IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 13

WCC No. 2016-3831

JILL MacGILLIVRAY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER REVERSING ORDER DIRECTING MEDICAL EXAMINATION

Summary: Petitioner appeals DLI's Order Directing Medical Examination. *Inter alia*, Petitioner argues that this Court should reverse the order because the Workers' Compensation Court has exclusive jurisdiction to decide issues relating to her claim, and § 39-71-605, MCA, does not provide for multiple IMEs on a denied liability claim. Respondent argues a change in the treating physician's medical opinion and Petitioner's new assertion that she is PTD justify a second IME.

Held: DLI did not exceed its statutory authority by ruling on Respondent's motion to compel attendance at an IME; its exercise of jurisdiction was lawful under § 39-71-605(2), MCA. However, it committed reversible error because the first IME physician addressed causation, the treating physician has not changed his opinion, and no evidence indicates Petitioner's condition has changed.

Topics:

> **Administrative Agencies: Jurisdiction.** Where § 39-71-605(2), MCA, allows an insurer to seek an order compelling attendance at an IME from either the Workers' Compensation Court or DLI, and DLI fully exercised its jurisdiction over Petitioner's attendance at a scheduled IME before

Petitioner invoked the jurisdiction of this Court by filing her Petition for Hearing, DLI's jurisdiction is not divested.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 35. Where this Court found that Petitioner's treating physician did not change his opinion, Petitioner's condition did not change, and insurer simply wanted another IME to bolster the opinions of the first IME doctor, DLI lacked the good cause necessary under M.R.Civ.P. 35(a) to order Petitioner to attend a second IME.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605. Where, following an IME, a medical doctor opined that Petitioner's condition was psychogenically-mediated, and insurer denied liability based on his determination that Petitioner's aggravation was merely temporary, the insurer is not entitled to a second IME by a psychologist to bolster the medical doctor's conclusions.

Independent Medical Examinations (IME): Generally. Where, following an IME, a medical doctor opined that Petitioner's condition was psychogenically-mediated, and insurer denied liability based on his determination that Petitioner's aggravation was merely temporary, the insurer is not entitled to a second IME by a psychologist to bolster the medical doctor's conclusions.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-605. Where the treating physician agreed with the IME doctor's "assessment of the diagnosis of vocal cord dysfunction," but in response to specific questions from Petitioner's attorney, later disagreed with the IME doctor's position that Petitioner's condition was a psychogenically-mediated temporary aggravation, insurer is not entitled to a second IME due to a change in medical opinion. Although the treating physician's later opinion is more detailed, the details are not inconsistent with his prior opinion.

Physicians: Independent Medical Examinations: Generally. Where the treating physician agreed with the IME doctor's "assessment of the diagnosis of vocal cord dysfunction," but in response to specific questions from Petitioner's attorney, later disagreed with the IME doctor's position that Petitioner's condition was a psychogenically-mediated temporary aggravation, insurer is not entitled to a second IME due to a change in

medical opinion. Although the treating physician's later opinion is more detailed, the details are not inconsistent with his prior opinion.

¶ 1 Petitioner Jill MacGillivray appeals the Department of Labor and Industry's (DLI) Order Directing Medical Examination. DLI ordered MacGillivray to attend an independent medical examination (IME) by psychologist Patrick Davis, PhD.

¶ 2 The parties telephonically argued their positions on August 17, 2016. Matthew J. Murphy represented MacGillivray. Leanora O. Coles represented Respondent Montana State Fund (State Fund).

ISSUES

¶ 3 This Court considers the following issues:

Issue One: Did DLI's consideration of State Fund's motion to compel MacGillivray's attendance at a second IME exceed its statutory authority in light of her pre-emptive notice that she would later file a Petition for Hearing in the Workers' Compensation Court?

Issue Two: Is DLI's order directing MacGillivray to attend a second IME in violation of constitutional or statutory provisions, affected by other error of law, clearly erroneous in view of the record evidence, and/or an abuse of discretion? [1]

PROCEDURAL HISTORY AND FACTS

¶ 4 On February 17, 2015, MacGillivray submitted a First Report to State Fund. According to the report, on February 11, 2015, she had had a respiratory reaction to the glue being used to lay flooring and carpet in her workplace.

