

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 21

WCC No. 2002-0505

BENEFIS HEALTHCARE

Petitioner/Insurer/Employer

vs.

DAVID JACKSON

Respondent/Claimant.

SUMMARY JUDGMENT

Summary: The employer, which is self-insured, seeks an order directing that claimant submit to an independent medical examination by a specialist in Portland, Oregon. It moves for summary judgment. Claimant in his reply to the motion for summary judgment does not contest the appropriateness of the examination or the examiner, nor does he provide facts or argument indicating that Portland is an inappropriate place. Rather, he alleges that prior to any examination he should have the opportunity to depose three co-employees, two who are facilities managers and the third a human resources employee.

Held: The employer is entitled to the examination. Claimant has failed to provide any facts showing that the proposed depositions are relevant to any medical issue or to the further medical evaluation of the claimant.

Topics:

Independent Medical Examinations. As provided in section 39-71-605(1), MCA, where a claimant is entitled to compensation the insurer may request the claimant to submit "from time to time" to an independent medical examination. Where the claimant refuses to submit to the request, the Court may order the examination.

Independent Medical Examinations. Where medical information submitted to the Court indicates that a requested independent medical examination is appropriate and that the expertise of the examining physician is related to the claimant's condition, the Court will order the examination.

Independent Medical Examinations. The Court will not defer an independent medical examination to allow the claimant to undertake discovery where the claimant fails to

provide any facts showing that the proposed discovery is relevant to any medical issue or to the further medical evaluation of the claimant.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-605, MCA (1999). As provided in section 39-71-605(1), MCA, where a claimant is entitled to compensation the insurer may request the claimant to submit "from time to time" to an independent medical examination. Where the claimant refuses to submit to the request, the Court may order the examination.

¶1 The petitioner, Benefis Healthcare (Benefis), is the employer of David L. Jackson (claimant), who suffered a work-related ankle injury on June 26, 2000. Benefis is self-insured. In its petition it requests an order directing claimant to submit to an independent medical examination (IME) by Dr. Jose Ochoa in Portland, Oregon. It now moves for summary judgment, relying on the pleadings and medical records which are attached to its motion.

Facts

¶2 The facts set out by Benefis in its supporting brief are not contested by claimant. Those facts are:

¶2a David Jackson injured his left ankle while employed as a nurse by Benefis Healthcare in Cascade County, on June 26, 2000. (Petition for Trial, paragraph 1; Response to Petition for Trial, paragraph 1.)

¶2b Mr. Jackson's condition required left ankle surgery and a controversy exists concerning where Mr. Jackson has achieved maximum medical improvement. Orthopedic surgeon, Michael Yorgason, M.D., believes Mr. Jackson has reached maximum medical improvement for all conditions causally related to his employment. (Yorgason Report, p. 2.) Mr. Jackson's treating physician, podiatrist Ronald Ray, D.P.M., wants to have additional issues addressed by an out-of-state specialist before finding maximum medical improvement. (Reports of Ronald Ray, D.P.M.)

¶2c Mr. Jackson now alleges additional problems with his left leg, above the ankle, and right leg from his foot to his knee. (Response to Petition, paragraph 1.)

¶2d Mr. Jackson's condition has been diagnosed as reflex sympathetic dystrophy or complex regional pain syndrome. (Records of Ronald Ray, D.P.M., and Michael Yorgason, M.D.)

¶2e Dr. Ray has stated:

It also appears that Mr. Jackson may be sent to Oregon by Dr. Ochoa. Obviously an outside authority is totally appropriate, and although my initial recommendation was Stanton Hicks, I am not totally against the patient seeing Dr. Ochoa for further evaluation and

assessment regarding his pain pattern. It is difficult at this point to say whether or not this is a complex regional pain problem or a localized problem in the ankle and foot that has not yet been identified that his [sic] causing global symptoms. I would be very interested to see what Dr. Ochoa's evaluation and assessment produces regarding potential plans for intervention for Mr. Jackson.

(Records of Ronald Ray, D.P.M., August 20, 2001.) Dr. Ray reiterated this statement on October 23, 2001. (Records of Dr. Ray, D.P.M.)

¶12f Because of the complex nature of Mr. Jackson's condition(s), Benefis scheduled an independent medical evaluation with Dr. José Ochoa, M.D. [sic], in Portland, Oregon, and Mr. Jackson refused to attend. (Petition for Trial, paragraph 3; Response to Petition, paragraph 3.)

¶12g Dr. Ochoa is the Director of the Neuromuscular Clinic of the Neurosciences Department and Professor of Surgery in the Division of Neurosurgery at Oregon Health Sciences University. Dr. Ochoa has researched and written extensively in the area of sympathetic disorders, and has authored multiple articles on reflex sympathetic dystrophy. He holds multiple doctorates from the Catholic University in Santiago, Chile, and the University of London. (Attached internet summary of José L. Ochoa, M.D.)

¶12h Benefis is currently paying temporary total disability benefits and awaits resolution of the diagnosis, maximum medical improvement, and related issues, which will be addressed by Dr. Ochoa.

(Benefis Healthcare's Motion for Summary Judgment And Supporting Brief at 2-3.

Discussion

¶13 The Workers' Compensation Act makes specific provision for IMEs. Section 39-71-605, MCA (1999), 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.

(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.

(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.

Under subsection (1), where there is a compensable injury the insurer is entitled to schedule an IME whether or not there is currently a dispute regarding compensation. The Department or Court may also order an examination. Under subsection (2), if there is a dispute concerning the physical condition of claimant or the causal relationship between claimant's condition and his injury or disability, the insurer may apply to the Court for an order directing an examination. Under either subsection, the Court may order the examination.

¶4 The medical records furnished by the insurer indicate that further evaluation by an expert such as Dr. Ochoa is appropriate and calculated to determine the nature of claimant's condition and appropriate treatment. According to Benefis, and not refuted by claimant, Dr. Ochoa is the Director of the Neuromuscular Clinic for the Neurosciences Department and Professor of Surgery in the Division of Neurosurgery at Oregon Health Sciences University. He has special expertise in sympathetic nerve disorders. Claimant has been diagnosed as suffering from such a disorder. Claimant has not provided any facts or argument contesting Dr. Ochoa's expertise, the applicability of that expertise to claimant's condition, or the appropriateness of the examination.

¶5 Under subsection (2), the examination may be in this state "or elsewhere" so long as the IME physician has expertise in the appropriate field of medicine. Under subsection (1), the examination must be at a "place that is as close to the employee's residence as is practical." Claimant does not oppose the examination on the basis of location, so the Court

need not consider whether there is a physician with similar expertise as Dr. Ochoa who practices closer to claimant's home.

¶16 The only basis tendered by claimant in opposition to the requested IME is his desire to obtain additional discovery. Specifically, he wants depositions of two facilities managers at Benefis and of a human resources employee of Benefis. In his opposition to the motion for summary judgment, claimant does not indicate the purpose or the relevance of the depositions to the IME request. No medical documentation or opinion has been provided which indicates that the information sought from the Benefis' employees is relevant to any medical issue or to the further medical evaluation of the claimant. Given that lack of information, there is no basis for denying or deferring the motion for summary judgment.

JUDGMENT

¶17 Claimant is ordered to submit to an IME by Dr. José Ochoa in Portland, Oregon on a date and at a time to be agreed upon by claimant and Benefis. If they cannot agree on the date and time, then the Court will determine the date and time.

¶18 This JUDGMENT is certified as final for purposes of appeal.

DATED in Helena, Montana, this 11th day of April, 2002.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Leo S. Ward

Mr. Thomas J. Murphy

Submitted: April 10, 2002