

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 80

WCC No. 9406-7069

FRANK H. WHITE, JR.

Appellant

vs.

LUMBERMEN'S MUTUAL CASUALTY

Respondent.

ORDER DISMISSING APPEAL

This matter involves an occupational disease proceeding which is presently pending before the Department of Labor and Industry (DLI). Frank H. White, Jr. (White), brings this interlocutory appeal from an order directing White to submit to an independent medical examination (IME) by a physician who has not been designated as a member of the occupational disease panel. White argues that section 39-72-607, MCA, precludes an IME by a non-panel member.

Factual Background

While specific facts are not essential to a resolution of this case, they provide the context for the issue presented. Based on the DLI file, it appears that White was examined by at least two duly designated members of the occupational disease panel. See Order Referring Copy of Medical Panel Reports to Parties (December 16, 1993) and section 39-72-602(b), MCA. The medical panel appointed by the DLI thereafter concluded that Mr. White is suffering from an occupational disease, namely *meat wrapper's asthma*. Based on the request for hearing filed by Mr. White, the panel apparently concluded that he is nonetheless employable. See Request for Hearing (December 20, 1993).

Both parties thereafter requested a hearing. White objected to the panel's conclusion concerning his employability. *Id.* The insurer, Lumbermen's Mutual Casualty (Lumbermen's), sought a determination as to "whether the Claimant's condition meets the definition of an occupational disease and to what extent, if any, the Employer/Insurer [sic] responsible for the Claimant's condition." Request for Hearing (December 29, 1993).

On May 12, 1994, Lumbermen's filed a motion requesting that the DLI order White to submit to an independent medical examination (IME) by Dr. Stephen Demeter, a specialist in pulmonary medicine. Dr. Demeter practices medicine in Akron, Ohio.

In an Interim Order Partially Granting and Partially Denying Motion for Physical Examination, DLI's hearing examiner denied the request for an examination by Dr. Demeter but directed White to "submit to a duly scheduled medical examination by a Panel member who is a pulmonary specialist." Interim Order at 5 (underlining in original). The hearing examiner refused to order that the panel member perform the specific tests requested by Lumbermen's.⁽¹⁾

The original Interim Order was issued prior to the hearing examiner's receipt of a reply brief by Lumbermen's. That reply brief was received shortly after the original order issued and caused the hearing examiner to reconsider. On May 25, 1994, the hearing examiner issued an Amended Interim Order Granting Motion for Compulsory Physical Examination. In that order he concluded, "[B]ased upon the Insurer's offer and willingness to pay to have the Claimant examined by Dr. Demeter in Montana, the undersigned concludes that such an examination is in order with this specialist." Amended Interim Order at 1. The order went on to note that Dr. Demeter is a specialist in diagnosing and treating meat wrappers asthma. *Id.* It is from this amended order that Mr. White appeals.

Jurisdiction

While the judicial review provisions of the Montana Administrative Procedure Act (Title 2, chap. 4, part 7, MCA) are not expressly applicable to the Workers' Compensation Court, they have been followed in previous decisions, e.g., ***State Compensation Insurance Fund v. Lee Rost Logging***, 252 Mont. 97, 102, 827 P.2d 85 (1992), and will be followed here.

Section 2-4-701, MCA provides:

2-4-701. Immediate review of agency action. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

In its brief on appeal Lumbermen's does not contest this Court's jurisdiction to review the Amended Interim Order. Moreover, the physical examination contemplated by the Order involves a significant invasion of Mr. White's privacy. Waiting until a final agency decision to review his contentions would not adequately protect his interests. Therefore, he has properly invoked this Court's jurisdiction at this time.

Discussion

Lumbermen's request for an IME was made pursuant to Rule 35(a), Mont.R.Civ.P., as that rule is incorporated by the Model Rules of the Attorney General, ARM 1.3.217(2), which provides in relevant part:

(2) In all contested cases discovery shall be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37 (b)(2)(d)) of the Montana Rules of Civil Procedure in effect on the date of the adoption of this rule and any subsequent rule amendments thereto. . . .

The DLI has adopted the Model Rules through ARM 24.2.101(1), which provides that:

(1) The Department of Labor and Industry of each of its Divisions has adopted the Model Rules proposed by the Attorney General by reference to such rules as stated in 1.3.205 ARM through 1.3.234 ARM with the following exceptions:

...

Model Rule 1.3.217(2) is within the enumerated rules adopted by reference and is not qualified by any of the exceptions which follow the language quoted from ARM 24.2.101(2). Moreover, in a separate, redundant rule, the DLI has specifically incorporated the discovery rules of the Montana Rules of Civil Procedure. Administrative Rule 24.2.105(1) provides in relevant part:

(1) In all contested cases discovery shall be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure in effect on the date of the adoption of this rule and any subsequent rule amendments. . . .

Rule 35(a), Mont.R.Civ.P., as incorporated in the DLI's rules, provides:

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons to whom it is to be made.

