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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JUSTIN M. POLLARD,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON, et al,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In deciding whether Respondents' refusal to authorize a current, local attending physician constitutes good cause for Mr. Pollard's refusal to attend subsequently scheduled defense medical examinations, it is important to note that the "guiding principle" in such a determination must be that the Industrial Insurance Act "is a remedial statute that is 'to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'" *Dep't of Labor & Indus. v. Lyons*, 185 Wn.2d 721, 734, 374 P.3d 1097 (2016), quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

Respondents have failed to refute the substantial evidence and binding authority establishing that Mr. Pollard had good cause for refusing to attend the defense examinations at issue. Indeed, to the extent that a good cause analysis requires a balancing of interests, Respondents' complete failure to conduct any such balancing is dispositive. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 356, 962 P.2d 844, 848 (1998)(quoting *In Re Bob Edwards*, BIIA Dec., 90 6072 (1992).

The primary argument asserted by Respondents is that Mr. Pollard's right to an attending physician of his choice is independent of his obligation to attend reasonably scheduled defense medical examinations. Respondents cite no authority for their assertion. Moreover, the suggestion that the issues are separate because defense examiners do not consult with attending physicians during the course of defense examinations is immaterial. A freely chosen attending physician plays a crucial role for the injured worker throughout the duration of a claim, most notably at the time of claim closure. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 720, 213 P.3d 591 (2009). In the present case, the defense examinations at issue were scheduled for the purpose of rating Mr. Pollard's disability and potentially closing his claim. BR, PD&O, p. 3. Clearly, a freely chosen attending physician need not participate in a defense examination in order to review the examination report, critique it for claims personnel, and/or counsel an injured worker about it. Rather than being independent, the employer's refusal to authorize an attending physician freely chosen by Mr. Pollard was pivotal in negating his expectation of a fair and impartial evaluation. Mr. Pollard had good cause for not attending the examinations and Respondents have presented no countervailing interest.

II. ARGUMENT

Respondents have failed to refute Mr. Pollard's proof of good cause. Their characterization of the employer's repeated refusal to authorize a freely chosen attending physician as merely a claims management dispute ignores the recognized importance of attending physicians generally, as well as the unrefuted testimony in the present case specifically establishing a direct connection between Mr. Pollard's distrust of the scheduled defense examinations and the employer's refusal to authorize a current, local attending physician.

A. Respondents have Failed to Conduct the Requisite Balancing.

Whether good cause exists requires a balancing of Mr. Pollard's expectation of a fair and independent medical examination with the Department's and self-insured employer's interest in resolving disputes at the first-step administrative level. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 356, 962 P.2d 844, 848 (1998)(quoting *In Re Bob Edwards*, BIIA Dec., 90 6072 (1992)). Neither Respondent has conducted such a balancing. Similarly, neither the Superior Court nor the Board of Industrial Insurance Appeals performed the necessary balancing in their respective decisions.

Conducting the balancing set forth in *Romo*, the preponderance of evidence clearly weighs in Mr. Pollard's favor. Indeed, his expectation that the defense examinations at issue would not be fair or independent without a freely chosen attending physician to serve as a check and balance against the employer's hand-selected examiner, is unrefuted.

Balanced against Mr. Pollard's right to rely upon the critical role played by a freely chosen attending physician, particularly at the stage of a claim where future medical treatment and benefits are at stake, is not a scintilla of evidence. No valid interest exists in denying Mr. Pollard his fundamental right to an attending physician of his choice.

There is likewise no evidence establishing, or even suggesting, that granting Mr. Pollard's request for a current, local attending physician would have adversely impacted resolution of claim related issues at the first-step administrative level. To the contrary, had the self-insured employer allowed Mr. Pollard to have an attending physician of his choice, the defense examinations at issue would have long ago been completed and the claim likely closed. The mere presence of an attending physician in Las Vegas would have had no adverse impact on a fair adjudication of the claim. The Department and self-insured employer could have continued to seek and rely upon the opinion of Dr.

Kersten to the extent he was willing. They could have proceeded with their defense examinations. Had a current, local attending physician been authorized and had he or she disagreed with the defense examiners, or recommended further treatment and benefits, the Department and self-insured employer would have remained fully capable of adjudicating the claim based upon a preponderance of the evidence. Certainly, the interest in resolving disputes at the first-step administrative level does not include preventing injured workers from obtaining and presenting relevant medical opinions, or at a minimum relying upon the advice and recommendation of a current attending physician. The interest likewise does not include the power to prematurely close a claim or ignore relevant evidence for the purpose of obtaining or preserving a desired outcome. Quite simply, the possibility that a current, local attending physician may have recommended additional treatment or benefits and therefore assisted Mr. Pollard in keeping the claim open is not a factor contrary to Respondents' legitimate interests.

B. The Right to a Freely Chosen Attending Physician and Good Cause are Closely Related.

Respondents' primary argument is that their refusal to authorize a current, local attending physician is independent of Mr. Pollard's

obligation to attend reasonably scheduled defense examinations. They assert that the employer's refusal is not a factor to be considered in the determination of good cause. Respondents' argument is not persuasive for multiple reasons.

