

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 37

WCC No. 2003-0761 0901

FILED

LENNIE J. THOMPSON

JAN - 5 2004

Petitioner

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

vs.

MONTANA STATE FUND

Respondent/Insurer.

MOTION TO DENY THE STATE FUND ACCESS TO MEDICAL FINDINGS AND RECORDS

Summary: 1) The State Fund should not be allowed access to and the use of "any and all" existing medical records merely to add "weight" to their argument that the petitioner is at MMI. IMEs are usually focused on particular injuries and should not be used to support generalizations about an individual's medical condition. Therefore, unless the IME's initial focus is on the exact same area of injury in question such so-called "evidence" should be given the highest scrutiny by the court and medical professionals. Dr. Headapohl's IME, therefore, should not be allowed.

2) Should the court allow the subpoena of external documents and records they should be limited to only those which pertain directly to the lower back injury in question. Medical reports that were initiated to investigate cervical injuries which mention some tertiary reference to the lumbar region (as in Dr. Headapohl's IME) should not be allowed. At the very least they should be scrutinized with regards to their initial purpose (i.e. upper body injuries and disabilities.) Dr. Chapman's exam should be given the highest consideration as it is the most extensive and comprehensive.

3) The court should not allow the IME from Dr. Burton due to his hostility towards the plaintiff and the State Fund's misuse of medical reports aimed at biasing the IME.

Argument: 1) This petitioner objected to the deposition of Larry Jones for two reasons:

A) The petitioner had not been given adequate time (7 days) to object to the court or prepare for the deposition.

B) This petitioner was led to believe by this court that subpoena's had to be issued by the court in order to be legal. (The clerk of court had informed the petitioner that the court is reluctant to subpoena physicians. The petitioner was therefore forced to pay \$250.00 for 15 minutes of a doctor's time to testify in a previous case.) It is this petitioner's contention that to require him to pay (with such limited resources at his disposal) for a doctor's testimony while giving carte blanche access to the State Fund (with unlimited resources) to witnesses and records puts an unequal burden on most petitioners in the Workers' Compensation Court. This reinforces this petitioner's argument in the Montana Supreme Court that injured workers have "unequal protection" under the law.

2) The State Fund has already misused its authority in its handling of this case.

A) When case worker Karen Horne said she would allow claimant to pick a physician for the IME (essentially "Authorizing"¹ prior to choosing) the State Fund reneged on its agreement when the claimant asked for a certified IME who also happened to be a chiropractor² (Dr. Chapman). It should be noted that though the State Fund used its own chiropractic consultant (Dr. Blom) when it found the claimant's treatment to have "appeared" ... to have "become maintenance in nature", it refused to allow a certified Independent Medical Examiner, who happened to be a chiropractor, to do the IME. This decision is not only indicative of a dual standard and inconsistent use of chiropractors but is a clear indicator of the bias against chiropractors perpetrated upon them by the so-called "mainstream" or "legitimate" medical community since the 1920's. Not only should such archaic and biased attitudes be rejected but the court should hold chiropractors in equal legal and medical status as much of society, the medical community, law makers, and other courts have already done. Perpetuating the myth that chiropractors are "quacks", "charlatans", and/or "fringe element" medical professionals is a disservice to them and the millions they have and can help and is slanderous - to say the least.

B) After making an arbitrary decision to turn over this case to a managed

¹ **MCA-39-71-1101. Choice of physician by worker -- change of physician -- receipt of care from managed care organization.** (1) Subject to subsection (3), a worker may choose the initial treating physician within the state of Montana.

(2) Authorization by the insurer is required to change treating physicians.

² **MCA-39-71-116. Definitions.** (36) "Treating physician" means a person who is primarily responsible for the treatment of a worker's compensable injury and is:

(a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located;

(b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

(c) a physician assistant-certified licensed by the state of Montana under Title 37, chapter 20, if there is not a treating physician, as provided for in subsection (36)(a), in the area where the physician assistant-certified is located;

care organization (which Karen Horne implied she was not going to do when she noted that such action had not been initiated during the 7 years prior to this action and subsequently offered to let the claimant pick a physician for the IME) the State Fund's legal department refused to give an explanation for its decision even though the claimant sternly requested an explanation in writing. The State Fund's response was, "We'll respond to that question in court should it go that far."

This type of non-responsive and arbitrary action gives evidence to the fact that the State Fund is a "rogue" agency with no regulatory agency in place to hold it accountable for its day to day dealings. When this plaintiff called the Montana State Insurance Auditor's office they were just as baffled as I was that such a major insurance industry would not be held accountable to its office unlike any other insurance industry in the state. In the words of the auditor, "The Montana State Legislature has given the State Fund carte blanche to do whatever it wants. Such action by the legislature is baffling to this office." When the plaintiff called the Montana Department of Labor and Industry they said the only recourse one might have is to call Senators Baucus and Burns and file a complaint. Perhaps they could pressure the State Fund into responding.

C) The State Fund has misused its authority by submitting medical records to Dr. Burton for his IME which questionably support MMI while withholding a medical report from the claimant's "primary treating physician" (Dr. Heath) which support the claimant's assertion that he has benefited from and is in need of further chiropractic treatment from Dr. McClintock.