White does not contend that good cause to order an examination was lacking. Rather, he argues, and the hearing examiner initially found, that section 39-72-607, MCA, precludes any IME by a physician who has not been designated by the DLI as a member of an occupational disease panel. Section 39-72-607, MCA, provides:

Periodic medical examinations. (1) Upon the request of the department or the insurer, each employee entitled to compensation shall submit to a medical examination from time to time by a physician designated by the department who is a member of the appropriate medical panel. The examination shall be at a place reasonably convenient for the employee.

The hearing examiner initially found that section 39-72-607, MCA, preempts Rule 35(a) IME, in occupational disease cases:

As the specific controls over the general (Section 1-3-225, MCA), and to avoid voidness of the provisions of the Occupational Disease Act (Section 1-3-232, MCA), the undersigned finds that the Act itself fully provides for medical examinations as set forth above. Section 39-72-607, MCA affords due process and case development through this statutory scheme adopted by the legislature for the medical examination(s) of individuals claiming occupational disease benefits. Rule 35 examinations appear to contemplate situations other than occupational disease cases.

Interim Order at 3. Although not entirely clear, the hearing examiner's subsequent change of heart appears to be based on section 39-72-610, MCA, which provides:

Report of and examinations conducted by medical panel. (1) At a hearing held before the department or the workers' compensation judge, there is a rebuttable presumption that the report of the medical panel and any medical examination reports by members of the medical panel are correct.

(2) the claimant or the insurer may present additional medical information in order to rebut the medical examination report of a panel member or a panel report.

In his Amended Interim Order the hearing examiner writes:

This examination [by Dr. Demeter], to be scheduled by the Insurer's Counsel, will give effect to Section 39-72-610(2), MCA (presentation of additional medical evidence to rebut a Panel report or to rebut an examination by a Panel member). **Without this requested examination, it is concluded that the Insurer would be denied full development of the medical record.** [Emphasis added.]

Amended Interim Order at 2.

In interpreting statutes the Court must first look to the face of the statute. If the words are plain, they speak for themselves and no interpretation is required. **Holly Sugar v. Department of Revenue**, 252 Mont. 407, 412, 830 P.2d 76 (1992); and **State ex rel. Neuhausen v. Nachtsheim**, 253 Mont. 296, 299, 833 P.2d 201 (1991). Where multiple provisions of a statute are involved, all provisions must be coordinated and harmonized, if possible. **McClanathan v. Smith**, 186 Mont. 56, 61, 606 P.2d 507 (1980). The particular section of a statute should be interpreted "in such a manner as to insure coordination with the other sections of the Act." **Hostetter & Leep v. Inland Development & Big Sky**, 172 Mont. 167, 171, 561 P.2d 1323 (1977); **accord State v. Meader**, 184 Mont. 32, 37, 601 P.2d 386 (1979). Particular words cannot be read in isolation: "[L]egislation must be read as a whole in order to ascertain legislative intent." **State v. Magnuson**, 210 Mont. 401, 408, 682

P.2d 1365 (1984). Applying the foregoing principles, I find that section 39-72-60, MCA, does not preclude an IME by a non-panel member physician.

On its face section 39-72-607, MCA, applies to an "employee **entitled** to compensation." Mr. White has not been determined to be **entitled** to compensation. Section 39-72-607, MCA, is part of an overall scheme which provides a specific procedure for finally determining a claimant's entitlement under the Occupational Disease Act. Where any party requests a hearing, that final determination is made only **after** hearing. §§ 39-72-611 and 612, MCA. In the context of these statutory procedures, an "employee entitled to compensation" can only refer to an employee whose claim has either been accepted by the insurer or finally determined by the DLI to be compensable. Thus, whether or not the medical examination specified under section 39-72-607, MCA, is exclusive as to an employee entitled to compensation, the section does not apply to Mr. White.

Moreover, section 39-72-607, MCA, must be read in conjunction with section 39-72-610, MCA, which entitles both the claimant and insurer at any contested case hearing to "present **additional** medical information in order to rebut the medical examination report of a panel member or a panel report." Certainly, medical testimony by a claimant's treating physicians, or by consultants retained by claimant to examine him and testify, would be admissible under this section. To give the claimant the right to develop medical testimony based on personal examination and deprive the insurer's medical experts of a similar opportunity, would create an uneven playing field. The right to present evidence surely implies a right to fairly develop that evidence.

The Court concludes that section 39-72-607, MCA, does not preclude the DLI from ordering an IME by a physician selected by an insurer even though the physician is not a designated member of a Montana occupational disease panel. The Amended Interim Order correctly concluded that Lumbermen's is entitled to an IME by Dr. Demeter.

ORDER

The May 25, 1994 Amended Interim Order Granting Motion for Compulsory Physical Examination is **affirmed**. This matter is remanded for further proceedings.

DATED in Helena, Montana, this 8th day of September, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. William P. Joyce
Mr. Thomas A. Marra
Ms. Melanie A. Symons

1. The tests requested by Lumbermen's were ventilation perfusion lung scan, methacholine challenge, and cardiopulmonary exercise stress test. Affidavit in Support of Motion for Compulsory Physical Examination Pursuant to Mont. R. Civ. P. Rule 35(a).