

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 42

WCC No. 2010-2593

SCOTT SHERWOOD

Petitioner

vs.

WATKINS & SHEPARD TRUCKING
Respondent/Insurer.

FILED

DEC 30 2010

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

DECISION AND JUDGMENT

Summary: Petitioner requests that he be evaluated at Respondent's expense by Dr. Bill Rosen regarding chronic pain and medication intake issues. Respondent requests the Court to require Petitioner to undergo an evaluation in a multi-disciplinary setting at the Rehabilitation Institute of Washington. Both parties request direction on the appropriate course to address Petitioner's drug addiction.

Held: In a bench ruling, the Court concluded that Petitioner presented no evidence that a new evaluation by Dr. Rosen would yield different results than the evaluation Dr. Rosen conducted in 2009. Therefore, Petitioner is not entitled to a new evaluation by Dr. Rosen. Although Respondent established that the Rehabilitation Institute of Washington is the closest available place to provide Petitioner with the in-patient treatment both parties agree is needed, it has not been established that the Rehabilitation Institute of Washington is the closest available place to provide the evaluation for such treatment. Respondent shall investigate whether the Rehabilitation Institute of Washington will accept an evaluation performed by Montana physicians and whether Montana physicians are available to perform the required evaluation closer to Petitioner's home. If the evaluation can be done closer to Petitioner's home, it shall be done as close as practical to Petitioner's home in accordance with § 39-71-605(1)(b), MCA. If the Rehabilitation Institute of Washington is the closest practical location to accomplish the evaluation, the evaluation may be conducted at the Rehabilitation Institute of Washington.

¶ 1 The trial in this matter was held on December 29, 2010, in the Workers' Compensation Court, Helena, Montana. Petitioner Scott Sherwood was present and

represented by Norman H. Grosfield. Respondent Watkins & Shepard Trucking was represented by Leo S. Ward.

¶ 2 Exhibits: Exhibits 1 through 4 were admitted without objection. The exhibits from the underlying proceeding, WCC No. 2008-2181, were used by the parties in the current proceeding per stipulation.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Scott Sherwood, Catherine Capps, M.D., Joseph K. McElhinny, Psy.D., and Bill S. Rosen, M.D., taken in the underlying proceeding, can be considered part of the record. Scott Sherwood and Michael Kim Stevens were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

Issue 1: Whether Scott Sherwood may be evaluated at the expense of Watkins & Shepard Trucking by Bill Rosen, M.D., regarding chronic pain and medication intake issues.

Issue 2: What is the appropriate course to address Scott Sherwood's drug addiction?¹

¶ 5 Counsel stipulated that the ruling herein shall not impact in any way the ruling on the motion for reconsideration in the underlying case, WCC No. 2008-2181.

¶ 6 After considering the trial testimony, depositions, exhibits, and the arguments of the parties, I issued a bench ruling pursuant to ARM 24.5.335. The reasoning for my ruling on the contested issues is set forth in the attached transcript. The rulings are as follows:

Issue 1: Whether Scott Sherwood may be evaluated at the expense of Watkins & Shepard Trucking by Bill Rosen, M.D., regarding chronic pain and medication intake issues.

¶ 7 Petitioner has presented no evidence that a new evaluation by Dr. Rosen will yield any different results or recommendations than his evaluation from July 13, 2009.² A second evaluation would be redundant. Respondent is not responsible for the expense of a new evaluation by Dr. Rosen.

¹ Pretrial Order at 2.

² In my oral ruling, I erroneously referred to the date as July 18, 2009.

Issue 2: What is the appropriate course to address Scott Sherwood's drug addiction?

¶ 8 The parties agree that Sherwood should be evaluated for his suitability for an in-patient pain management program to address Sherwood's chronic pain problem and pain medication dependency. Based on the evidence presented, I am satisfied that the Rehabilitation Institute of Washington is the closest available place to provide this in-patient treatment. However, it has not been established that Rehabilitation Institute of Washington is the closest available place to provide the evaluation for such treatment. Watkins & Shepard shall investigate whether the Rehabilitation Institute of Washington will accept an evaluation performed by Montana physicians and whether Montana physicians are available to perform the required evaluation closer to Sherwood's home. If the evaluation can be done closer to Sherwood's home, it shall be done as close as practical to Sherwood's home in accordance with § 39-71-605(1)(b), MCA. If the Rehabilitation Institute of Washington is the closest practical location to accomplish the evaluation, the evaluation may be conducted at the Rehabilitation Institute of Washington.