3) Dr. Burton's IME is biased due to his lack of access to records from the original treating physician Dr. Heath and Dr. Burton's hostility towards the claimant who wanted to video tape the exam.

A) When the claimant entered Dr. Burton's office and then exam room with a video recorder Dr. Burton ordered the claimant to turn it off. When the claimant asked why the Dr. said that recordings were faulty and didn't give good audio. He then asked why the claimant wanted to record the exam. The claimant said that he had a problem with the so-called notion of an "Independent" Medical Exam when doctors are hired by the insurance company. The doctor then angrily said, "Then why don't you just leave!" The claimant responded by pointing out that he would then be perceived as "uncooperative".

B) Though the claimant can show in the video that he was not "hostile" but in reality the doctor was hostile towards the claimant, the IME states that the claimant was hostile. This should be a clear indicator that the IME is suspect at the very least and therefore biased.

C) Dr. Burton did not submit a copy of his report to the plaintiff as required

under the MCA giving further evidence of his hostility towards the claimant and bias for the State Fund. Dr. Burton refused to submit copies of their files to the plaintiff. Only after repeated requests to the State Fund did the plaintiff receive a copy of Dr. Burton's report some 6 months after its creation. Such lack of adherence to the MCA³ from a physician who should know his obligations to the patient and not just the State Fund is further evidence of Dr. Burton's bias. Having severely delayed the plaintiff's access to information needed to pursue legal and medical remedies has caused the plaintiff unnecessary suffering.

C) Although the MCA states that a claimant can have a physician of his own choosing at the IME (very expensive and therefore cost preventative) it does not state that recording equipment is NOT allowed. Should claimants be judged uncooperative if they want to record the exam and the physician won't allow it? Is an eye-witness (i.e. physician) more reliable than a video recorder? Other courts have found video camera evidence to be very reliable while eye-witnesses have proven to be very unreliable.

4) IME's should only be allowed if the claimants are allowed to have access to the same doctor for a follow-up exam on a day when they are having a severe recurrence of their symptoms.

A) Most IMEs are given on days when a claimant is having a good day with little if any negative or debilitating symptoms.

B) If IMEs are to be given weight before the court then they should be done under similar circumstances that the treating physicians experience when they see the patient in pain and dysfunctional and/or temporarily disabled. This is most likely to occur if the patient is allowed to come to the IME when he or she is experiencing the same symptoms as when they see their treating physician. To leave such exams to only scheduled days at the convenience of the "independent" medical examiner is unlikely to produce an accurate exam.

Attachments:

Dr. Heath's report (Bitterroot Clinic), March 25, 2003
Plaintiff's letter's to the State Fund, March 18th and 25th 2003

³ 39-71-605. Examination of employee by physician -- effect of refusal to submit to examination -- report and testimony of physician -- cost.

(2) In the ... The physician, psychologist, or panel making the examination shall file a written report or findings with the claimant and insurer for their use in the determination of the controversy involved.

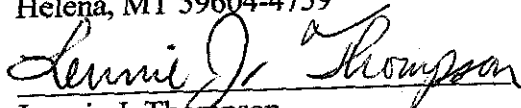
CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2003, I served the original copy of the foregoing, MOTION TO DENY THE STATE FUND ACCESS TO MEDICAL FINDINGS AND RECORDS, via first-class mail, postage prepaid, on the following:

Clerk of Court
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624

And a copy of the same to the following:

Tom Martello
Attorney of Law
Montana State Fund
5 South Last Chance Gulch
P.O. Box 4759
Helena, MT 59604-4759


Lennie J. Thompson



Bitterroot Clinic

Comprehensive Family Health Care

1224 West Main Street • Hamilton, Montana 59840 • 406-863-1100



March 25, 2003

Karen Horn
Montana State Fund
P.O. Box 4759
Helena, MT 59604

Re: Lennie Thompson
DOB: 05/13/51
Claim# 3-1996-15162-3

Dear Ms. Horn:

I have had the opportunity to see Mr. Thompson today on March 25, 2003. He was previously seeing a chiropractor, Dr. McCormick, who recommended the patient begin an aggressive back program. He did this for about four to six weeks. He had a total of 10 treatment sessions and the patient says his back felt better than it did in seven years. He wanted to continue this, but apparently Workman's Compensation denied further treatment saying this is more of a maintenance treatment instead of an acute treatment. In the last three weeks, he has been regressing and is having worsening back pain now. His back continues to give out on him and he is very uncomfortable. The pain is only partially responsive to appropriate medications.

I would be in support of Mr. Thompson receiving further chiropractic care both acutely now and as far as a maintenance program for up to several months or perhaps sooner if his back pain should remit for the most part. If this is unsuccessful, then the next step may be to consider an IME or further medical investigation and referral to another back specialist. If you could help support Mr. Thompson in this matter, it would be appreciated. If you need more information from me, please contact my office.

