

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 2

WCC No. 9511-7432

MARY C. STORMONT

Petitioner

vs.

NATIONAL UNION FIRE OF PITTSBURGH

Respondent/Insurer for

HILLHAVEN CORPORATION

Employer.

ORDER PERMITTING IME

Summary: Parties presented dispute regarding whether claimant must submit to independent medical examination by physician selected by insurer or whether Department of Labor and Industry must select the physician.

Held: Under section 39-71-605, MCA (1995), a claimant must submit from time to time to examination by a physician or panel selected by the and shall also submit from time to time to examination by a department-selected physician. Limiting IMEs to physicians selected by the department would nullify one of the statutory provisions.

Topics:

Constitutions, Statutes, Regulations and Rules: section 39-71-605, MCA (1995).

Under section 39-71-605, MCA (1995), a claimant must submit from time to time to examination by a physician or panel selected by the and shall also submit from time to time to examination by a department-selected physician. Limiting IMEs to physicians selected by the department would nullify one of the statutory provisions.

Independent Medical Examination (IME). Under section 39-71-605, MCA (1995), a claimant must submit from time to time to examination by a physician or panel selected by the and shall also submit from time to time to examination by a department-selected physician. Limiting IMEs to physicians selected by the department would nullify one of the statutory provisions.

Pursuant to a request by counsel in this matter, the Court held a telephone conference with Mr. Steve M. Fletcher, attorney for petitioner, and Ms. Sarah R. Sexe, attorney for respondent. Counsel requested the Court to resolve a matter of statutory interpretation concerning independent medical examinations.

Respondent has noticed an IME of petitioner. It designated Dr. Rappaport of Big Timber to perform the examination. The sole dispute between the parties is whether the respondent can designate the IME examiner or whether only the Department of Labor and Industry can do so.

In arguing that only the Department can designate the examiner, Mr. Fletcher points to subsection (2) of section 39-71-605, MCA, which provides that in the event of a "dispute concerning the physical condition of the claimant or the cause or causes of the injury," the Department, at the request of either the insurer or claimant, shall designate the examiner. Subsection (1), however, provides that the insurer may require a claimant to submit to an IME by a physician **it** designates. The two subsections read as follows:

39-71-605. Examination of employee by physician -- effect of refusal to submit to examination -- report and testimony of physician -- cost. (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 or panel of physicians, who must be provided and paid for by the insurer, **and shall likewise submit to examination from time to time by any physician or panel of physicians selected by the department.**

(b) The request or order for an examination must fix a time and place for the examination, with regard for the employee's convenience, physical condition, and ability to attend at the time and place that is as close to the employee's residence as is practical. The employee is entitled to have a physician present at any examination. If the employee, after written request, fails or refuses to submit to the examination or in any way obstructs the examination, the employee's right to compensation must be suspended and is subject to the provisions of 39-71-607. Any physician or panel of physicians employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.

(2) In the event of a dispute concerning the physical condition of a claimant or the cause or causes of the injury or disability, if any, the department, at the request of the claimant or insurer, as the case may be, shall require the claimant to submit to an examination as it considers desirable by a physician or panel of physicians within the state or elsewhere who have had adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute.

The physician or panel of physicians making the examination shall file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved. The requesting party shall pay the physician or panel of physicians for the examination. [Emphasis added.]

The two subsections must be read together, harmonized and reconciled if possible. As stated in *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 389, 632 P.2d 300, 306 (1981):

If possible, subsections of a statute should be construed in a manner that will give effect to them all. This Court must reconcile conflicting statutory provisions and make them operative in accordance with the legislative intent, insofar as it is possible to do so. [Citations omitted.]

Petitioner argues that the present case involves a question of what caused claimant's current condition and, therefore, subsection (2) applies and is exclusive. While the Court agrees that subsection (2) applies, it is clear that the subsection is **not** exclusive. Subsection (1), which gives the insurer the right to compel a claimant to submit to an examination by a physician of its choice, does not on its face limit the circumstances or issues under which it may exercise that right. Indeed, limiting the insurer's right to examination to issues and matters outside the scope of subsection (2) could effectively nullify the provision altogether since it is difficult to imagine a circumstance or issue not encompassed within the authority of the Department under subsection (2). Moreover, the highlighted portion of the last sentence of subsection (1)(a), expressly contemplates an overlap between the two subsections. It provides that a claimant may be subject to examination under **both** subsections. The two sections are readily and easily harmonized and given effect by interpreting them as providing alternatives for IME examinations.

THEREFORE, I FIND that pursuant to subsection (1) of section 39-71-605, MCA, the claimant is subject to examination by a physician designated by respondent. Since Mr. Fletcher indicated that petitioner will submit to such examination should I so hold, a further order is unnecessary.

Dated in Helena, Montana, this 5th day of January, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Steve M. Fletcher

Ms. Sara R. Sexe

Date Submitted: January 3, 1996