IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 18

WCC No. 2017-4119

CATHERINE HEFFERNAN

Appellant/Claimant

vs.

SAFETY NATIONAL CASUALTY CORP.

Appellee/Insurer.

ORDER AFFIRMING IN PART AND MODIFYING IN PART DEPARTMENT OF LABOR AND INDUSTRY'S AMENDED ORDER DIRECTING MEDICAL EXAMINATION

Summary: Claimant appeals an Amended Order Directing Medical Examination, in which the DLI ordered her to attend a panel IME. Claimant argues that the DLI erred because: (1) it declined her request to allow her to make an audio recording of the history portion of her examination; (2) it did not require the IME provider to send a copy of its report directly to her, despite the provider's policy not to do so being in violation of § 39-71-605(2), MCA; and (3) it directed her to attend a panel IME, which she contends is three IMEs, without good cause for "multiple" IMEs.

Held: The Amended Order Directing Medical Examination is affirmed in part and modified in part. The DLI correctly determined that claimant did not have good cause to make an audio recording of the history portion of her examination. The DLI also correctly determined that good cause exists for a panel IME, which is not "multiple" IMEs. However, Claimant is correct that she has a statutory right to a copy of the IME report directly from the IME provider. Thus, the DLI's order is modified to require the IME provider to provide its report directly to Claimant at the same time it provides it to the Insurer. The Insurer is ordered to file a written declaration from the IME provider that the provider will provide its report directly to Claimant.

¶ 1 Claimant Catherine Heffernan appeals the Department of Labor and Industry's (DLI) Amended Order Directing Medical Examination, made pursuant to § 39-71-605(2), MCA. Heffernan argues that the DLI erred in ordering her to undergo a panel independent medical examination (IME) upon the application of Insurer Safety National Casualty Corp. (Safety National). This Court affirms in part and modifies in part the DLI's order.

Facts

¶ 2 Pursuant to the parties' agreement during the telephone conference on October 24, 2017, this Court considers the following facts from the DLI's record and from the Exhibits the parties attached to their briefs on appeal. However, this Court has not considered the Mediator's Report and Recommendation, which Safety National submitted after the telephone conference, as it is confidential and inadmissible.[1]

¶ 3 Heffernan worked as a dog groomer at Petco.

¶ 4 On October 27, 2016, Heffernan saw Michael T. Hall, PA-C, with complaints of tingling in her hands, left greater than right, ongoing for two to three months. Hall put her on a trial of B vitamins, and stated the next step would be a nerve conduction study.

¶ 5 On February 2, 2017, Heffernan returned to Hall. Hall documented that Heffernan had a horseback riding accident, which resulted in a low-back surgery in 2004. Because Heffernan was still experiencing numbness and tingling in her fingers, Hall recommended a nerve conduction study.

¶ 6 William E. Henning, DO, performed the nerve conduction study on March 28, 2017. Dr. Henning concluded the study was "[n]ormal," and did "not reveal findings of left upper extremity focal neuropathy or of left cervical radiculopathy."

¶ 7 On May 3, 2017, Heffernan reported to the emergency room (ER) with complaints of paresthesias, leg weakness, a "burning dysesthesia of her LEFT arm into her neck," mild to moderate neck pain, and weakness in her left upper extremity. The ER called in Benny E. Brandvold, MD, a neurosurgeon. Dr. Brandvold noted, "Over the last week she began to develop dysesthesias down both arms from her neck. This morning she awoke and her legs were wobbly, and she was brought to the emergency room for evaluation." Dr. Brandvold noted that an MRI showed a "massive C6-7 disk herniation." Upon Dr. Brandvold's recommendation, Heffernan underwent emergency surgery.

¶ 8 Heffernan has filed a First Report of Injury/Occupational Disease. She contends that she has a compensable occupational disease caused by her work at Petco. According to Heffernan, Safety National "accepted Heffernan's claim as a bilateral upper extremity condition, but denied Heffernan's cervical spine condition. [Safety National] paid for some medical treatment related to Heffernan's bilateral upper extremity condition, but denied payment of all treatment related to Heffernan's cervical spine."

¶ 9 Safety National twice applied to the DLI for an order directing Heffernan to attend an IME. In its second request, Safety National applied for an order directing Heffernan to attend a panel IME with a neurologist, an orthopedist, and an occupational medicine physician. Heffernan opposed Safety National's applications.

[1] § 39-71-2410, MCA.

