheduled an examination of claimant by his treating cardiologist, Dr. Guy E. Katz. The examination is scheduled in Spokane for May 11, 1998.

¶3 Petitioner moves for a protective order barring the examination. The motion is **granted**.

¶4 Whether the petitioner is permanently totally disabled on account of a heart condition is irrelevant to the inquiry in this case. In *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995), the Supreme Court held that even if a worker is totally disabled on account of a preexisting, non work-related heart condition, the worker is still entitled to workers' compensation total disability benefits if his or her industrial injury is also totally disabling.

¶5 Petitioner must muster persuasive evidence that he is in fact totally disabled **on account of his work-related orthopedic injuries**. The only information offered by respondent which suggests that claimant's heart condition might be relevant to that inquiry is a letter of a nurse case manager who wrote that petitioner has "very marked memory loss, which his wife attributes to his heart attack." In light of the short time allowed the Court to address the petitioner's motion, I am not able to determine whether petitioner is claiming that he is totally disabled on account of a memory loss he suffered as a result of his orthopedic injuries. Certainly, there is no suggestion of such theory in petitioner's brief supporting the motion. Absent some indication that petitioner intends to pursue that theory, the motion for protective order must be granted.

¶6 Finding good cause, IT IS HEREBY ORDERED AS FOLLOWS:

- The medical examination of petitioner which was scheduled by respondent with Dr. Katz for May 11, 1998, is prohibited.
- Within 10 days of this Order, petitioner shall notify the Court and respondent, in writing, whether he alleges that he suffers from disabling memory loss attributable to his industrial accident. If he alleges such loss, then respondent may reschedule his examination by Dr. Katz and petitioner shall attend such examination. If the delay occasioned by vacating the May 11th examination affects respondent's ability to go to trial as scheduled, then the Court will consider a motion to reset this matter over to a later term.

DATED in Helena, Montana, this 8th day of May, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Laurie Wallace - U.S. Mail & FAX

Mr. Robert C. Griffin - U.S. Mail & FAX

Submitted: May 7, 1998