First, they cite no authority for the proposition that the two issues are separate and independent.

Second, Respondents ignore the plain and unambiguous language of *Romo* regarding the factors to be considered in a good cause balancing. The list of factors is not exhaustive and expressly includes unspecified "other relevant concerns." *Romo*, 92 Wn. App. at 356. Given the important role played by attending physicians as described in *Shafer* and *McManus*, it is unreasonable to suggest that being denied an attending physician of one's choice at a critical moment in a claim should not be a "relevant concern" for the purpose of weighing good cause. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009); *Clark County v. McManus*, 185 Wn.2d 466, 472, 372 P.3d 764 (2016).

Respondents further misconstrue the language in *Romo* describing a worker's "expectation of a fair and independent medical evaluation" as being an important, relevant concern. *Romo*, 92 Wn. App. at 356. Respondents assert that because there is no evidence of actual bias by

the defense examiners against Mr. Pollard, he fails to meet his burden. However, a worker's "expectation of a fair and independent medical evaluation" can be adversely impacted by "relevant factors" other than examiner bias. Specifically, as explained by Mr. Pollard, he did not believe that he could obtain a fair and independent examination without the benefit of a current, local attending physician to review the report and make recommendations on his behalf. BR, Pollard, 5/28/15, 6-8, 12. The issue in this case is not the bias of the examiner but the absence of a current, local attending physician to guide the process. Given the importance of the attending physician as described in *Shafer*, Mr. Pollard's belief was utterly reasonable.

Third, Respondent Department of Labor and Industries asserts that the denial of Mr. Pollard's right to a freely chosen attending physician is independent of a good cause analysis because the defense examiner does not consult with the attending physician. Respondent Department's Brief, p. 1. While it is true that defense examiners do not consult with attending physicians, the Department certainly cannot reasonably suggest that the right to an attending physician does not exist at the time of a defense examination, or that the attending physician does not serve a critical role in determining the weight to be afforded such an examination. It is common practice for claim managers, both state fund

and self-insured, to forward copies of defense examination reports to attending physicians for their review and comment. BR, Herron, p. 22. Furthermore, defense examiners are required to consider the opinion of an attending physician regarding issues of medical fixity. WAC 296-23-377. Indeed, the importance of an attending physician in reviewing defense reports, explaining reports to his or her patients, advising claims personnel of his or her concurrence, or alternatively submitting opposing conclusions and recommendations, is neither defeated nor diluted by the fact that defense examinations occur without the attending physician's consultation.

C. A Department Order is not Required.

Respondents further argue that rather than refusing to attend the defense examinations at issue, the appropriate course for Mr. Pollard was to request an order from the Department of Labor and Industries directing the self-insured employer to authorize a current, local attending physician. Respondents reason that such an order would provide protest and appeal rights through which Mr. Pollard could present his case. Should the Department refuse to issue an order, Respondents note that Mr. Pollard could seek a *writ of mandamus*.

Respondent Department's Brief, p. 14. Respondents' argument fails for several reasons.

First, such a scenario would place the injured worker in an impossible position. By the time a Department order was issued and all protests and/or appeals were resolved, months or years could easily pass. If an injured worker is required to seek a *writ of mandamus*, the delay would likely be even longer. Under Respondents' scenario, the injured worker would nonetheless have been required to attend defense medical examinations. The defense examiners' opinions would have been unrefuted given the absence of an attending physician. Relying upon the defense examination report, Respondents could deny treatment, terminate benefits, segregate conditions, and/or rate the nature and extent of permanent impairment – all while the worker awaits a final Department order.

Second, the futility of Respondents' suggested approach is illustrated by the current case. Mr. Pollard's former attorney advised the Department of the employer's failure to authorize a change of physician. She requested the Department to order the employer to authorize Mr. Pollard's request. She even asked the Department to issue a penalty against the self-insured employer for its refusal to grant Mr. Pollard's

clearly appropriate request for a current, local attending physician. BR, Thorp, pp. 127-138. No such order was issued. In fact, it has been three years since the request was made with no response to date.

Third, the Department's authority to issue an order authorizing a change of attending physician is not mutually exclusive of an injured worker's argument that the failure to authorize a current attending physician constitutes good cause for refusing to attend a contemporaneously scheduled defense medical examination. As in the present case, the parties are perfectly capable of putting forth evidence of good cause in the absence of a Department order regarding a change of attending physician.

Fourth, the self-insured employer's obligation to adjudicate claims, including the timely authorization of medical treatment, is entirely independent of a Department order directing such action. *See e.g.*, WAC 296-15-420; WAC 296-15-266.

Finally, although the present case involves a self-insured employer responsible for scheduling defense medical examinations, in state fund claims it is the Department that does so. Consequently, requiring workers in state fund claims to first obtain a Department order addressing a worker's request to change physicians as a prerequisite to

obtaining good cause for refusing to attend a defense examination scheduled by the *same* claims manager who had thus far refused to authorize a change of physician in the first place, is the definition of futility.