¶ 5 She attempted to return to work several times in February and March 2015, but on each occasion, she suffered increasing symptoms and had to leave.

¶ 6 On March 19, 2015, Suzanna Simmons, claim examiner for State Fund, wrote to MacGillivray, explaining that State Fund would pay Temporary Total Disability (TTD) benefits under § 39-71-608, MCA, retroactively effective February 17, 2015, while it continued investigating.

[1] Although MacGillivray also argues that a psychologist is not the appropriate medical professional to conduct the proffered exam, and that State Fund's proposed accommodations are not sufficiently responsive to MacGillivray's needs, this Court does not address those issues due to its disposition of Issues One and Two.

¶ 7 On April 3, 2015, MacGillivray underwent an IME with David J. Hewitt, MD, MPH, DABT, at State Fund's request. As part of his report, Dr. Hewitt answered questions submitted by Simmons in her letter dated March 25, 2015.

¶ 8 Dr. Hewitt opined that MacGillivray's inhalation exposure to carpet glue or odors in February 2015 aggravated her pre-existing vocal cord dysfunction (VCD). He defined VCD as "a condition in which inappropriate vocal cord motion (adduction) produces partial airway obstruction." He considered the aggravation to be "temporary" and stated that it "would not have any long-term sequelae." He further stated that MacGillivray could return to work at her time-of-injury position.

¶ 9 Dr. Hewitt explained:

> VCD in some cases is considered to be secondary to psychological conditions including anxiety, panic attacks, or recent stress. In such cases, it may be considered a form of conversion disorder in which psychological stresses may be converted into physical symptoms. Under this mechanism, a perceived exposure of concern could manifest as symptoms.[2]

¶ 10 Specifically with regard to MacGillivray, Dr. Hewitt stated:

> Although the individual's perceived exposure in February 2015 may have precipitated an acute episode of vocal cord dysfunction, this is a temporary condition which resolves once the individual is removed from the perceived exposure. This is more of a psychogenically-mediated condition rather than a true allergic type of reaction.

¶ 11 Following the IME, Simmons sent a copy of Dr. Hewitt's report to David E. Anderson, MD, MacGillivray's treating physician. On June 12, 2015, Dr. Anderson responded, "I agree with his view of the previous evaluations of Jill Mac[G]illivray as well as his assessment of the diagnosis of vocal cord dysfunction."

¶ 12 On June 30, 2015, Simmons advised MacGillivray that, as a result of Dr. Hewitt's conclusion that her condition was a temporary aggravation, the symptoms of which would have resolved once removed from the perceived exposure, and Dr. Anderson's concurrence, State Fund was denying liability.

¶ 13 On February 16, 2016, counsel for MacGillivray asked Dr. Anderson to answer a series of questions. In particular, Dr. Anderson was asked to explain whether he agreed or disagreed with Dr. Hewitt's opinion that "Mrs. MacGillivray's condition is 'psychogenically mediated . . . rather than a true allergic type of reaction,' " and "that her aggravation is 'temporary.' "

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[2] Citation omitted.

¶ 14 On April 18, 2016, Dr. Anderson responded as follows:

> [That] [h]er condition [is] psychogenically[ ] mediated is obviously false because of preexisting history of asthma with allergic component[;] her hyperreactivity airway became more severe after the above-mentioned exposure. This is also well documented by checking peak flows as the asthma control now is more difficult. Therefore, [it is] a permanent condition that she has and will need continued optimal treatment.

¶ 15 On June 22, 2016, Tammy Gibson, claim examiner for State Fund, advised MacGillivray by letter that an appointment for an evaluation with Dr. Davis had been scheduled for her on July 8, 2016.

¶ 16 On June 23, 2016, counsel for MacGillivray responded by letter that State Fund was not entitled to a second IME and that MacGillivray would not attend.

¶ 17 On June 28, 2016, Gibson wrote to DLI, pursuant to § 39-71-605, MCA, to request an order compelling MacGillivray's attendance at the IME. Gibson explained that the purpose of the examination was "to confirm whether Ms. MacGillivray's ongoing complaints and treatment is causally related to her claimed exposure of 02/11/2015."