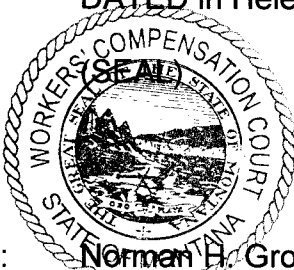
¶ 9 The Court will retain jurisdiction over this matter for 30 days, by which time the parties will report back to the Court as to the resolution of where Petitioner's evaluation will be conducted. If any clarifications or further Court involvement is necessary to facilitate the resolution of this issue, the parties shall contact the Court.

JUDGMENT

¶ 10 The transcript of the bench ruling shall constitute the Court's Decision and Judgment.

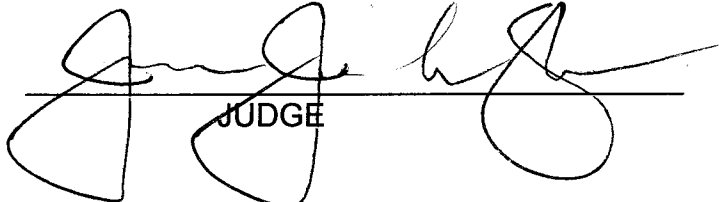
¶ 11 An Order certifying this Judgment as final Pursuant to ARM 24.5.348(2), will be issued on January 31, 2011.

DATED in Helena, Montana, this 30th day of December, 2010.



c: Norman H. Grosfield
Leo S. Ward

Attached: Copy of Bench Ruling
Submitted: December 29, 2010



JUDGE

1 WORKERS' COMPENSATION COURT
2 IN AND FOR THE STATE OF MONTANA

FILED

DEC 30 2010

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

3
4 SCOTT SHERWOOD,
5 Petitioner,
6 vs.
7 WATKINS & SHEPARD
8 TRUCKING,
9 Respondent.

WCC No. 2010 - 2593
December 29, 2010
Oral Bench Ruling

RECEIVED

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11
12 BEFORE THE HONORABLE JAMES JEREMIAH SHEA

13
14 The proceedings in the above-entitled matter were
15 held on Wednesday, December 29, 2010, at 11:40 a.m., at the
16 Workers' Compensation Court, Helena, Montana.

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APPEARANCES:

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For the Petitioner:

Norman H. Grosfield
Attorney at Law
PO Box 5015
Great Falls, Montana 59624

For the Respondent:

Leo S. Ward
Attorney at Law
PO Box 1697
Helena, Montana 59624

Court Reporter:

Kim Johnson, RPR

1 BE IT REMEMBERED that on Wednesday, December
2 29, 2010, in Helena, Montana, before the Honorable James
3 Jeremiah Shea, Workers' Compensation Court Judge, the
4 following proceedings were had:

5 * * * * *

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7 THE COURT: Why don't we go on the record, then.
8 As I indicated when we were off the record and
9 during the recess, I'm prepared to bench rule on this matter
10 pursuant to ARM 24.5.335. The one thing -- as I also discussed
11 with counsel off the record -- that I wanted to clarify here on the
12 record is that obviously I have issued findings of fact,
13 conclusions of law and judgment in the other case -- WCC No.
14 2008-2181 -- and there was a motion for reconsideration that
15 was filed in that case which is pending, and everybody agreed,
16 as was my belief, that this ruling in this case will not be impacted
17 in any way by whatever the ruling is in the motion for
18 reconsideration in 2008-2181.

19 So as I told counsel off the record, I wanted to put
20 that on the record so we don't end up getting a bunch of
21 confusing issues going back and forth between the two of them.
22 So everybody agreed that whatever the ruling in the motion for
23 consideration in the other case is will have no impact one way or
24 the other as to the ruling in this case and vice versa.

