BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTINE CORAY, Claimant, v. IDAHO REGIONAL HAND & UPPER EXTREMITY CENTER, PLLC, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2018-034888** **ORDER ON PETITION FOR DECLARATORY RULING** FILED FEB 03 2023 INDUSTRIAL COMMISSION

This matter is before the Idaho Industrial Commission upon Claimant's Petition for Declaratory Ruling on the Application of I.C. § 72-433, filed under JRP 15 on November 21, 2022, with supporting memorandum and exhibits. Defendants filed a timely response on December 13, 2022. The question presented for decision is whether, when a single injury is at issue, Idaho Code § 72-433 requires a claimant to submit to multiple examinations by more than one duly qualified physician or surgeon. Claimant asserts that having originally chosen a physician to evaluate Claimant for her back injury, Idaho Code § 72-433 prohibits Defendants from choosing another physician to see Claimant in follow-up evaluation for the same injury; they must use the same physician they originally chose for any subsequent exam. As explained infra, the Commission concludes that Idaho Code § 72-433 places no such constraint on Defendants, even though such an exam may nevertheless be challenged on the basis that it is not reasonable.

FACTS

On December 4, 2018, 61-year-old Christine Coray, "Claimant", was injured when she exited her car to enter the business and slipped, falling on ice. (Complaint 1, Answer 1). Claimant

had injuries to her left knee, left wrist, a hand sprain, and low back strain. (Defendant's Exhibit ("Def. Ex.") 7, pg. 15; *also see* Cl. Ex. E, pg. 10). She sought medical care the next day and a muscular abnormality was noted. (Def. Ex. 1, pg. 1, 12/5/18). Shortly thereafter, she was diagnosed with spondylosis without myelopathy or radiculopathy in her lumbar region, as well as low back pain and pain in her left knee. (Def. Ex. 2, pg. 4, 1/17/19). Her diagnosis would later expand to include spinal stenosis in the lumbar region with neurogenic claudication. (Cl. Ex. A, pg. 50; Cl. Ex. D., pg. 20). Imaging would show grade 1 anterolisthesis at L4-L5 and L3-L4, degenerative disc disease with height loss at L5-S1, and moderate lateral recess stenosis bilaterally at L4-L5. (Cl. Ex. A. pg. 49-50).

Between January of 2019 (Def. Ex. 2) and July of 2020 (Def. Ex. 6; Cl. Ex. A. pg. 86), Claimant received a variety of medical treatments. Claimant received multiple lumbar medical branch blocks at the L3-L5 levels bilaterally. (*Id.*; Cl. Ex. A). Lumbar radio frequency ablation was also attempted, but little benefit was noted (Cl. Ex. A. pg. 30, 36). Lumbar transforaminal epidural steroid injections were not helpful (Cl. Ex. A, pg. 44, 50), and lumbar interlaminal epidural steroid injections similarly failed to provide more than moderate and short-lived improvement (Cl. Ex. A., pg. 54, 60). Initial success with SI joint injections did not continue. (Def. Ex. 6, pg. 1; Cl. Ex. A. pg. 84).

SI joint injections were diagnostic in nature as well as a form of treatment, and were used to investigate further options up to and including surgery. (Cl. Ex. A. pg. 60, 69, 79, 90). Ultimately Claimant's treating physician, Dr. Stephen Hansen, noted that the conservative treatment was failing and her pain was ongoing. (Cl. Ex. A. pg. 60, 81, 84). On August 20, 2020, he recommended a bone density test in anticipation of a fusion surgery, which he considered to be the best course of action. (Cl. Ex. A., pg. 95).