¶ 10 In its Amended Order Directing Medical Examination, the DLI concluded there was good cause for the panel IME. The DLI denied Heffernan's request to record the IME, explaining, "There does not appear to be any contentious history between the claimant and doctors to warrant this." Thus, the DLI ordered Heffernan to attend a panel IME with WellCare on November 20, 2017.

Law and Analysis

¶ 11 Section 39-71-605(1), MCA (2015), provides that whenever "the right to compensation under this chapter would exist in favor of any employee, the employee shall . . . submit from time to time to examination by a physician, psychologist, or panel . . . ." However, an insurer's right to an IME is not absolute. This Court has stated that an IME is the most invasive form of discovery, that an IME implicates a claimant's constitutional rights, and, therefore, that an insurer must have good cause for an IME.[2] Moreover, this Court may place protective measures on an IME when warranted.[3]

¶ 12 Heffernan first argues that Safety National cannot have an IME done by WellCare because it will not allow her to make an audio recording of the history portion of the IME. She argues that this protective measure is warranted because the IME physicians are "potentially adversarial witnesses," because the audio recording will dispel any dispute as to what was said during the history portion of her IME, and that it will protect her constitutional right to cross examination. She also alleges that WellCare has a well-known bias in favor of insurers.

¶ 13 Safety National counters that while Heffernan has the right to have another person present with her during the history portion of the IME, and points out that WellCare will allow that, she does not have the right to record it, and that such a protective measure is unnecessary.

¶ 14 Although this Court questions why WellCare will not allow Heffernan to make a nonintrusive audio recording of the history portion of the IME, Safety National is correct that, on this record, Heffernan has not established that such a protective measure is warranted. The Supreme Court has held that the way to protect a claimant's rights at an IME is to allow her attorney to attend the history portion of the examination.[4] The Supreme Court and this Court have previously held that, absent a reason to require recording the IME, a claimant does not have the right to videotape an IME.[5] It is undisputed that

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[2] *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶ 25 (citations omitted); *New Hampshire Ins. Co. v. Matejovsky*, 2015 MTWCC 15, ¶ 22 (citations omitted).

[3] ARM 24.5.325; *see also Haman v. Wausau Ins. Co*., 2007 MTWCC 49 (ruling that because the claimant and the IME physician disputed what was said and what had occurred during the first IME, the insurer could have a second IME with the physician who conducted the first IME on the condition that claimant's attorney could attend the entire IME and that it be conducted on the record).

[4] *Mohr v. Dist. Court of Fourth Judicial Dist.*, 202 Mont. 423, 426, 660 P.2d 88, 89 (1983).

[5] *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, ¶ 14, 317 Mont. 30, 75 P.3d 308 (holding that District Court did not abuse its discretion when it prohibited Hegwood's counsel from attending, and recording devices from documenting, the entire IME); *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶ 29 (ruling that there was insufficient evidence to support an order allowing the claimant to videotape an IME).

Heffernan may have her attorney, or another person, with her during the history portion of her IME. On this record, there is no reason for any additional protective measures. Accordingly, the DLI correctly determined that Heffernan's demand that she be allowed make an audio recording of the history portion of the IME is unwarranted.

¶ 15 Second, Heffernan argues that Safety National cannot have an IME done by WellCare because its policy on providing a copy of its report does not comply with Montana law. Section 39-71-605, MCA, states, "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." However, as Heffernan points out, WellCare's policy states, "WellCare is not permitted to provide [the claimant] a copy of the report."

¶ 16 Safety National counters that this is a mere "technicality." Safety National's attorney states he will "request" that WellCare send a copy of its report to Heffernan. In addition, he states he will provide a copy of the report to Heffernan "immediately upon receipt, without even reviewing it first."

¶ 17 Contrary to Safety National's claim, this is not a technicality. WellCare has a clear statutory duty to provide its report to Heffernan and the insurer at the same time, a duty imposed to keep the examination as independent as possible and to allow the parties access to the same information. There is no authority supporting Safety National's position that it or its attorney can assume WellCare's statutory duty. Thus, if WellCare will not provide its report directly to Heffernan at the same time it provides its report to Safety National, then it may not conduct the IME. This Court concludes that the DLI should have made the panel IME contingent upon WellCare's agreement to provide its report directly to Heffernan, in spite of its policy.