25 So Norm, you agree with that?

1 MR. GROSSFIELD: I do.

2 THE COURT: Leo?

3 MR. WARD: Yes, Your Honor.

4 THE COURT: So in that regard, I'll proceed to the
5 bench ruling.

6 As to the issues which are presented in the pretrial
7 order, there are two. The first is whether Mr. Scott Sherwood
8 may be evaluated at the expense of -- with his -- by Dr. Bill
9 Rosen regarding chronic pain and medication intake issues, and
10 the second issue is what is the appropriate course to address
11 Mr. Sherwood's addiction.

12 As far as Issue One goes, first, whether Mr. Sherwood
13 may be evaluated at the expense of Watkins & Shepard by Dr.
14 Rosen regarding chronic pain and intake issues, I note from the
15 exhibits that have been presented, Dr. Rosen last evaluated
16 Mr. Sherwood on July 18, 2009, and that was presented to me at
17 Exhibit 1, Pages 4 through 6.

18 Dr. Rosen gave specific recommendations regarding
19 the course of Mr. Sherwood's treatment that are detailed at
20 Pages 5 and 6 of that exhibit, and I will discuss those
21 recommendations at greater length regarding my ruling on Issue
22 Two here shortly.

23 But pertinent to the answer to today's issue, I have
24 been presented with no evidence that a new evaluation by
25 Dr. Rosen will yield any different results or recommendations

1 than his evaluation from July 18, 2009. And in the colloquy we
2 had during closing arguments, Mr. Sherwood's counsel basically
3 conceded as much. So I don't see any point to reevaluation by
4 Dr. Rosen at this point that is expected to yield the same results
5 as the July 18, 2009, evaluation. It strikes me that would just be
6 redundant.

7 So my ruling as pertains to Issue One is going to be
8 that Mr. Sherwood may not be evaluated at the expense of
9 Watkins & Shepard by Dr. Bill Rosen regarding chronic pain and
10 medication intake issues.

11 Moving on to Issue Two, what is the appropriate
12 course to address Mr. Sherwood's addiction, I note that the
13 broad issue as to the appropriate course, at least in the
14 immediate term to address Mr. Sherwood's addiction, is not
15 really hotly disputed here by the parties. Based on what I have
16 been presented with, it appears that both parties seem to
17 believe that Mr. Sherwood should at least be evaluated for
18 suitability for inpatient pain management program that will also
19 address his pain medication dependency.

20 As pertains to this issue, the devil's in the details here
21 as to where and how this should be done, at least as far as the
22 evaluation goes.

23 Dr. Rosen has recommended a neuropsychological
24 evaluation and electrodiagnostic studies to be done here in
25 Montana by doctors that are specifically named. That's from his

1 report of July 13, 2009.

2 Watkins & Shepard has suggested that these
3 evaluations would be redundant of the evaluation that would be
4 done in Seattle at the Rehabilitation Institute of Washington.

5 There are a couple of open questions that I really
6 don't have an answer for based on the evidence before me, and
7 they are twofold. First, what is the nature of the evaluation that
8 is going to be required by the Rehabilitation Institute of
9 Washington? And as it pertains to that evaluation, can it be
10 done here in Montana?

11 Section 39-71-605 (1) (b), Montana Code Annotated,
12 requires that the request for examination must be done with
13 regard to employee's convenience, physical condition, and ability
14 to attend at the time and place that is as close to the employee's
15 residence as is practical.

16 I'm satisfied from the testimony of Mr. Stevens that
17 the Rehabilitation Institute of Washington is the closest available
18 place for the inpatient treatment that is recommended here. But
19 it is not clear to me that the evaluation for Mr. Sherwood's
20 suitability for this program cannot be done closer to home
21 pursuant to 605(1)(b).

22 It's possible and, as I said, this is an open question,
23 that the evaluation for Mr. Sherwood's placement in the
24 Rehabilitation Institute of Washington could be done here in
25 Montana, and I believe it is incumbent upon Watkins & Shepard

1 to make that determination and find that out.

