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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34757-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JUSTIN M. POLLARD,

Appellant,

v.

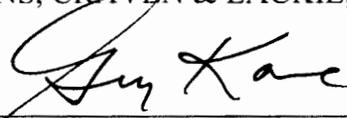
DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, et al.,

Respondents

BRIEF OF RESPONDENT
KAISER ALUMINUM & CHEMICAL CORPORATION

EVANS, CRAVEN & LACKIE, P.S.

By



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I. INTRODUCTION

This is a worker's compensation case in which the Appellant Justin Pollard sustained an injury on 9/23/10 during the course of his employment with Kaiser Aluminum. Mr. Pollard filed his worker's compensation claim which was allowed, and he began receiving benefits, paid by the self-insured employer Kaiser Aluminum, consisting of time loss compensation for the days he missed from work and medical treatment for his injury. Mr. Pollard's injury consisted of bilateral shoulder strains, and orthopedic surgeon Tycho Kersten, M.D., became his attending treating physician. Dr. Kersten diagnosed a rotator cuff tear of the left shoulder for which he performed surgery on 2/22/11. Subsequently, Mr. Pollard returned to work at Kaiser Aluminum.

In order to evaluate Mr. Pollard's condition independent medical examinations were performed at the request of the employer Kaiser Aluminum by Dr. Barnard on 5/14/12 and by Dr. Monkman on 6/22/12. Both doctors indicated that Mr. Pollard's condition caused by his industrial injury was medically fixed and stable, he did not require any further diagnostic testing or treatment, he was capable of performing his job at Kaiser Aluminum, and he sustained a permanent impairment equal to 17% amputation value of the left arm at the shoulder. Mr. Pollard's attending physician Dr. Kersten concurred with the opinions of the IME

physicians. Based on this information the Department of Labor and Industries issued an order dated 10/3/12 closing Mr. Pollard's worker's compensation claim with a permanent impairment award equal to 17% for his left shoulder condition and no permanent impairment for his right shoulder.

Mr. Pollard appealed the 10/3/12 Department order which closed his claim to the Board of Industrial Insurance Appeals contending that he required further medical evaluations and treatment. This appeal was resolved with a settlement agreement between Mr. Pollard and Kaiser Aluminum which provided for the reversal of the 10/3/12 Department order and a remand of the claim back to the Department of Labor and Industries with instructions to perform a diagnostic MRI scan and provide additional medical treatment as indicated. The settlement agreement also provided that Kaiser Aluminum would pay Mr. Pollard loss of earning power benefits based on a calculation comparing minimum wage jobs he could perform in the general labor market versus his earning capacity at Kaiser Aluminum.

Under these circumstances, Mr. Pollard's claim was reopened and he returned to his attending physician, Dr. Kersten, for further diagnostic testing and treatment. After the diagnostic testing and treatment were completed, Dr. Kersten signed a statement on 1/31/14 indicating that no

further treatment of Mr. Pollard's condition caused by his industrial injury was necessary. He further indicated that Mr. Pollard's condition caused by his industrial injury was medically fixed and stable, and that permanent impairment had resulted from his injury. Dr. Kersten indicated in the statement he signed on 1/31/14 that he recommended an independent medical examination be performed to rate Mr. Pollard's permanent impairment caused by his industrial injury. (See Board Exhibit 7--1/31/14 Statement of Dr. Kersten).

Pursuant to the recommendation of Mr. Pollard's attending orthopedic surgeon Dr. Kersten, the employer Kaiser Aluminum scheduled an independent medical examination for Mr. Pollard to attend on 3/28/14 in Spokane, Washington. In this regard, RCW 51.36.070 requires workers to attend independent medical examinations (IME) scheduled by self-insured employers or the Department of Labor and Industries for the purpose of evaluating a worker's condition. Mr. Pollard's attorney notified Kaiser that Mr. Pollard would not be able to attend the IME scheduled on 3/28/14 in Spokane because he had relocated from Spokane to Las Vegas, Nevada. Under these circumstances, Kaiser Aluminum canceled the 3/28/14 IME.

Kaiser Aluminum then scheduled an IME in Henderson, Nevada, approximately 30 minutes from Las Vegas. Orthopedic surgeon Aubrey

Swartz, M.D., was scheduled to perform the examination on 5/27/14. Kaiser Aluminum had never previously used Dr. Swartz to perform an independent medical examination. Mr. Pollard's attorney contacted Kaiser Aluminum and indicated he would not attend the 5/27/14 IME because of her opinion that Dr. Swartz would not be a fair, unbiased examiner and because plaintiff was not being allowed to select a new attending physician in Nevada.

