February 28, 2020

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DECISION AND ORDER

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RE: HF No. 42, 2018/19 – Reuben Wipf v. Maguire Iron, Inc. & Maguire Tank, Inc. and Zurich American Insurance Co.

Dear Mr. Nasser and Mr. Ashmore:

This letter addresses the following submissions by the parties:

December 6, 2019	Employer/Insurer's Motion for IME
January 10, 2020	Claimant's Objection to Motion for IME
	Affidavit of Claimant
January 27, 2020	Employer/Insurer's Reply to Claimant's Objection

QUESTIONS PRESENTED:

I. MAY INSURER REQUIRE CLAIMANT TO ATTEND AN INDEPENDENT MEDICAL EVALUATION IN MINNEAPOLIS, MN EVEN THOUGH IT IS NOT CURRENTLY PAYING CLAIMANT WORKERS COMPENSATION BENEFITS?

II. IS REQUIRING CLAIMANT TO TRAVEL TO MINNEAPOLIS FOR AN IME REASONABLY CONVENIENT UNDER SDCL 62-7-1?

FACTS

Claimant, Reuben Wipf, suffered a workplace injury on June 15, 2016. Employer/Insurer initially accepted the injury as compensable and began paying benefits to Claimant. A dispute later arose concerning the nature and extent of Claimant's injury. Claimant sought the opinion of Dr. Robert Tonks, a San Diego orthopedic surgeon. On September 9, 2018, Dr. Tonks completed a records review of Claimant's medical records and opined that Claimant had reached maximum medical improvement (MMI) and had a number of permanent work restrictions. Dr. Tonks further advised that if Employer was unable to accommodate his restrictions, Claimant should be offered vocational rehabilitation. Claimant then sought retraining benefits.

After Claimant put forth his claim for rehabilitation benefits, Employer/Insurer retained Dr. Ryan Noonan to conduct an Independent Medical Examination (IME)[1]. It was Dr. Noonan's professional opinion that Claimant's injury had resolved itself and that no further treatment was necessary. Dr. Noonan also opined that Claimant suffered from an underlying back condition that was unrelated to his work-place injury. Claimant subsequently provided a supplemental opinion from Dr. Tonks. Employer/Insurer sought to have Dr. Mark Larkins, a neurosurgeon licensed in both Minnesota and South Dakota, examine Claimant in Minneapolis, MN. Claimant refused to attend the IME and Employer/Insurer filed this motion to compel Claimant's attendance.

[1] In his brief, Claimant uses the term Defense Retained Medical Evaluation (DRME). For purposes of clarity, the Department shall use the term IME to refer to the evaluation at issue here.

ANALYSIS

I. MAY INSURER REQUIRE CLAIMANT TO ATTEND AN INDEPENDENT MEDICAL EVALUATION IN MINNEAPOLIS, MN EVEN THOUGH IT IS NOT CURRENTLY PAYING CLAIMANT WORKERS COMPENSATION BENEFITS?

Independent Medical Examinations are governed by SDCL 62-7-1, which provides:

> An employee entitled to receive disability payments shall, if requested by the employer, submit himself or herself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks. The examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

Claimant contends that because he is not currently receiving benefits, he is not obligated to attend the IME. Employer/Insurer counters that since Claimant is seeking benefits, and may be ultimately successful in securing them, he is obligated to attend the IME. To support this argument, Employer/Insurer cite *Rick Jepsen v. Rogers Ltd, Inc. d/b/a Rogers Jewelers & Cincinnati Ins. Co.*, No. HF No. 64, 2008/09, 2009 WL 1801474, at *2 (S.D. Dept. Lab. May 19, 2009), a previous Department opinion regarding this same issue. In *Jepson*, Claimant similarly refused to attend a functional capacity exam (FCE) set up by Employer/Insurer. Subsequently, Employer/Insurer filed a motion requesting the Department approve its physical therapist. The Claimant argued that he was not obligated to attend the appointment. The Department disagreed with Claimant, finding that he was obligated to attend the FCE even though he was to receiving benefits at the time:

> There is the possibility that claimant is entitled to benefits, therefore, the exam pursuant to SDCL § 62-7-1 may be requested by Employer/Insurer for the purpose of determining the nature, extent, and probably duration of the injury received by the employee, and for the purposes of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title. See *Madsen v. Prairie Lakes Health Care Center*, Civ No. 98-247 (September 30, 1998).