2 If the evaluation for his suitability and the placement
3 in the, in the Rehabilitation Institute of Washington cannot be
4 done in Montana -- and specifically, I'm thinking, for example, if
5 the nature of the evaluation required by the Rehabilitation
6 Institute of Washington is not available to be performed by
7 doctors in Montana, or the Rehabilitation Institute of Washington
8 requires, as part of its protocol, that evaluations be done
9 in-house, then in that circumstance, then it would be appropriate
10 for Mr. Sherwood to be evaluated for his suitability at the
11 Rehabilitation Institute of Washington.

12 So my ruling as to Issue Two -- specifically, what is
13 the appropriate course to address Mr. Sherwood's addiction -- is
14 that Watkins & Shepard shall investigate the availability for an
15 evaluation for Mr. Sherwood's suitability for placement at the
16 Rehabilitation Institute of Washington and determine whether
17 the availability of such evaluations can be done here in Montana.

18 If the evaluations can be done in Montana, then they
19 should be done in Montana pursuant to 605(1)(b).

20 If not, then the evaluation -- it's appropriate that the
21 evaluation be done and conducted at the Rehabilitation Institute
22 of Washington.

23 Regarding the inpatient treatment itself, if
24 Mr. Sherwood is deemed an appropriate candidate, I'm
25 convinced from the testimony and the evidence presented that a

1 number of options were explored and that, ultimately,
2 Rehabilitation Institute of Washington is the closest available
3 program.

4 As pertains to the California program that Dr. Rosen
5 had alluded to in both his report and his -- in his report and, to a
6 certain degree in his deposition, obviously that's farther away
7 and, from what I have been presented with, it seems as though
8 Rehabilitation Institute of Washington, it's an established and
9 legitimate program, it's closer, and it's -- and I see nothing at
10 this juncture that convinces me that it would not be the
11 appropriate place for treatment.

12 So that is my ruling as to the appropriate -- what I
13 believe to be the appropriate course to address Mr. Sherwood's
14 addiction.

15 What I am going to do is -- I'm just going to -- I will
16 have a final, certified transcript of my ruling prepared and attach
17 it to an order that incorporates it, and that would be my ruling as
18 far as the findings of fact and conclusions of law.

19 MR. WARD: Thank you, Your Honor.

20 THE COURT: Any questions, Mr. Grosfield?

21 MR. GROSFIELD: No.

22 THE COURT: Mr. Ward?

23 MR. WARD: No, Your Honor.

24 THE COURT: Actually, I should -- before we go off
25 the record, I should just, in terms of time frame, what I am

1 going to do is I'll retain jurisdiction, and we will just put a 30-day
2 time frame on it. So I guess in that regard, what this is probably
3 most appropriate for is purposes of reconsideration, or what
4 have you, I'm going to retain jurisdiction for the issue of --
5 within 30 days requiring a status report as to -- this obviously
6 pertains as to Issue Two that the -- what the suitability is for
7 evaluation for Mr. Sherwood's inpatient treatment may be, and
8 that it be done, and that that determination be resolved,
9 whether it can be done here in Montana or whether it has to be
10 done at RIW.

11 MR. WARD: Okay.

12 THE COURT: Thank you. We are off the record.

13 (The trial concluded.)

14 (The time is 11:49 a.m.)

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1 STATE OF MONTANA)
2 County of Lewis and Clark) : SS.

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4 I, Kimberly Johnson, a Registered Professional
5 Reporter and Notary Public in and for the County of Lewis and
6 Clark, do hereby certify:

7 That the foregoing cause was taken before me at the
8 time and place herein named, that the foregoing cause was
9 reported by me, and that the foregoing pages contain a true
10 record of the testimony to the best of my ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand
12 this 30th day of December, 2010.

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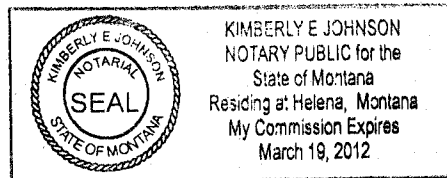
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Kimberly E Johnson
Kimberly E. Johnson
Registered Professional Reporter
Notary Public

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