IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 39

WCC No. 2002-0584

AMERICAN HOME ASSURANCE COMPANY

Petitioner/Insurer

vs.

TAMI THUNSTROM

Respondent/Claimant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: Insurer moves for summary judgment directing claimant to submit to an out-of-state independent medical examination (IME).

Held: Insurer is not entitled to an order for an out-of-state independent medical examination unless it demonstrates that an appropriate IME cannot be done in-state.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Sections 39-71-605(1)(b) and (2), MCA (1999-2001). Where the claimant insists, she is entitled to have an independent medical examination conducted as close to her residence as practical. An out-of-state IME will be ordered only where it is not practical to schedule one in-state, for example where the proposed examiner has special expertise specifically appropriate to claimant's condition which Montana examiners do not have or where Montana physicians with the requisite expertise are unwilling to perform an IME.

Independent Medical Examination. Where the claimant insists, she is entitled to have an independent medical examination conducted as close to her residence as practical. An out-of-state IME will be ordered only where it is not practical to schedule one in-state, for example where the proposed examiner has special expertise specifically appropriate to claimant's condition which Montana examiners do not have or where Montana physicians with the requisite expertise are unwilling to perform an IME. §§ 39-71-605(1)(b) and (2), MCA (1999-2001).

Statutes and Statutory Interpretation: Construing as a Whole. The subsections of a statute must be construed together to give effect to all provisions. Where one subsection provides that an independent medical examination shall be conducted at a place as close as practical to a claimant, and another subsection states that the Court may order an IME either in or out-of-state, the Court must fix the place of the examination as close as practical to the claimant's residence.

Summary Judgment: Criteria. Where an insurer moves for summary judgment directing a claimant to submit to an out-of-state independent medical examination, the statute governing such examination provides for the examination to take place as close as practical to the claimant's residence, and the claimant objects to the out-of-state examination based on distance, the insurer, to prevail on its motion, must present uncontroverted facts showing that it is not practical to obtain an examination in-state and closer to claimant's residence. It cannot rest on mere allegations that the out-of-state examination is appropriate.

¶1 Petitioner herein is an insurer which is paying benefits under a reservation of rights. Through its petition, it seeks an order directing claimant to submit to an IME by Dr. Jose Ochoa in Portland, Oregon. Claimant has to date refused to submit to the examination and the insurer American Home Assurance Company (American) now moves for summary judgment.

Factual Basis for the Motion

¶2 The motion is based on the pleadings. American cites claimant's admissions to certain of its allegations, including the fact that she has to date declined American's demand that she travel to Portland to undergo an examination by Dr. Ochoa, a specialist in carpal tunnel syndrome. Claimant has undergone two carpal tunnel releases but apparently is still suffering symptoms.

Discussion

¶3 Claimant filed a belated response to the motion for summary judgment, indeed the response was nearly two weeks late. Prior to the filing of the brief, American urged the Court to summarily grant its motion on the ground that claimant's failure to file a timely reply amounts to an admission that the motion is well taken. ARM 24.5.316(4).[(1)]

Notwithstanding the rule, it still must appear from the face of the motion and its supporting evidence that the moving party is entitled to judgment as a matter of law. ARM 24.5.329(2). "It is well established that the moving party must prove that it is entitled to judgment as a matter of law." *Western Industries, Inc. v. Chicago Min. Corp.,* 279 Mont. 105, 109, 926 P.2d 737, 739 (1996). If there is "any doubt" regarding the propriety of summary judgment, the motion must be denied. *Id*.

¶4 In her response to the petition, the claimant alleges that she is entitled to have an independent medical examination held as close to her place of residence as practical and contends that Portland, Oregon, is not such a place. Her allegations are predicated upon the plain language of section 39-71-605, MCA, which provides in relevant part:

> 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, 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.
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> (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.** An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. 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, psychologist, or panel 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.
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> (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 or the workers' compensation judge, 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, psychologist, or panel within the state or elsewhere that has had adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute. The physician, psychologist, or panel 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, psychologist, or panel for the examination.

¶5 American proffers no factual evidence demonstrating that it cannot secure an adequate IME from a physician closer to claimant's residence. Rather, citing language in subsection (2) and this Court's recent decision in *Benefis Healthcare v. Jackson,* 2002 MTWCC 21, it argues it is entitled to have claimant examined in Portland without regard to the practicality of a closer exam. American misreads both subsection (2) and *Benefis*.

¶6 Subsection (2) allows the Court to order an out-of-state examination, however, the section must be read together with subsection (1)(b), which provides generally that the claimant is entitled to be examined in a "place that is as close to the employee's residence as is practical." Rules governing statutory interpretation require that "a court must reject a construction that would leave any part of the statutory language without effect--the court must give effect to all relevant provisions of the statute." *Montco v. Simonich,* 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997). When read together with subsection (1), subsection (2) authorizes the Court to order an out-of-state examination when examination by an appropriate specialist cannot be had in-state.

¶7 American's reading of *Benefis* is out of context and in disregard of the specific facts and issues of the case. In *Benefis* I ordered an out-of-state examination, however, my decision in that matter was based upon the failure of the claimant to object to an out-of-state examination. The only issue was whether claimant was entitled to take depositions before an IME.

¶8 Unlike *Benefis*, the claimant in this case objects to the out-of-state examination. The burden is therefore on the insurer to show that an appropriate IME cannot be had closer to claimant's place of residence. Such showing might be made by presenting evidence showing that the out-of-state physician has special expertise appropriate to claimant's case which is unavailable among physicians in Montana, or that Montana physicians with the requisite expertise are unwilling to perform an IME. No such evidence has not been presented in conjunction with American's motion.

¶9 The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 8th day of August, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas A. Marra
Mr. Thomas J. Murphy
Submitted: August 5, 2002

1. The rule provides:

(4) Failure to file briefs may subject the motion to summary ruling. Failure of the moving party to file a brief with the motion shall be deemed an admission that the motion is without merit. Failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well taken. Reply briefs are optional and failure to file a reply brief will not subject the motion to summary ruling.