¶ 18 The same day, Gibson notified MacGillivray by letter that her appointment with Dr. Davis had been rescheduled to August 5, 2016. Gibson also explained:

> The evaluation could take several hours to all day. A portion of this time will be spent talking with[ ] Dr. Patrick Davis and the balance will be spen[t] filling out the evaluation forms. You will be able to take break[s] during these time frames and there will be a break for lunch.

¶ 19 On June 30, 2016, counsel for MacGillivray responded to State Fund's motion to compel. First, counsel argued that MacGillivray's plan to file a Petition for Hearing, requesting acceptance of her claim and payment of permanent total disability (PTD) benefits in the Workers' Compensation Court would divest DLI of jurisdiction on the issue of compelling an IME. Second, counsel pointed out that because State Fund had already held a causation IME, and thereafter denied liability, it was not entitled to another IME to bolster its denial. Third, counsel argued that because objective medical evidence established that MacGillivray's respiratory condition is not psychological, a psychologist was not the appropriate medical professional to conduct the proffered exam. Fourth, counsel objected to State Fund's failure to accommodate MacGillivray's condition with respect to the location and length of the appointment.

¶ 20 On July 1, 2016, State Fund e-mailed DLI, arguing that several changes in circumstance necessitated a second IME, this time with a psychologist. First, State Fund contended that Dr. Anderson's April 18, 2016, opinion that MacGillivray's workplace inhalation caused a permanent aggravation of her condition, represented a "180 degree

turn in his opinion" from his agreement with Dr. Hewitt's diagnosis on June 12, 2015. Second, State Fund contended that MacGillivray's plan to seek PTD benefits suggested that her condition may have changed. State Fund also requested clarification as to the accommodations MacGillivray was seeking.

¶ 21 On July 5, 2016, counsel for MacGillivray responded by e-mail to DLI: "Mrs. MacGillivray can only attend appointments for limited time periods (1-2 hours), and at locations which are by nature sterile and free of excess contaminants i.e. hospitals/clinics."

¶ 22 The same day, State Fund replied by e-mail that MacGillivray could be accommodated: Dr. Davis was willing to break the IME up into two days with sessions of 2-3 hours each; and he could do the exam at the Old Columbus Hospital, which he believed had a fragrance-free policy, or at Benefis, where MacGillivray saw Dr. Anderson.

¶ 23 On July 6, 2016, DLI issued an order pursuant to § 39-71-605(2), MCA, directing MacGillivray to attend the examination with Dr. Davis on August 5, 2016. DLI explained that "the claimant should be examined by a physician for a diagnostic update of claimant's medical problems attributable to claimant's industrial injury of 02/11/2015."

¶ 24 On July 22, 2016, MacGillivray filed her Petition for Hearing in this Court, claiming that State Fund is liable and that she is entitled to PTD benefits, costs, attorney fees, and a penalty.

¶ 25 Thereafter, on July 29, 2016, MacGillivray filed a Notice of Appeal from Order of the Department, raising the same objections she made in opposition to State Fund's motion to compel before DLI.

¶ 26 On August 2, 2016, State Fund responded to MacGillivray's appeal, raising the same grounds it asserted in support of its motion to compel.

STANDARDS OF REVIEW

¶ 27 When reviewing an order from DLI, with the exception of an order for interim benefits under § 39-71-610, MCA, this Court bases its decision on the record.[3] In this matter, both parties have submitted, and stipulated to this Court's reliance upon, exhibits that are outside of the record. Aside from two mediation reports,[4] this Court considers those documents, as well.

¶ 28 Section 2-4-704(2), MCA, sets forth the standards of review:

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[3] § 2-4-704(1), MCA; ARM 24.5.350(6).

[4] *See* § 39-71-2410(4)(b), MCA ("The mediator's report and any of the information or recommendations contained in the report are not admissible as evidence in any action subsequently brought in any court of law.").

> The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
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> (a) the administrative findings, inferences, conclusions, or decisions are:
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> (i) in violation of constitutional or statutory provisions;
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> (ii) in excess of the statutory authority of the agency;
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> (iii) made upon unlawful procedure;
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> (iv) affected by other error of law;
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> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
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> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (b) findings of fact, upon issues essential to the decision, were not made although requested.