Defendants wished to test the surgical recommendation and arranged for Claimant to undergo an Idaho Code § 72-433 exam by Dr. Qing-Min Chen. (Def. Ex. 7). Dr. Chen's opinion was submitted on November 24, 2020. Dr. Chen found that as of March 4, 2019, Claimant had completely recovered from all injuries related to the industrial accident with no ongoing permanent impairment. (Def. Ex. 7 pg. 15-17). The back issues Claimant was suffering from were likely due to chronic preexisting and degenerative conditions, such as facet arthritis, degenerative disc disease, and a grade 1 anterolisthesis at L4-L5. *Id.* Dr. Chen opined that all prospective treatment was not work-related and that Claimant could return to work as a receptionist with no restrictions. *Id.* By a letter dated December 2, 2020, Defendants notified Claimant that no further treatment or medications would be authorized. (Cl. Ex. C).

After some difficulty obtaining alternate funding, Claimant sought the recommended surgery at Bingham Memorial Hospital. (Cl. Ex. D; Memorandum in Support of Petitioner's J.R.P. 15 Petition for Declaratory Ruling on the Application of I.C. § 72-433, pg. 2). The failure of conservative treatment was discussed, as were her surgical options. (Cl. Ex. D. pg. 4, 11). Surgical decompression and reconstruction was found to be appropriate, and a bilateral hemilaminectomy on L4-L5 and L5-S1 was performed by Dr. Clark H. Allen on December 20, 2021. (Cl. Ex. D. pg. 11, 20).

Claimant arranged for her examination by Dr. James Bates on September 28, 2022. He found that the surgery was necessitated by the accident. (Def. Ex. 8, pg. 16). He also found that Claimant had a 6% whole person impairment from the accident, without any apportionment to a preexisting injury. (*Id.* at 18). He identified permanent work restrictions including: no lifting more than thirty five pounds, occasional lifting of up to ten pounds, occasionally pulling up to twenty five pounds, and rarely pulling up to fifty pounds, rarely twisting or bending but never both

simultaneously, no more than thirty minutes uninterrupted walking, rare prolonged standing with no more than five hours total in a day, no more than two hours continuous sitting, and some other limitations (*Id.* at 19-20).

Following surgery and Dr. Bates exam, Defendants attempted to schedule a second independent medical examination for December 12, 2022, this time with Dr. Charles Timothy Floyd. (Def. Ex. 9). Dr. Floyd is an orthopedic surgeon just as is Dr. Chen. (Memorandum in Support of Petitioner's J.R.P. 15 Petition for Declaratory Ruling on the application of I.C. 72-433, pg. 3). He has years of experience in the related field of medicine, and is an experienced evaluator who has provided medical opinions on workers compensation cases before. (Response to Claimant's Memorandum in Support of Petitioner's JRP 15 Petition for Declaratory Ruling on the Application of I.C. § 72-433, pg. 7).

Claimant objected to the exam. (Def. Ex. 10). On November 21, 2022, Claimant filed a petition for declaratory ruling on whether Defendants could ask for a subsequent independent medical examination with a new doctor, Dr. Floyd, as opposed to the original physician consulted for the first independent medical examination, Dr. Chen.

ARGUMENTS OF THE PARTIES

Claimant argues that Defendants are limited to using one and only one physician for each discrete injury that results from an accident, but acknowledges that the facts of a case may warrant multiple medical examinations for a single injury. Claimant bases this on the fact that the words "injury" and "physician" are singular while "times and places" is plural. Claimant also makes a policy argument, that permitting a surety to use multiple physicians would encourage hiring questionably qualified physicians at the outset of a claim to ensure a denial, but later hiring more reasonable physicians to defend against the claim.

Defendants argue that Idaho Code § 72-433 only requires that an employee shall submit himself for examination at reasonable times and places to a duly qualified physician. Defendants may be required to justify the need for additional, multiple, independent medical examinations, but there is no requirement that the physician be the same. Here, another examination is warranted by a change in circumstances. Since the original exam by Dr. Chen, Claimant has undergone low back surgery and has been examined by Dr. Bates, who pronounced Claimant stable, ratable, and able to return to work subject to certain permanent restrictions. Defendants have requested oral argument and moved that the Commission compel Claimant's attendance at an independent medical examination with Dr. Floyd.