Mr. Pollard refused to attend the 5/27/14 examination and a representative of Kaiser Aluminum sent a letter to Mr. Pollard, in care of his attorney, asking for an explanation as to why he did not attend the 5/27/14 examination but no response was provided within the 30-day statutory time frame. Thereafter, pursuant to RCW 51.32.110 and WAC 296-14-410, Kaiser Aluminum requested that the Department of Labor and Industries issue an order suspending all action and benefits in the claim, due to Mr. Pollard's non-cooperation with the adjudication process as evidenced by his refusal to attend the 5/27/14 IME with Dr. Swartz without good cause for doing so.

The Department considered Kaiser Aluminum's request and on 9/5/14 issued an order determining that Mr. Pollard had refused to attend the examination scheduled on 5/27/14 without good cause and therefore it suspended all action and benefits until he agreed to attend an exam

scheduled by Kaiser. Mr. Pollard protested the 9/5/14 order alleging that Dr. Swartz was not a fair, unbiased examiner and he would not attend an IME because he had not been permitted to select a new treating physician in Nevada. On 12/30/14 the Department of Labor and Industries issued its final order affirming the 9/5/14 order suspending Mr. Pollard's benefits due to his refusal to attend the 5/27/14 examination without good cause.

Mr. Pollard then appealed the 12/30/14 Department order to the Board of Industrial Insurance Appeals where hearings were conducted before Industrial Appeals Judge Lynn Hendrickson. On appeal before the Board, Mr. Pollard contended that he had "good cause" for refusing to attend the 5/27/14 IME with Dr. Swartz because (1) he did not think Dr. Swartz would be a fair examiner; and (2) he and his attorney perceived that Kaiser Aluminum was improperly adjudicating his worker's compensation claim by not allowing a transfer of physicians from Dr. Kersten to a doctor in Nevada. For these reasons, Mr. Pollard and his attorney contended that he had good cause for refusing to attend the scheduled IME with Dr. Swartz on 5/27/14.

At the conclusion of the hearings, Industrial Appeals Judge Hendrickson issued a Proposed Decision and Order indicating that Mr. Pollard did not have good cause for refusing to attend the 5/27/14 IME. Therefore, Judge Hendrickson affirmed the 12/30/14 Department of

Labor and Industries' order which suspended Mr. Pollard's workers compensation benefits. Judge Hendrickson's Proposed Decision and Order dated 10/23/15 contained the following Findings of Fact:

FINDINGS OF FACT

1. On February 17, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Justin Pollard sustained an industrial injury on September 23, 2010 when he attempted to move an oversized piece of sheet metal while working as a furnace line operator at Kaiser Aluminum & Chemical Corporation. A claim was allowed for bilateral shoulder conditions.
3. In February 2014 Mr. Pollard relocated to Las Vegas, Nevada.
4. On April 22, 2014 and May 2, 2014 appointment/notice letters were sent to Mr. Pollard informing him that an Independent Medical Examination (IME) had been scheduled for May 27, 2014 in Henderson, Nevada with Dr. Aubrey Swartz. Henderson, Nevada is approximately 30 minutes away from Las Vegas.
5. On May 22, 2014, Trish Guadagnoli, Senior Claims Examiner at Broadspire received an email from counsel for Mr. Pollard informing her that Mr. Pollard would not attend the IME because he was not being allowed a new physician in Nevada, his place of residence.
6. Mr. Pollard did not attend the May 27 2014 IME.

7. On June 6, 2014, Kaiser sent a letter asking Mr. Pollard to explain why he did not attend the examination and informing him late cancellation fees and/or a no-show fees and suspension of benefits might occur if Mr. Pollard did not provide a written "good cause" reasoning for not attending the May 27, 2014 IME. A written response was requested within 30 days.
8. No written response was provide within 30 days of the letter from Kaiser.
9. On September 5, 2014, L&I issued an order determining that Mr. Pollard had refused or failed to attend a scheduled examination on May 27, 2014, without good cause. Mr. Pollard's time-loss compensation and/or loss of earning power benefits were suspended. The order stated that the suspension would remain in effect until Mr. Pollard cooperated with the examination or until the claim was closed, whichever occurred first.
10. A protest to the suspension order was filed on September 10, 2014.
11. On December 30, 2014 L&I affirmed the suspension order.