LAW AND ANALYSIS

¶ 29 This case is governed by the 2013 version of the Montana Workers' Compensation Act since that was the law in effect on MacGillivray's last day of employment and, consequently, her alleged last injurious exposure.[5]

> **Issue One: Did DLI's consideration of State Fund's motion to compel MacGillivray's attendance at a second IME exceed its statutory authority in light of her pre-emptive notice that she would later file a Petition for Hearing in the Workers' Compensation Court?**

¶ 30 *Inter alia*, § 39-71-605, MCA, allows an insurer to seek an order compelling attendance at an IME from either the Workers' Compensation Court or DLI:

> (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

[5] *See Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶¶ 26-29, 346 Mont. 141, 194 P.3d 77 (explaining that in the occupational disease realm, the court has not previously made exceptions for statutes of limitation or other procedural statutes in cases in which it has held that the statutes in effect on an employee's last day of work control, and likewise declining to do so in the instant matter). *But see EBI/Orion Grp. v. Blythe*, 281 Mont. 50, 54, 931 P.2d 38, 40 (1997) ("A rule as to who is qualified to conduct an IME is a procedural rather than a substantive rule. Thus, the law in effect as to IMEs as of the date of the trial is controlling.").

> 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.[6]

¶ 31 On June 28, 2016, pursuant to this provision, State Fund sought an order from DLI to compel MacGillivray to attend a scheduled IME with Dr. Davis. DLI granted State Fund's motion on July 6, 2016 — more than two weeks before MacGillivray filed her Petition for Hearing with this Court on July 22, 2016. Because DLI's jurisdiction over MacGillivray's attendance at the IME was lawful and fully exercised before MacGillivray invoked the jurisdiction of this Court, DLI's jurisdiction is not divested.[7] If MacGillivray is aggrieved by DLI's order, her recourse is limited to appealing the dispute to this Court.[8]

Issue Two: Is DLI's order directing MacGillivray to attend a second IME in violation of constitutional or statutory provisions, affected by other error of law, clearly erroneous in view of the record evidence, and/or an abuse of discretion?

¶ 32 Notwithstanding DLI's authority, pursuant to § 39-71-605(2), MCA, to issue an order compelling the claimant to submit to an IME upon request, an insurer's right to an IME is not unlimited.[9] Section 39-71-605(2), MCA, "must be construed in the context of the purposes of those procedures."[10] "In that vein, Rule 35(a), Mont. R. Civ. P. provides that an IME may be ordered only for good cause shown."[11] The Montana Supreme Court has explained:

> [G]ood cause for an examination may not constitute good cause for the specific examination requested by a defendant. A court must scrutinize a request for a proposed examination on a case-by-case basis. The time, place, manner, conditions and scope of an examination must be balanced with the plaintiff's inalienable rights. A court is further required to consider the availability of other means through which a defendant can obtain the information necessary to an informed defense.[12]

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[6] Emphasis added.

[7] *See State v. Hass*, 2011 MT 296, ¶ 29, 363 Mont. 8, 265 P.3d 1221 (citation omitted) ("The jurisdiction of a court depends on the state of facts existing at the time it is invoked.").

[8] § 39-71-204(5), MCA; ARM 24.5.350(1).

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

[10] *Whitford v. Montana State Fund*, 2006 MTWCC 11, ¶ 6.

[11] *Whitford*, ¶ 6 (citations omitted).

[12] *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, ¶ 33, 315 Mont. 135, 68 P.3d 678.

¶ 33 This Court has held that disliking the opinions of a prior IME physician or being concerned that the physician's opinions may not be persuasive are not legitimate reasons to seek multiple IMEs.[13] On the other hand, it has explained that "an insurer is entitled to obtain a second, third, or even more IMEs . . . where there is an indication that claimant's medical condition has changed or there is some other sound reason for doing a repeat examination; for example, where the prior examination did not address the current medical issue."[14]