ISSUES

1. When a single injury is the subject of multiple Idaho Code § 72-433 examinations, does the statute require that each such exam be conducted by the same physician?

2. Whether Claimant is required to attend an independent medical examination with Dr. Charles Timothy Floyd.

DISCUSSION

I. Standards For Declaratory Judgment

A party may request a declaratory judgment to resolve a dispute with a written petition when there is "an actual controversy over the construction, validity or applicability of a statute, rule, or order." JRP 15C.

> 1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
> 2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
> 3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the

petition;

JRP 15C. A supporting memorandum must also be filed. "The Commission may hold a hearing on the petition, issue a written ruling providing guidance on the controversy or decline to make a ruling when it determines that there is no controversy or that the issue at hand is better suited through resolution in some other venue, or by some other administrative means." *Miller v. Yellowstone Plastics, Inc.*, 100722 IDWC, IC 2019-024650 (Idaho Industrial Commission Decisions, 2022); *also see Bonner General Hospital, Inc. v. Pincenti*, 082415 IDWC, IC 2010-031621 (Idaho Industrial Commission Decisions, 2015) (petition for declaratory ruling was properly the decision of the referee in charge of case management on issue that was not statutory construction).

The first issue before the Commission concerns the construction and applicability of the first sentence of Idaho Code § 72-433. The actual controversy is over whether the statute recognizes that an "accident" may produce a variety of distinct injuries, and that for each distinct "injury" Defendants are entitled to choose one, and only one, physician to examine Claimant, even if the facts of the case warrant more than one exam for such injury. The petitioner, Claimant, has a direct interest in the answer as the interpretation may determine whether Claimant is subject to an independent medical examination with Dr. Floyd as opposed to Dr. Chen. Therefore, the matter is properly considered under JRP 15 for a declaratory ruling. Having reviewed the petition, briefing of the parties, and exhibits, the Commission finds that a hearing is unnecessary. Comprehensive documentation has been provided and the issues are narrow. Therefore, it is appropriate to issue a written ruling on the controversy.

However, we decline to entertain the question of whether, under the facts of this case, there are other bases to challenge the reasonableness of the proposed exam. Such determination is better

left to the Referee assigned to this case.

II. The plain language of Idaho Code § 72-433 does not require a surety to use one and only one physician for the evaluation of discrete injuries.

The meaning of the first sentence of Idaho Code § 72-433(1) is in dispute. The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (Idaho 2011).

> A statute is ambiguous when the meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden*, 78 Idaho 191, 195, 300 P.2d 818, 819 (1956). "However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous.... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

State v. Browning, 123 Idaho 748, 750, 852 P.2d 500, 502 (Idaho App. 1993). The contested statutory language at issue in this case reads as follows:

> After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon.

I.C. § 72-433.

In resisting the proposed exam by Dr. Floyd, Claimant asserts that as the result of an accident, a claimant may suffer several distinct injuries to the physical structure of his body, and that "an injury" as used in the statute refers to each of the several injuries that might be caused by an accident, e.g., a fall causing discrete injuries to a worker's knee, back and wrist. Further, Claimant argues that the statute specifies that for each such injury, Defendants are

only entitled to have Claimant evaluated by "a", i.e. a single, qualified physician or surgeon, even though Defendants may be able to justify more than one exam by that single physician. In no way, however, can the statute be read to require defendants to use only one physician for a discrete injury.

The language quoted above was recently considered by the Court in *Moser v. Rosauer's Supermarkets, Inc.*, 165 Idaho 133, 443 P.3d 147 (2019). The Court found the quoted language to be without ambiguity, although the focus of the Court's scrutiny was on the meaning of "disability", not "injury" or "a duly qualified physician." As with "disability", the term considered in *Moser*, "injury", is a term defined in statute. Per Idaho Code § 72-102(17)(a) injury is defined as follows:

> "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.