Based on her Findings of Fact, Judge Hendrickson issued the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
2. Under RCW 51.36.070, Mr. Pollard was required to submit to an examination by a physician selected by

the self-insured, Kaiser, in order to resolve medical issues.

3. Mr. Pollard did not have good cause for failing to attend the May 27, 2014 IME within the meaning of RCW 51.32.110.
4. The December 30, 2014 L&I order is correct and is affirmed.

In response to Judge Hendrickson's Proposed Decision and Order, Mr. Pollard filed a Petition for Review with the Board of Industrial Insurance Appeals. In response to Mr. Pollard's Petition for Review, the Board of Industrial Insurance Appeals issued an order dated 2/29/16 denying the Petition for Review and adopting Judge Hendrickson's Proposed Decision and Order as the final Decision and Order of the Board.

Mr. Pollard then appealed the 2/29/16 order of the Board of Industrial Insurance Appeals to Spokane County Superior Court where the issue presented was whether or not the decision of the Board was correct. The Superior Court determined that the preponderance of evidence in the record supported the findings and decision of the Board of Industrial Insurance Appeals dated 2/29/16 and therefore the Superior Court Judge entered the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

The Plaintiff Justin Pollard sustained an industrial injury on 9/23/10 during the course of his employment with Kaiser Aluminum and Chemical Corp. and his worker's compensation claim was allowed for bilateral shoulder conditions. Medical treatment was provided for Mr. Pollard's condition proximately caused by his industrial injury.

II.

On January 31, 2014 Mr. Pollard's attending and treating orthopedic physician Tycho Kersten, MD indicated that Mr. Pollard's condition proximately caused by his 9/23/10 industrial injury was medically fixed and stable and no further treatment was necessary. Dr. Kersten indicated that permanent impairment resulted from Mr. Pollard's 9/23/10 industrial injury and he recommended that an independent medical examination be performed to determine the extent of the permanent impairment. Based upon the recommendation of Dr. Kersten, an independent medical examination was scheduled.

III.

In February 2014 Mr. Pollard relocated from Spokane, Washington to Las Vegas, Nevada. In March and May 2014 Mr. Pollard, through his attorney, requested that the self-insured employer Kaiser Aluminum authorize a change of attending physician to a physician in Las Vegas, Nevada. These requests were denied.

IV.

On April 22nd, 2014 and May 1st, 2014 appointment/notice letters were sent to Mr. Pollard informing him that an independent medical examination was scheduled for him to attend on May 27th, 2014 in Henderson, Nevada and that the examining physician would be performed by Dr. Aubrey Swartz. Henderson, Nevada is approximately 30 minutes away from where claimant was residing in Las Vegas.

V.

On May 22nd, 2014 Trish Guadagnoli, senior claims examiner at Broadspire, received an email from Mr. Pollard's attorney informing her that Mr. Pollard would not attend the independent medical examination because he was not being allowed a new physician in Nevada.

VI.

Mr. Pollard did not attend the May 27th, 2014 independent medical examination. On June 6th, 2014 Kaiser Aluminum and Chemical Corporation sent a letter to Mr. Pollard's counsel asking for an explanation as to why Mr. Pollard did not attend the 5/27/14 independent medical examination. This letter informed Mr. Pollard and his counsel that a suspension of worker's compensation benefits could occur if Mr. Pollard did not provide a written "good cause" reason for not attending the 5/27/14 examination. A written response was requested within 30 days. No written response was provided by Mr. Pollard or his counsel within 30 days of the 6/6/14 letter from Kaiser Aluminum and Chemical Corporation.

VII.

On 9/5/14 the Department of Labor and Industries issued an order suspending Mr. Pollard's right to further time loss compensation and/or loss of earning power benefits for the reason that he failed to submit to and/or cooperate and attend a medical examination scheduled by his employer, Kaiser Aluminum and Chemical Corporation. The order indicated that the Department's action was taken pursuant to RCW 51.32.110 which provides that if the worker refuses to submit to an independent medical examination scheduled by the self-insured employer, the Department of Labor and Industries or the self-insured employer, on approval by the Department of Labor and Industries, with notice to the worker may suspend or deny compensation. The 9/5/14 Department order provided that the suspension of benefits would remain in effect until Mr. Pollard cooperated and attended an independent medical examination or until the claim was closed, whichever occurs first.