¶ 18 Notwithstanding, this Court does not deem WellCare's policy to be a complete bar to its ability to conduct the IME. Pursuant to § 2-4-704(2), MCA, on an appeal from a DLI order directing an IME, this Court may modify the DLI's decision if the claimant's rights have been prejudiced because the DLI's order is, *inter alia*, "in violation of constitutional or statutory provisions." Under this authority, this Court modifies the DLI's Amended Order Directing Medical Examination to require WellCare to provide its report directly to Heffernan at the same time it provides its report to Safety National. To ensure that WellCare will do so, this Court orders Safety National to file a written declaration from WellCare with this Court on or before Wednesday, November 8, 2017, stating that WellCare will provide its report directly to Heffernan. If WellCare does not agree to provide its report directly to Heffernan, or if Safety National does not file WellCare's written declaration by this deadline, then the IME may not proceed.

¶ 19 Finally, Heffernan argues that because the panel is made up of three physicians, the scheduled examination constitutes "multiple" IMEs for which Safety National does not have good cause.

¶ 20 Safety National counters that, given the complexities of this case, good cause exists to have a neurologist, an orthopedist, and an occupational medicine physician examine Heffernan.

¶ 21 On this record, Safety National has shown good cause for a panel examination. This Court has explained, "The plain purpose of section 39-71-605, MCA, is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, his or her current medical condition and need for further treatment, and the relationship of the claimant's condition to the industrial injury or disease."[6] This Court agrees with Safety National that the complexities of this case warrant a panel IME. Based upon the current record, there is an unanswered question regarding causation, which can be answered only with medical expertise.[7] Moreover, while an insurer does not have the absolute right to pick IME physicians,[8] this Court agrees with Safety National that the medical issues in this case fall within the realm of practice of a neurologist, an orthopedist, and an occupational medicine physician. Thus, the DLI correctly concluded that Safety National has good cause for the panel IME.

¶ 22 Heffernan's claim that a panel IME is considered multiple IMEs is without merit. Under the plain language of § 39-71-605(1), MCA, the insurer can have the claimant "submit from time to time to examination by a physician, psychologist, ***or panel*** that must be provided and paid for by the insurer."[9] Moreover, as set forth above, § 39-71-605(2), MCA, states, "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."[10] In short, the plain language of § 39-71-605, MCA, states that an IME can be conducted by a panel, and it is to be considered one IME. When this Court has considered cases involving "multiple IMEs," it has considered the situation in which the insurer had the claimant undergo an IME and then, at some point later, asserted that the claimant had to go to a "repeat" IME.[11] Thus, this case does not involve multiple IMEs.

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[6] *Liberty Northwest Ins. Corp. v. Marquardt*, 2003 MTWCC 63, ¶ 6.

[7] § 39-71-407, MCA (stating that occupational disease arises out of employment when it is established by objective medical findings and "the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease"); *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 49, 365 Mont. 405, 282 P.3d 687 (holding that causation must be proven with medical expertise or opinion).

[8] *See Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678 ("Rule 35, M.R.Civ.P., does not empower a defendant to seek out and employ the most favorable 'hired gun' available no matter the inconvenience to the plaintiff and without regard to the plaintiff's rights.").

[9] Emphasis added.

[10] Emphasis added.

[11] *See, e.g.*, *Chapman v. Smurfit-Stone Container Enters., Inc.*, 2013 MTWCC 12 (citation omitted) (ruling that insurer was entitled to a third IME in November 2012 even though she had undergone a panel IME in 2006, and a second IME in September 2012, because "an insurer is entitled to obtain a second, third, or even more IMEs or FCEs where there is an indication that claimant's medical condition has changed or there is some other sound reason for doing a repeat examination . . .").

ORDER

¶ 23 The DLI's Amended Order Directing Medical Examination is **affirmed in part and modified in part**. The DLI's Amended Order Directing Medical Examination is modified to require WellCare to provide its report directly to Heffernan at the same time it provides it to Safety National.

¶ 24 IT IS ORDERED that Safety National shall file with this Court a written declaration from WellCare stating it will provide its report to Heffernan at the same time it provides it to Safety National. Safety National shall filed the declaration on or before Wednesday, November 8, 2017. If Safety National files the declaration, the panel IME may proceed. If WellCare does not agree to provide its report directly to Heffernan, or if Safety National does not file WellCare's declaration by this deadline, then the IME may not proceed.

DATED this 3rd day of November, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Matthew J. Murphy
Charlie K. Smith

Submitted: October 27, 2017