Further elaboration on the meaning of the term is found at Idaho Code § 72-102(17)(c):

> "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

We see nothing in these definitions to suggest that "injury" means anything less than the totality of the physical damage causally related to the accident in question. Therefore, we reject Claimant's argument that "an injury" is only meant to refer to some part of the damage resulting from an accident. Nor do we attach any particular significance to the fact that in defining who is qualified to perform an Idaho Code § 72-433 exam, the statute refers to "a" duly qualified physician. The purpose and focus of the statute is to afford an employer the right to have access to an injured worker to the end that employer may perform such medical examinations as it deems necessary to adjust or defend the claim. The right conferred by

statute is not unqualified. These qualifications are found in the phrases "After an injury . . . during the period of disability . . . at reasonable times and places. . . . to a duly qualified physician or surgeon." The phrase "a duly qualified physician or surgeon," contains no reference to a specific or single physician. It simply means that an examination, when held, must be held before one who is qualified to perform it. The gloss that Claimant would have us put on "a...physician" subverts a fair reading of the statute.

We reject the construction of the statute urged on the Commission by Claimant, and decline to conclude that any construction is actually needed. "An injury" refers to the totality of a claimant's work-related injuries, and in a case where multiple exams are called for, nothing in statute prevents an employer from using a different physician or physicians from exam to exam. However, as discussed in the next section, notwithstanding the lack of a specific prohibition against the use of different physicians for multiple exams involving the same body part, the statute adopts an overarching requirement of reasonableness that must be honored in performing medical evaluations, and it is this requirement that seems most relevant to the objection raised by Claimant.

III. It is for the Referee assigned to this case to determine whether Defendants have met their burden of showing that it is reasonable to require Claimant to submit to the proposed exam by Dr. Floyd.

Idaho Code § 72-433 specifies that exams authorized by the statute may only be held at reasonable times and places. Idaho Code § 72-434, treating the consequences for failure to submit to a request for exam, specifies:

> If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues.

Therefore, an essential element of the Idaho Code § 72-433 exam is that it be "reasonable", not only as to time when and place where it is held, but in other ways as well, or a claimant may have a reasonable basis to refuse to submit to the exam. An injured worker can only be subjected to the penalties imposed by Idaho Code § 72-434 if he "unreasonably" refuses to submit to the exam, inviting inquiry into whether employer is acting reasonably in such things as the structure, design and purpose of the exam. An unreasonable refusal to submit can be demonstrated by proof that the exam, in all its aspects, is reasonable.

The case of *Hewson v. Asker's Thrift Store*, 120 Idaho 164, 814 P.2d 424, 428 (1991) makes it clear that Idaho Code § 72-434 places the burden on an employer to prove that an injured worker has unreasonably refused to participate in a scheduled Idaho Code § 72-433 exam. However, in the subsequent case of *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 71 P.3d 548, (2003), it was recognized that Idaho Code § 72-433 authorizes an employer to suspend benefits for failure to attend a scheduled exam without first having obtained a Commission order approving the sanction. Therefore, even though an employer may unilaterally suspend benefits where the injured worker refuses to submit to a scheduled examination, an employer ultimately bears the burden of establishing that the injured worker acted unreasonably in refusing the exam. Practically, this means that when an injured worker voices objection to a proposed exam, the cautious employer will move the Commission for its order that the exam is reasonable and requiring claimant to attend the exam or face the statutory sanction, rather than waiting to unilaterally curtail benefits when claimant fails to show up.

The reasonableness of Idaho Code § 72-433 exams comes up not infrequently in contested cases. Most of these matters are resolved on motion and are not found in published opinions of the Commission. There are several that are worthy of review.

In *Niebuhr v. Aapex Construction, Inc.*, 092211 IDWC, IC 2006-513568 (Idaho Industrial Commission Decisions, 2011) the Commission treated a request for multiple medical examinations, ruling that such exams are reasonable when supported by good cause.

> The Commission does not condone the practice of repeated § 72-733(1) exams without a showing of good cause. Historically, where claimants in litigation have sought, by motion, to avoid an additional IME after one has occurred, referees have carefully considered that motion and the defendants' reasons for requesting another IME. Indeed, if a surety used the practice of requiring repeated IMEs as a means to unreasonably delay or deny benefits, Idaho Code § 72-804 sanctions would apply.