VIII.

On 9/10/14 plaintiff's counsel filed a letter with the Department of Labor and Industries protesting the 9/5/14 Department order. On 12/30/14 the Department of Labor and Industries issued an order affirming the prior Department order dated 9/5/14. Thereafter, on 1/5/15 Mr. Pollard's attorney filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the 12/30/14 order and on 1/13/15 a Board order granted Mr. Pollard's appeal.

IX.

Hearings before the Board of Industrial Insurance Appeals were held under Docket No. 15 10151.

X.

After the hearings were concluded, a Proposed Decision and Order dated 10/23/15 concluding that pursuant to RCW 51.36.070 Mr. Pollard was required to submit to an examination by a physician selected by the self-insured employer Kaiser Aluminum in order to resolve medical issues and that he did not have good cause for failing to attend the May 27th, 2014 independent medical examination within the meaning of RCW 51.32.110. Therefore, the Proposed Decision and Order concluded that the Department order dated 12/30/14 was correct and was affirmed.

XI.

Claimant's counsel filed a timely Petition for Review with the Board of Industrial Insurance Appeals and on 2/29/16 the Board issued its final order adopting Judge Hendrickson's 10/23/15 Proposed Decision and Order as its final order. Plaintiff Justin Pollard then appealed the 2/29/16 Board order to this court.

XII.

The preponderance of the evidence supports the findings and decision of the Board of Industrial Insurance Appeals dated 2/29/16.

Based on the forgoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over the parties and the subject matter of this appeal.

II.

Pursuant to RCW 51.36.070 Plaintiff Justin Pollard was required to submit to an examination by a physician selected by the self-insured employer Kaiser Aluminum and he did not have good cause for failing to attend the May 27th, 2014 independent medical examination within the meaning of RCW 51.32.110.

III.

The order of the Board of Industrial Insurance Appeals dated 2/29/16 under industrial insurance Claim No. SF11163 Docket No 15 10151 which affirmed the order of the Department of Labor and Industries dated 12/30/14 is correct and is affirmed in all respects.

IV.

The Defendant Kaiser Aluminum and Chemical Corporation is entitled to recover from the Plaintiff Justin M. Pollard the sum of \$200 as its statutory attorney fee.

The Superior Court entered a Judgment indicating that the Order of the Board of Industrial Insurance Appeals dated 2/29/16 in Industrial

Insurance Claim No. SF 11163, Docket No. 1510151 is correct and is affirmed in all respects.

**II. STATEMENT REGARDING APPELLANT'S
ASSIGNMENT OF ERRORS**

The preponderance of the evidence presented in this case supports all of the Superior Court Findings of Fact and Conclusions of Law. Appellant failed to prove otherwise in Superior Court. The Findings and Conclusions of the Superior Court are supported by substantial evidence, therefore the Superior Court decision to affirm the 2/29/16 order of the Board of Industrial Insurance Appeals which determined that Mr. Pollard did not have good cause to refuse attendance at the independent medical exam should be affirmed.

III. COUNTERSTATEMENT OF FACTS

During the course of the hearings, Mr. Pollard testified that he performed some internet research and saw online comments made by other injured workers that felt Dr. Swartz would not be a fair and unbiased medical examiner. For this reason he refused to attend the independent medical exam. He also testified that his self-insured employer Kaiser Aluminum had not granted his request to transfer his attending physician from Dr. Kersten to a new physician in Las Vegas, Nevada. Therefore, he

felt that he had good cause not to attend the independent medical examination scheduled by Kaiser Aluminum with Dr. Swartz on 5/27/14.

