

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 31

WCC No. 9402-6996

VIVIAN OSTERMILLER,

Petitioner,

vs.

AMERICAN STORES,

Respondent/Insurer for

BUTTREY FOOD & DRUG,

Employer.

ORDER COMPELLING ATTENDANCE AT INDEPENDENT MEDICAL EXAM;

ORDER DENYING PROTECTIVE ORDER;

ORDER VACATING TRIAL AND PRETRIAL

The claimant in this matter has filed a petition seeking benefits on account of carpal tunnel syndrome of the left wrist. Her industrial accident involved an injury to her right wrist,⁽¹⁾ not her left one. However, she alleges that the injury to her right wrist caused her to compensate by overusing her left hand, which in turn led to her developing carpal tunnel syndrome of the left wrist.

At the request of the insurer, American Stores (American), Dr. William S. Shaw, conducted an independent medical evaluation of claimant in June of 1993, approximately nine or ten months ago. Claimant's petition was filed February 3, 1994. On March 17, 1994, American notified claimant that she should appear for a further independent medical examination by Dr. Thomas Richard in Missoula, Montana on March 29, 1994. Claimant resisted the additional examination and American filed a motion to compel the examination. Claimant responded with a cross-motion for a protective order. These motions are the subject of the present order.

Claimant, who resides in Billings, argues that it is inconvenient for her to attend an examination in Missoula because it will interfere with her studies at Eastern Montana College. In its reply, American offers to reschedule the examination at a time convenient to her, thus avoiding any conflict with her school schedule. That offer sufficiently addresses her concerns.

As a further reason for resisting the examination, claimant argues that an examination in Missoula violates section 39-71-605 (1)(b), MCA (1991), which requires that the examination be at a "place that is as close to the employee's residence as is practical." The cited provision, however, is inapplicable. The Montana Supreme Court has repeatedly held that the law in effect at the time of the injury must be applied in determining the rights and obligations of the parties. *E.g., Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). The Court has expansively stated the rule as extending to "all aspects of a Worker's Compensation claim," *Monroy v. National Farmers Union Property & Casualty Insurance*, 246 Mont. 365, 805 P.2d 1343 (1990), and has applied that rule to statutes which provide extra-judicial mechanisms for the evaluation of a claimant, *e.g., Grenz v. Prezeau*, 244 Mont. 419, 798 P.2d 112 (1990) (holding that the methodology adopted by the 1987 legislature for determining impairment ratings is applicable only to injuries arising after the effective date of the statute.) Claimant's industrial accident occurred on March 9, 1989. The statutory language she cites was inserted by 1991 Laws of Montana, ch. 613, sec. 64, and is thus inapplicable.

At the time of her injury section 39-71-605(1)(b), MCA (1987), provided:

(b) The request or order for such examination shall fix a time and place therefor, due regard being had to the convenience of the employee and his physical condition and ability to attend at the time and place fixed. The employee shall be entitled to have a physician present at any such examination. So long as the employee, after such written request, shall fail or refuse to submit to such examination or shall in any way obstruct the same, his right to compensation shall be suspended. Any physician or panel of physicians employed by the insurer or the division who shall make or be present at any such examination may be required to testify as to the results thereof.

The section does not require the examination to be held "as close to the employee's residence as practical," but it does require consideration of the "convenience of the employee and his physical condition and ability to attend at the time and place fixed." Claimant's bilateral carpal tunnel condition is not on-its-face the sort of condition which precludes travel to another city, and claimant has not argued that she is *physically* unable to travel. As to claimant's convenience and ability to attend, she asserts that the examination will interfere with her school attendance. However, American is willing to reschedule the examination at a time which will not interfere with her school, thus countering her argument.

Finally, claimant argues that American's request for a further medical examination is unreasonable in light of Dr. Shaw's prior IME.⁽²⁾ She suggests that if American desires an updated appraisal of her condition it can send her back to Dr. Shaw. Dr. Shaw specializes in occupational medicine. Dr. Richard is an orthopaedic surgeon specializing in hand surgery. Since claimant's complaints relate to her hand and American has not previously had her

examined by a hand specialist, it is not unreasonable for American to now seek an examination by a hand specialist. The Court is aware that it is sometimes difficult to find Montana specialists who are willing to perform IME's in workers' compensation cases. While the 1991 amendment to section 39-71-605(1)(b) may require a party seeking an out-of-town examination to affirmatively demonstrate that no in-town specialist will perform the examination, or that is otherwise impractical to require examination by an in-town specialist, no such requirement exists under pre-1991 law.

American's position is also supported by case law. Although factually distinguishable, in *Young v. John's IGA*, 248 Mont. 46, 48, 807 P.2d 1369 (1991), the Supreme Court characterized the insurer's right to an IME as follows: "As the law now stands, we agree with the Workers' Compensation Court that § 39-71-605, MCA, clearly gives the insurer the right to a physician or panel of its own choosing."

Since the IME scheduled by American has been delayed by claimant's refusal to attend, and will have to be rescheduled for a later date, the scheduled trial date will be vacated.

In light of the foregoing discussion, IT IS HEREBY ORDERED AS FOLLOWS:

1. The trial and pretrial dates set for this matter are **vacated**. A new date will not be set until the parties have determined a mutually convenient date for claimant's examination by Dr. Richard.
2. American's motion to compel attendance at independent medical examination is **granted** and the claimant is **ordered** to submit to an independent medical examination by Dr. Richard in Missoula.
3. The parties shall **confer** and fix a time for the examination that is convenient to both claimant and Dr. Richard. If the parties cannot agree on a date, they shall advise the Court of their inability to agree and schedule a phone conference with the Court.
4. Claimant's Motion for Protective [sic] is **denied**.

DATED in Helena, Montana, this 7th day of April, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Dane C. Schofield
Mr. Steven S. Carey

1. She developed carpal tunnel syndrome in her right wrist and had surgery.
2. She also argues that a previous, separate IME by Dr. Veraldi, who is a psychologist, also renders the requested IME unreasonable. That examination, however, was apparently for

the specific purpose of assessing claimant's further allegation that she is *psychologically* debilitated as a result of her physical injuries.