Id. In *Niebuhr,* good cause was found where the claim was complicated, involving multiple injuries, uncertain diagnoses, and inconsistent medical reports.

In the case of *Sheri Wells v. Target Corp. & Ins. Co. of N. America*, IC 2013-001075 (Order Denying Defendants' Motion to Compel Claimant's Attendance At Medical Examination and Prohibiting Defendants From Demanding Additional IME Without Justification, Jan. 5, 2015), cited by both parties in the present case, a request for a fourth examination was found unreasonable. No reasonable explanation for the request had been shown. Additionally, the referee noted it was not a panel exam, did not involve multiple medical issues, there was no material change in claimant's condition, and treating doctors had not modified opinions or diagnosis.

In this case, Defendants have requested that the Commission order Claimant to attend the requested examination with Dr. Floyd. For any such order, the requested examination must be shown to be reasonable. It is conceded by Claimant that another exam is warranted based on the fact that Claimant's condition has significantly changed since she was first evaluated by Dr. Chen, making his only report no longer probative of certain important issues. For its second exam, Defendants propose that Claimant be evaluated by Dr. Floyd, citing his medical expertise and familiarity with the Workers' Compensation system.

However, Defendants have not explained why Dr. Chen has fallen out of favor. It is not

argued, for example, that he is unavailable or that Claimant's current physical status raises issues that Dr. Chen is not competent to address. Defendants' designs have been met with skepticism on the part of Claimant. Claimant argues that permitting Defendants to use multiple physicians encourages the use of questionable physicians at the outset of a claim to perfect a blanket denial, but later hiring physicians that provide more nuanced and defensible opinions should Claimant unexpectedly choose to contest the denial by retaining counsel and filing a complaint. We also recognize the possibility that Claimant may be content with Dr. Chen's wholesale rejection of all aspects of the claim, believing Dr. Chen's opinion to be without strong foundation and unlikely to prevail over the opinions the treater and Dr. Bates; Claimant may be very happy with the posture of the evidence right now, and believe that her case will only suffer if she has to battle a better-reasoned middle ground opinion from another evaluating physician. Perhaps the current dispute arises from nothing more than a desire by each party to have a numerical advantage in favorable medical opinions, a kind of arms race approach to defense/prosecution. Suffice it to say that there are various strategies to the defense or prosecution of this case that might be advanced by either obtaining or preventing Dr. Floyd's evaluation. Against these strategies, however, is the Commission's obligation to understand the facts of the case in order to craft a just decision on the claim for benefits, and regardless of whether the proposed exam is perceived to benefit or hinder the litigation strategy of a particular party, it might nevertheless be reasonable if it is likely to adduce facts or opinions which help promote a better decision. The Commission relies on expert medical opinion to inform its judgment on many aspects of a contested case.

The dispute that must be resolved is whether the needed exam is made unreasonable by Defendants unexplained decision to have that exam conducted by another physician with no prior involvement in the case. We believe that the issue of the ultimate reasonableness of the proposed

exam is a matter not well suited to determination under JRP 15, and is better left to the discretion of the Referee to whom this case is assigned. Defendants are urged to file a motion with the Referee to determine whether, under the peculiar facts of this case, it is reasonable to require Claimant to submit for evaluation by Dr. Floyd.

ORDER

Based on the foregoing the Commission rules as follows:

1. Idaho Code § 72-433 contains no specific prohibition against the use of different physicians to perform repeat examinations of an injured worker.

2. However, the right to proceed with any Idaho Code § 72-433 exam is determined by the reasonableness of that exam, and the facts of this case may or may not support a conclusion that the proposed exam is reasonable. This is a determination best left to the Referee assigned to the case.

DATED this 2nd day of February, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Aaron White, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamarron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 3rd day of February, 2023 a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by Electronic Mail upon each of the following:

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