D. Mr. Pollard's Right to an Attending Physician was Denied.

Although the Department of Labor and Industries appears to concede that Mr. Pollard might have been entitled to a change of attending physician following his relocation, the self-insured employer continues to assert that no such right was present. Respondent Department's Brief, p. 14. The employer's argument is without merit.

The employer has failed to address the clear and unambiguous language of RCW 51.36.010(4). To the extent that Mr. Pollard's claim remained open; that it was a case of permanent partial disability; and that loss of earning power benefits continued to be paid through the date of the requested defense examinations, there is frankly no question that Mr. Pollard's right to an attending physician of his choice remained in effect at the time of the requested examinations.

The employer further questions Mr. Pollard's need for a current, local attending physician since he was at maximum medical improvement and since his previous treating orthopedic surgeon, Dr.

Kersten, continued in that role. However, the right to a freely chosen attending physician continues through medical fixity. RCW 51.36.010(4). Furthermore, although Dr. Kersten may have remained reasonably convenient for the self-insured employer, he was not conveniently located for Mr. Pollard as required by RCW 51.36.010(2)(a). Considering further that Dr. Kersten had not seen or treated Mr. Pollard in several months at the time of the defense medical examinations, he was no longer the attending provider. WAC 296-20-01002.

Mr. Pollard, who was living one-thousand miles from Dr. Kersten; who had not seen Dr. Kersten in several months; and who believed that he required further evaluation and treatment for his untreated right shoulder as well as depression, clearly retained the right to an attending physician of his choice.

E. The Attending Physician Issue is Before this Court.

The Department of Labor and Industries argues that the merits of Mr. Pollard's request for a current, local attending physician is not before this Court since the Department has not issued an order on the subject. Respondent Department's Brief, pp. 15-17. The Department's argument fails for at least four reasons.

First, there is no question that the issue of good cause is properly before this Court. Since the absence of a freely chosen, current, and local attending physician was a relevant factor in Mr. Pollard's belief that he could not obtain a fair and independent defense medical examination, and since that issue was fully presented and litigated before the Department, Board, and Superior Court, this Court can certainly address the issue of whether the absence of a freely chosen attending physician constitutes good cause under the facts of this case.

Second, issues are routinely litigated at the Board and Superior Court that were not expressly addressed by a Department order. For example, an order denying time loss compensation or closing a claim may result in an appeal where the issue litigated is whether a particular medical condition, which is the cause of the worker's disability, was proximately caused by the industrial injury. In such a case, causal relationship of the medical condition is relevant to the issue of total disability even though the Department had not specifically addressed the issue. Similarly, the attending physician issue in the present case is subsumed by the good cause issue under appeal.

Third, contrary to the Department's assertion, Mr. Pollard is not asserting that two wrongs make a right. Respondent Department's Brief,

p. 1. Although Respondents' refusal to authorize a current, local attending physician in the current case was a clear violation of Mr. Pollard's right under the Act to an attending physician of his choice, good cause is present from the resulting absence of an attending physician. As a factual matter, Mr. Pollard was denied an attending physician, the result of which was a reasonable belief that he could not obtain a fair and independent defense examination. Those are questions of fact properly addressed by this Court while conducting a good cause balancing.

Fourth, prior to issuing the suspension order under appeal, the Department was asked to issue an order directing the employer to authorize the requested change of physician. It failed to do so. It certainly appears suspect that the Department would refuse to issue an order regarding the requested change of physician by Mr. Pollard; then issue an order suspending Mr. Pollard's benefits as requested by the employer; then argue that this Court is precluded from addressing the attending physician issue as it relates to good cause because the Department has yet to issue an order on the subject. By virtue of the suspension order, the Department has put all relevant factors contributing to good cause at issue.

III. CONCLUSION

Substantial evidence supports the conclusion that the denial of Mr. Pollard's request for a current, local attending physician is a relevant factor in the determination of whether he had a reasonable expectation that the defense medical examinations at issue would be fair and independent. The unrefuted evidence establishes that he did not have any expectation that the defense examinations would be fair and independent due to the denial of a freely chosen, current, and local attending physician.

Balanced against Mr. Pollard's reasonable belief, neither the Department nor the self-insured employer has any valid interest in denying an injured worker his or her right to a freely chosen attending physician under the Act. Ironically, the Department's and employer's interest in resolving disputes at the first-step administrative level would have been furthered by authorizing Mr. Pollard's requested change of physician. It is Respondents' actions, not Mr. Pollard's, which have resulted in obstruction of the claim adjudication process.

It is therefore respectfully requested that this Court find that Mr. Pollard had good cause for refusing to attend the defense examinations

at issue, thereby reversing the Superior Court's decision dated
September 9, 2016.

RESPECTFULLY SUBMITTED this 15th day of June, 2017.

MEYER THORP, PLLC

A handwritten signature in black ink, appearing to read "Stephen K. Meyer".

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PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the Reply Brief of Appellant, to which this proof of service is attached, was delivered as follows:

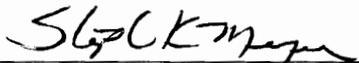
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