Id. at *2.

Claimant argues that the Department's reading of SDCL 62-7-1 in *Jepsen* was incorrect. However, the Department's reasoning was based on the circuit court's decision in the earlier *Madsen* decision. In that case, the Claimant also argued that she was not obligated to attend a scheduled IME since she was not receiving benefits. The Department initially agreed with the Claimant. However, the Employer/Insurer appealed the Department's decision. Judge Steven Zinter disagreed with the Department's conclusion that Claimant was not obligated to attend the IME. In reversing, Judge Zinter explained[2]:

> In reviewing the language "entitled to receive disability payments," the Department concluded that because this Claimant's disability payments had ceased, the statute did not apply. However, the statute says, "entitled to." It does not say that an employee is, "presently receiving", "receiving" or that the employee's entitlement is established… In other words, entitled to receive, as I view it, is not limited to a present tense situation as the Department concluded.

Transcript of Bench Decision, *Madsen*, 3.

In addition, Judge Zinter focused on the phrase "as soon as practical after the injury". He reasoned "[I]f you're going to wait until legal entitlement to permanent partial or permanent total disability is decided, the Legislature would not have used or not have said that they're entitled to the IME as soon as practical after the Injury." *Id.*

[2] The Department's records indicate that Judge Zinter issued an oral ruling instated of a written decision.

Though Claimant's reading of SDCL 62-7-1 is not unreasonable, previous precedent by both the Department and circuit court establishes Employer/Insurer's right to request an IME under SDCL 62-7-1 whenever a claimant is seeking workers compensation benefits. Since Claimant is seeking future benefits, this is sufficient to require Claimant to submit to an additional IME in accordance with SDCL 62-7-1.

II. IS REQUIRING CLAIMANT TO TRAVEL TO MINNEAPOLIS FOR AN IME REASONABLY CONVENIENT UNDER SDCL 62-7-1?

While Claimant contends that SDCL 62-7-1 does not grant Employer/Insurer the ability to force him to attend an IME in this case, he nonetheless concedes that the Department could order one under SDCL 15-6-35(a). This statute provides:

> In an action in which the mental or physical condition of a party or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician. The order may be made only on motion for good cause shown and upon notice to the person or party to be examined and to all other persons or parties involved and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Claimant argues that Employer/Insurer cannot demonstrate good cause to require him to attend another IME. Both parties agree that the Department is not bound by the rules of civil procedure, though it may apply them so long as they do not conflict with other specific statutes. Since the Department finds that Employer/Insurer in this case is entitled to request another IME as a matter of right, there is no need to apply SDCL 15-6-35.

This is not to say that Employer/Insurer may subject Claimant to an IME anywhere it chooses. SDCL 62-7-1 specifies that such an IME be performed "at a time and place reasonably convenient for the employee". The statute does not provide

guidance as to what is reasonable. However, the issue of what is reasonably convenient has been examined in other jurisdictions. In *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1255 (Alaska 2007), the Supreme Court of Alaska determined that it was not reasonable to require the Claimant to travel 2,600 miles to attend an IME. The Alaska Workers' Compensation Board originally denied a portion of Claimant's benefits because she refused to travel from Miami, where she had subsequently moved, to Utah to attend an IME. The Alaska Court examined its statute related to independent medical examinations and determined "the statute provides that the employer may request examinations 'at reasonable times.' Although the statute does not make any comment on where the examination takes place, its requirement of a 'reasonable time' indicates that the legislature intended some consideration of the employee's ease in attending the examination." *Id.* at 1255. The Alaska Court emphasized that the request was unreasonable because the Insurer did not attempt to locate a physician in Florida to complete an IME. *Id*.