Sincerely,

H. Brett Heath, M.D.
HBH/pmnn

cc: Lennie Thompson ✓

Teresa P. Borino, M.D. • John R. Courchesne • H. Brett Heath, M.D. • Lisa J. Milch, M.D.
Gary L. Smith, M.D. • Randy L. Stewart, M.D. • Virginia Forbes, F.N.P.

MSF 03/31/2003

March 25, 2003

Tom Martello
Attorney at Law
Montana State Fund
5 South Last Chance Gulch
P.O. Box 4759
Helena, MT 59604-4759

RECEIVED
MAR 31 2003
LEGAL

3-96-15162-3

Coll

RG: Claim 03-1996-15162-3

Dear Mr. Martello,

Regarding our phone conversation today and my request for a letter explaining your department's interpretation of the law/MCA's I am formally requesting that interpretation in writing. I believe that your refusal to do so per our conversation and your referring me to the mediation process is additional proof of a process aimed at attrition which further supports my case with the Montana Supreme Court challenging the constitutionality of many of the MCA's.

What reason could you have for not defending the legitimacy of your legal interpretation by responding in writing immediately other than to delay action aimed at making people give up? If your interpretation and the subsequent action of not allowing me to have a certified IME of my choice do an exam are justifiable then you should have no problem putting said interpretation and supporting laws in writing. The point you made on the phone about looking out for your interest by having your agency choose the IME is exactly the kind of argument I am making with the Montana Supreme Court. Your agency has too much vested in outcomes to allow this practice to continue.

In addition I would like to point out that I went to the State Fund's website and looked up your vision/mission statement. The fact is that it has very little to do with the care and rehabilitation of injured worker's and everything to do with the "prosperity of Montana" (i.e. keeping business owners whole). It is also interesting that the 2002 Strategic Plan has an "estimated surplus target" of approximately \$167 million while the 2003 Strategic Plan gives no comparable figure. That tells me that your surplus is getting so big from the high rates the employers are paying and the low benefits injured worker's are receiving that is not very "strategic" to continue to distribute those estimates. How about a written response? If you don't respond to my questions and accusations in writing it will only further my assertion that your decisions and actions are based on an agency philosophy aimed at cheating and defrauding the injured workers of what they should be given as a matter of ethical fortitude even if it's not according to the subjective interpretation of arbitrary legislation.

Mad as Hell and I'm NOT Gonna Take It Anymore,

Lennie J. Thompson
Lennie J. Thompson
302 Cooper Lane
Hamilton, MT 59840
363-7577 or 546-3960

Ing 3-31-03
wm

MSF 03/31/2003

March 18, 2003
Karen Horne
Claim Adjuster
Montana State Fund
4 So. Last Chance Gulch
P.O. Box 4759
Helena, MT 59604-4759

RECEIVED
MAR 20 2003
STATE FUND 72

RG: Claim 03-1996-15162-3

Dear Karen,

Recent letters from your office which have arbitrarily canceled my treatments from Dr. McClintock have reversed the progress made towards my rehabilitation. The recent review by your chiropractic consultant should have included testimony and/or feedback from the affected party(s). If Dr. McClintock and/or I had been consulted during this process I believe we could have made substantial arguments justifying continued treatment. Dr. McClintock had submitted a plan aimed at aggressive treatment of my injury. Although I felt only slight improvement at first it was when your office canceled my treatment that it was starting to take significant affect. The process that you are now requiring me to embark on which will include an IME and as much as two or three months of delay of my treatment due to the slowness of the process will serve to only allow the progress that has been made to reverse itself (as I can feel it doing already).

Would you require a cast to be removed before a broken bone is healed? Would a physician disrupt antibiotics before the full regime was complete? NO!

My treatments should resume immediately! If you still require an IME to continue then do so while I am being treated. Do not disrupt what is working just because someone who is not directly involved arbitrarily makes a decision based more on his loyalty to his income source than to a patient to which he has no association or doctor patient relationship.

In regards to not allowing Dr Chapman to do an IME I do not believe the courts would hold it appropriate to disqualify a chiropractor to do the IME just because a chiropractor was treating me when it was determined my treatment was maintenance. It could be argued that such reasoning is not consistent with your department's decision to consult a chiropractor in order to justify discontinuing treatment. Would you be as

MSF 03/28/2003

quick to assign a specialist *other than* a medical doctor if your consultant arbitrarily decided that a medical doctor's treatments were "maintenance"?

MCA-39-71-116. Definitions. Unless the context otherwise requires, in this chapter, the following definitions apply:

(36) "Treating physician" means a person who is primarily responsible for the treatment of a worker's compensable injury and is:

(a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located;

(b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

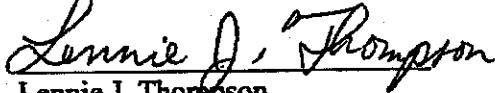
(c) a physician assistant-certified licensed by the state of Montana under Title 37, chapter 20, if there is not a treating physician, as provided for in subsection

(36)(a), in the area where the physician assistant-certified is located;

(d) an osteopath licensed by the state of Montana under Title 37, chapter 5;

My condition worsens as we debate. Please expedite this matter.

Adamant About Treatment,



Lennie J. Thompson
302 Cooper Lane
Hamilton, MT 59840

NSF 03/20/2003