During the course of the appeal, plaintiff's attorney Rondi Thorp withdrew as plaintiff's counsel so that she would be permitted to testify. For this reason, Ms. Thorp's law partner Steve Meyer took over plaintiff's representation. During the hearings, Ms. Thorp testified that she did not believe Dr. Swartz would be a fair and unbiased examiner based on some internet research that she had performed. She also testified that she did not feel it was appropriate for Kaiser Aluminum to conduct the IME on 5/27/14 because it had not yet approved plaintiff's request to transfer his care from Dr. Kersten to a new physician in Nevada. Ms. Thorp also testified to her belief that Kaiser Aluminum's process of choosing IME examiners was not fair and impartial, and she referred to prior experiences she had in prior workers compensation claims years before Mr. Pollard's claim was filed. (Thorp BR 77-85; 107-112)

Kaiser Aluminum's Claims Administrator Ilise Herron, and Occupational Health Nurse Randi Moyer, testified that Dr. Swartz was selected to conduct the IME for the reasons that he was licensed to practice medicine in Washington; he was an orthopedic surgeon qualified to address plaintiff's orthopedic condition caused by his injury; he was on the Department of Labor and Industries' approved examiners list; and he

was willing to do the examination in Henderson, Nevada, which is 30 minutes away from where plaintiff was living in Las Vegas. (Moyer, BR 63-77). Ms. Moyer, who selected Dr. Swartz to perform the IME, confirmed that she had never scheduled an IME with him before in a Kaiser Aluminum worker's compensation claim therefore there was no evidence that he would be unfair to plaintiff and biased in favor of the employer Kaiser Aluminum.

Ms. Thorp testified in support of plaintiff's appeal regarding alleged unfavorable experiences she had with other IME physicians in prior Kaiser workers compensation claims. She testified at some length about her experiences in a different worker's compensation claim eight years earlier in 2008 when the industry practice was for IME companies to provide employers with rough draft IME reports before the final report was issued.

Occupational Health Nurse Randi Moyer testified that it was the usual practice in the industry in the early 2000's, for the IME companies to provide draft reports to all self-insured employers prior to the submission of a final report. That practice stopped approximately five to six years prior to Mr. Pollard's worker's compensation claim, and although Ms. Thorp was frustrated with this practice and felt that was unfair to her clients back in the early 2000's, this practice did not occur in

Mr. Pollard's claim and it had nothing to do with the IME that was scheduled for him to attend with Dr. Swartz on 5/27/14. (Moyer, BR 63-77).

The testimony of Kaiser Aluminum's workers compensation claims representatives Trish Guadagnoli and Ilise Herron, as well as Occupational Nurse Randi Moyer, indicates that the 5/27/14 IME with Dr. Swartz was scheduled in response to the request made by Mr. Pollard's long-time attending physician Tycho Kersten, M.D. who indicated on 1/31/14 that: (1) Mr. Pollard's condition proximately caused by his industrial injury was medically fixed and stable, (2) no further medical treatment was necessary, (3) Mr. Pollard did sustain permanent impairment, and (4) he recommended that an IME be performed to obtain a permanent impairment rating. (Herron, BR 28-36; Moyer, BR 63-77). Dr. Kersten's 1/31/14 Statement containing his opinions was admitted as Exhibit No. 7 during the hearings conducted before the Board of Industrial Insurance Appeals.

IV. ARGUMENT IN RESPONSE

It is ironic that Mr. Pollard contends it was so important for him to have an attending physician to consult with regarding the results of an IME and yet he objected to going to the IME recommended by his long-time attending physician, Dr. Kersten. If claimant had attended the IME, a

copy of the report could have been provided to Dr. Kersten to see if he agreed or disagreed with the opinions and conclusions of the IME physicians. It appears that Mr. Pollard wanted to transfer to a new attending physician because his long-time attending physician Dr. Kersten had indicated his claim was ready for closure which would have terminated his workers compensation benefits.

LAW

On appeal to Superior Court, the Decision of the Board of Industrial Insurance Appeals is presumed to be prima facie correct and the burden of proof is on the party challenging the Board decision which in the present case is Mr. Pollard. *Belnap v. Boeing Co.*, 64 Wn. App. 212 (1992); *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 368 (1992).

In an appeal from the Board of Industrial Insurance Appeals to Superior Court, the Court presumes the correctness of the decision made by the Board of Industrial Insurance Appeals and can reverse it only upon finding by a preponderance of evidence that the Board's findings and decision are erroneous. *Department of Labor and Industries v. Rowley*, 185 Wash.2d 186, 378 P.2d 139 (2016).

In an appeal from the Superior Court to the Court of Appeals, the Court reviews the evidentiary record to determine whether substantial evidence supports the findings made by the Superior Court after its *de*

novo review and whether the Court's conclusions of law flow from the findings. *Department of Labor and Industries v. Rowley, supra. Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 977 P.2d 570 (1999).