In *Miceli v. Indus. Comm'n of Arizona*, 135 Ariz. 71, 75, 659 P.2d 30, 34 (1983), The Arizona Court of Appeals refused to require Claimant to travel from her home in Tucson to Phoenix for an IME. Claimant filed a motion for a protective order to the Arizona Workers' Compensation Board to prevent Insurer from requiring her to attend. The Board denied the motion. Upon appeal, the Arizona Court reversed the Board. It noted,

> Respondents argue that there are many situations in which it is appropriate to require a worker to travel to a different city for examination. We agree. There are many localities where it is not possible to arrange examination by a physician of the appropriate specialty or discipline or where it may be difficult to obtain an uninvolved physician. In other cases it may be appropriate to arrange for examination by a physician with particular qualifications or experience, so that

> requiring the employee to submit to examination in another locality may be reasonable. Many other examples could be given. However, none of these reasons, nor any other was advanced in the case at bench. We hold that where there is no arguable reason for requiring the employee to submit to examination in a locality other than his or her place of residence, the imposition of such a requirement is one which calls for examination "at a place" which is not "reasonably convenient for the employee" and is improper even where the costs of travel are paid by the Commission, the carrier or the employer. The wording of the statute leads to the conclusion that when a satisfactory examination can be made easily without an extended journey, an employee should not be compelled to submit to an examination by some specialist located at a distance.

Id. at 34.

Finally, the Washington Court of Appeals considered whether Claimant was justified in refusing to attend an IME in *Romo v. Dep't of Labor & Indus.,* 92 Wash. App. 348, 356–57, 962 P.2d 844, 848–49 (1998). The Washington Board of Workers Compensation suspended Claimant's benefits after she refused to attend a follow-up examination. Claimant then appealed the Board's decision to the Superior Court and then to the Washington Court of Appeals. The Court noted:

> The circumstances of the requested examination, even beyond those personal to the worker, should be relevant to determining whether the worker has good cause to refuse to attend. As the Board has held, the good cause determination thus should involve a balancing of the worker's individual circumstances and the Department's interests in requiring the examination.

Id.

Similarly, in determining whether subjecting Claimant to a trip to Minneapolis is "reasonably convenient" under SDCL 62-7-1, the Department must weigh the competing interests of the parties. On the one hand, Claimant has an interest in being free of unnecessary pain and aggravation of his injury which could result from a trip between Sioux Falls and Minneapolis. On the other hand, Employer/Insurer has an interest in

obtaining an IME from a doctor of its choosing when it claims that it could not secure the services of a local doctor to perform one.

The Department is left to decide this question without the benefit of evidence on either side. Claimant has not provided medical evidence that would prohibit him from traveling to Minneapolis or suggest that traveling there would result in unreasonable suffering. Neither has Employer/Insurer presented proof that it could not find a competent doctor locally to perform the IME. The distance between Sioux Falls and Minneapolis is approximately 240 miles and would take just under four hours to complete by automobile.[3] However, a flight between the two cities would require Claimant to be stationary for considerably shorter period of time. While travel by airplane may not completely alleviate Claimant's symptoms, the Department finds that this is an acceptable accommodation. Therefore, a flight to Minneapolis from Sioux Falls is "reasonably convenient" under SDCL 62-7-1.

Finally, Claimant argues that allowing Employer/Insurer to schedule an IME in Minneapolis would create a financial burden on Claimant because he would bear additional litigation costs associated with the travel necessary for his attorney to depose Dr. Larkins and with hiring another expert to refute the IME. Since SDCL 62-7-1 provides Employer the right to request a subsequent IME, Claimant would incur additional costs regardless of whether the IME is in Minneapolis or Sioux Falls. It is logical to presume Claimant's costs will be higher due to the necessity of his attorney

[3] The Department takes judicial notice of the following: According to Google Maps, the shortest route between Sioux Falls, South Dakota and Minneapolis, Minnesota is 238 miles, with a travel time by automobile of 3 hours, 47 minutes. https://www.google.com/maps

traveling to Minneapolis, but this alone is not sufficient grounds to render the Minneapolis IME unreasonable under SDCL 62-7-1.

CONCLUSION

Employer/Insurer's motion for an IME is GRANTED, conditioned on Employer/Insurer making travel arrangements for Claimant to fly via commercial fight from Sioux Falls to Minneapolis. This decision shall constitute the Department's order on this matter.

Sincerely,

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Joe Thronson
Administrative Law Judge