¶ 34 State Fund is not entitled to a second IME, as State Fund initially explained, "to confirm whether Ms. MacGillivray's ongoing complaints and treatment is causally related to her claimed exposure of 02/11/2015." Dr. Hewitt already offered an opinion that MacGillivray's condition was more "psychogenically-mediated" than a "true allergic type of reaction," and State Fund denied liability based on his opinion that the condition amounted to only "a temporary aggravation."[15] Although this Court has granted an IME where medical opinions express doubt as to the origin of a condition or indicate the need for specialized evaluation,[16] Dr. Hewitt's opinion does neither. State Fund may not seek a second opinion to bolster Dr. Hewitt's conclusions.[17] To the extent State Fund is concerned that Dr. Hewitt's opinion could be attacked on the basis that he did not have a complete set of medical records at the time of his report, State Fund could simply provide those records now and seek an addendum.[18]

¶ 35 Furthermore, State Fund is not entitled to a second IME on the grounds of "changed circumstances."

¶ 36 First, this Court does not agree with State Fund that Dr. Anderson changed his opinion. In his IME Report, under the heading, "ASSESSMENT," Dr. Hewitt diagnosed MacGillivray with "Vocal cord dysfunction (VCD), claim related aggravation." As part of his "ASSESSMENT," Dr. Hewitt made no mention of whether he believed the claim-related aggravation to be temporary or permanent. After reviewing Dr. Hewitt's report, Dr. Anderson stated, "I agree with . . . his assessment of the diagnosis of vocal cord dysfunction." Thereafter, counsel for MacGillivray specifically asked Dr. Anderson to opine as to whether her condition had psychological rather than physical origins, and whether her aggravation was temporary. Dr. Anderson responded that MacGillivray's

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[13] *Stacy v. Plum Creek NW Lumber, Inc.*, 2001 MTWCC 64, ¶ 3.

[14] *Marquardt*, ¶ 6.

[15] *See Montana State Fund v. Grande*, 2012 MT 67, ¶ 39, 364 Mont. 333, 274 P.3d 728 (permanent aggravations of underlying conditions can be considered occupational diseases if work-related factors are the major contributing cause of the condition).

[16] *Blancher v. Liberty Mut. Fire Ins. Co.*, 1996 MTWCC 74.

[17] *See Stacy*, ¶ 3 (An insurer is not permitted to compel repeat examinations simply because it "is concerned that the physician's opinions may not be persuasive.").

[18] *See Simms*, ¶ 33 ("A court is further required to consider the availability of other means through which a defendant can obtain the information necessary to an informed defense.").

condition, which he described as worsening hyperreactivity airway, had physical origins, i.e., pre-existing asthma with allergic component. Moreover, he explained that he viewed the inhalation-related aggravation as permanent, since MacGillivray's asthma is now more difficult to control. Dr. Anderson never said that he agreed with Dr. Hewitt's position that MacGillivray's condition was psychogenically-mediated and temporary. While his later opinion is more detailed, the details are not inconsistent with his previous opinion; indeed, it is justified by the specificity of the questions MacGillivray's counsel asked him to answer.

¶ 37 Second, there is no evidence currently before this Court that MacGillivray's condition has changed since her IME with Dr. Hewitt. To the extent State Fund contends MacGillivray's claim for PTD benefits indicates otherwise, this Court disagrees. While amending one's petition to alter the claimed disability status could indicate a change in condition,[19] MacGillivray has not done so in this case; State Fund's contention is based solely on its position that Dr. Anderson previously agreed her aggravation was temporary. However, as explained above, this Court does not share that position. Moreover, the fact that MacGillivray alleges she is PTD does not constitute grounds for a second IME, as Dr. Hewitt has already opined that she can return to her time-of-injury position. If Dr. Hewitt needs to offer additional thoughts on MacGillivray's claim that she is PTD, or comment on alternative employment, he can do so in an addendum.

¶ 38 Therefore, DLI's order directing MacGillivray to attend a second IME is in violation of constitutional or statutory provisions, affected by other error of law, clearly erroneous in view of the record evidence, and an abuse of discretion.

ORDER

¶ 39 The DLI's Order Directing Medical Examination is **reversed**.

DATED this 4th day of October, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Matthew J. Murphy
Leanora O. Coles

Submitted: August 17, 2016

[19] *See Haman v. Wausau Ins. Co.*, 2007 MTWCC 49, ¶ 4 (petitioner's post-IME amendment of her petition from a claim of PTD to TTD invoked the issue of her healing status, which was not at issue at the time of her IME).