In this regard, workers compensation claimants are held to "strict proof of their right to receive benefits of the Act." *Cyr v. Dept. of Labor and Industries*, 47 Wn.2d 92 (1955); *Berry v. Dept. of Labor and Industries*, 45 Wn. App. 883 (1986).

In the present case, substantial evidence exists to support the findings and conclusions of the Superior Court which determined that Mr. Pollard's refusal to attend the IME scheduled for May 27, 2014 without good cause.

RCW 51.36.070 provides that the self-insured employer Kaiser Aluminum had the right to have Mr. Pollard undergo independent medical examinations by physicians of its choice. RCW 51.32.110 and WAC 296-14-410 provide that Mr. Pollard had the duty to cooperate and attend the independent medical evaluations scheduled by the self-insured employer, and if he failed to do so without good cause, it was grounds for the suspension of benefits due to his non-cooperation.

Under our workers compensation statutes, the burden of justifying a refusal to appear for a scheduled medical examination is on the worker. *Anderson v. Dept. of Labor and Industries*, 93 Wn. App. 60 (1998). Judge

Hendrickson pointed out in her Proposed Decision and Order, which was adopted as the final decision of the Board of Industrial Insurance Appeals, that pursuant to WAC 296-23-307, IME's are scheduled for a number of reasons including but not limited to: (1) establishing a diagnosis; (2) outlining a program of treatment; (3) evaluating what if any conditions are related to the claimed industrial injury or occupational disease/illness; (4) determining whether an industrial injury or occupational disease/illness has aggravated a preexisting condition and the extent of duration of that aggravation; (5) establishing if the accepted industrial injury or occupational disease/illness has reached maximum medical improvement; (6) establishing an impairment rating; (7) evaluating whether the industrial injury or occupational disease/illness has worsened; or (8) evaluating the worker's mental and/or physical restrictions as well as the worker's ability to work.

Mr. Pollard's attending physician, Dr. Kersten, indicated in the Statement he signed on 1/31/14 that Mr. Pollard's condition caused by his industrial injury was medically fixed and stable, no further treatment was necessary, he had sustained permanent impairment and he recommended that an independent medical examination be performed to rate the permanent impairment. Under these circumstances, it was reasonable and necessary for Kaiser Aluminum to conduct an independent medical

evaluation as recommended by Mr. Pollard's attending physician to evaluate his condition caused by his injury and to obtain a permanent impairment rating. That exam was scheduled on 5/27/14 with Dr. Swartz but Mr. Pollard refused to attend. His refusal was based on allegations that he did not think Dr. Swartz would be fair, yet as Judge Hendrickson pointed out in the decision of the Board, "Neither Mr. Pollard nor his attorney have had personal contact or any experience with Dr. Swartz." (Proposed Decision and Order p. 5, ll. 1-2.

Judge Hendrickson correctly pointed out that Dr. Swartz was selected to perform the examination because he was licensed to practice medicine in Washington, he was on the Department of Labor and Industries approved examiners list, he was an orthopedic surgeon, and he was willing to do the exam where plaintiff lived near Las Vegas. The unrefuted testimony from Occupational Health Nurse Randi Moyer, who selected Dr. Swartz to perform the exam, indicates she had never before scheduled Dr. Swartz to perform an IME and this was the first time she had done so. Under these facts, the Board correctly found that Mr. Pollard failed to establish good cause for refusing to attend the IME based upon the contention that Dr. Swartz would be biased in favor of Kaiser Aluminum and unfair to him. Further, the Superior Court correctly found that the preponderance of evidence indicated the Board order was correct.

Ms. Thorp testified at some length about IME physicians other than Dr. Swartz that were used by Kaiser in other claims as well as IME reporting practices that occurred seven to eight years before Mr. Pollard's claim was filed, all of which she thought were unfair. It is respectfully contended that Ms. Thorp's subjective perception of unfairness with regard to other industrial insurance claims that occurred years before the present claim was filed have no relevance to the IME that was scheduled for her client to attend on 5/27/14. As pointed out by Judge Hendrickson, the anecdotal experiences of counsel which are then related to the injured worker does not establish a physician has demonstrated a pattern of prejudice against workers. *In re: John E. Boldt*, Docket No. 07 14638 (June 2, 2008). It is undisputed that Kaiser Aluminum, Mr. Pollard and his attorney had no prior experience with Dr. Swartz and there's no evidence in the Board record that indicates Dr. Swartz is unfair or biased against Mr. Pollard and in favor of Kaiser Aluminum.

Mr. Pollard and Ms. Thorp testified they were frustrated by Kaiser's refusal to approve plaintiff's request for the transfer of care from Dr. Kersten to a new physician in Nevada however this frustration with the claims administration process does not demonstrate good cause for refusing to attend an IME. *Garcia v. Dept. of Labor and Industries*, 86 Wn. App. 749 (1997).

The issue concerning whether Kaiser should grant a transfer of attending physician status from Dr. Kersten to a physician in Nevada is a separate issue from the issue concerning Mr. Pollard's refusal to attend a medical exam and must be addressed by the Department of Labor and Industries. The Department can then issue appropriate orders and any aggrieved party can appeal to the Board. It is not a factor in the present case and does not establish good cause for Mr. Pollard's breach of his statutory duty to attend the independent medical examination that was scheduled by Kaiser Aluminum pursuant to the recommendation made by his attending orthopedic surgeon Dr. Kersten who had been treating him for years. Clearly, the need to transfer physicians is questionable when Mr. Pollard's long-time attending orthopedic physician Dr. Kersten indicated in January 2014 that his condition caused by the industrial injury was medically fixed and stable, no further treatment was necessary, and recommended that an IME should be conducted to rate his permanent impairment.

In re: Bob Edwards, BIIA Dec., 906072 (1992) the Board sets forth the test to determine whether an injured worker had good cause to refuse to attend the scheduled medical examination:

Whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next. Among those factors that may be considered

are the worker's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.

Balanced again this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of such. Neither of the above lists of factors are exhaustive. *Edwards, supra*, at 3-4.

In *Romo v. Dept. of Labor and Industries*, 92 Wn. App. 348 (1998), claimant's treating psychologist recommended an independent medical examination to evaluate Ms. Romo's psychiatric condition. This is similar to what happened in the present case when Mr. Pollard's treating physician Dr. Kersten recommended an independent medical examination for the purpose of rating Mr. Pollard's permanent impairment.

In *Romo, supra*, Mrs. Romo refused to attend a scheduled examination and the Department of Labor and Industries issued an order suspending her benefits. The Court in *Romo* indicated that whether the claimant had good cause to refuse to attend the examination should involve a balancing of the worker's individual circumstances and the Department's and employer's interests in requiring the examination. Mrs. Romo indicated she felt the exam was unnecessary, yet it was clear that

given the recommendation of her attending psychiatrist for the examination, it was necessary to evaluate her condition.

In this regard, the Court in *Romo, supra*, determined that the Department of Labor and Industries, which scheduled the examination, had a clear interest in evaluating her condition and that Mrs. Romo failed to provide any good cause for refusing to attend the Department's requested examination. The Court noted that claimant stated she believed the scheduled examination was redundant and unnecessary to which the Court responded indicating that the burden of proving good cause to refuse an examination is on the worker and the worker's frustration with the claims adjudication process, is not good cause. *Romo v. Dept. of Labor and Industries, supra*.

V. CONCLUSION

In the present case, the Department of Labor and Industries considered all of the facts and circumstances, including Mr. Pollard's reasons for refusing to attend the 5/27/14 IME, and determined that his benefits should be suspended because he did not have good cause for refusing to attend the examination. Mr. Pollard appealed the Department order to the Board of Industrial Insurance Appeals which conducted hearings regarding the reasons why Mr. Pollard failed to attend the

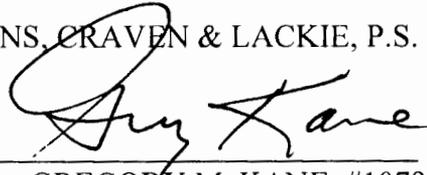
examination and determined that he did not have good cause for refusing to attend the exam.

Mr. Pollard appealed to Superior Court; however, the Court determined that the Board's Decision was supported by a preponderance of evidence, and that Mr. Pollard has failed to sustain his burden to prove otherwise. It is submitted that substantial evidence supports the Superior Court decision and that Appellant has not met his burden of proof to show otherwise. Therefore the Superior Court decision is correct and should be affirmed.

SUBMITTED this 17th day of May, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By



GREGORY M. KANE, #10794

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