AlaFile E-Notice

47-CV-2006-000134.00

Judge: JAMES P. SMITH

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

JAMES BRYANT VS THYCON CONSTRUCTION CO & CADDELL CONSTRUCTION CO
47-CV-2006-000134.00

The following matter was FILED on 4/3/2009 9:18:27 AM

C001 BRYANT JAMES

MOTION FOR INDEPENDENT MEDICAL EXAM AND FUNCATIONAL CAPACITY EVALUATION

[Attorney: BLACKWELL JEFFERY GLENN]

Notice Date: 4/3/2009 9:18:27 AM

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IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

JAMES BRYANT

Plaintiff

v. **CIVIL ACTION NO.: CV06-134**

THYCON CONSTRUCTION CO.;
and CADDELL CONSTRUCTION CO.,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO UNDERGO MEDICAL EVALUATION AS REQUESTED BY DEFENDANT

COMES NOW the Plaintiff, by and through his undersigned counsel, and submits the following opposition to Defendant's request for an additional medical evaluation by a second chosen defense physician. As grounds in opposition thereto, Plaintiff states as follows:

I. BACKGROUND

This is a workers' compensation case. The Plaintiff James Bryant suffered a severe work-related accident and injury in July, 2004, almost five years ago. The Plaintiff properly submitted at that time, and all times since, to the Defendant's chosen physician. The Defendant's physician has examined, treated, and opined, concerning Mr. Bryant's condition, multiple times over the course of the subsequent years of medical care. The Plaintiff, James Bryant, has complied with any and all requests for examination by the Defendant's chosen physician. That physician, Dr. Griffin, has a complete medical clinic with other physicians, nursing staff, and attendant professionals,

who have participated in multiple examinations of the Plaintiff throughout the years since his accident and injury.

II. THE DEFENDANT'S DELAY OF THE CLAIM

In its current motion, the Defendant generally asserts that the Plaintiff saw a physician, Dr. Aggarwal, and it should now be allowed a month before trial, to do the same. First, the Defendant's Motion is based upon a false premise. The Defendant has already chosen a physician who has evaluated the Plaintiff multiple times over the almost 5 years since his injury.

In essence, the Defendant's request is for a second defense physician. Coming almost five years after the injury and just a month before trial, one clear purpose of the defense seeking a second physician is to delay the conclusion of the claim.

At this point, the Plaintiff was placed at MMI by Defendant's first physician on March 25, 2008, over a year ago. It is believed that TTD payments then ceased in April 2008.

Quite clearly, a motion on the eve of trial is interposed ultimately for delay. As noted by the Defendant in its motion, Plaintiff's counsel had disagreed with its request for a new, 2nd defense physician, on earlier occasions. The delay caused by now seeking a 2nd defense physician is magnified when one considers that the Plaintiff has now been without any benefits for a long period of time and unsuccessful in his efforts to work.

III. THE DEFENDANT'S CURRENT REQUEST FOR AN ADDITIONAL EVALUATION BY DEFENDANT'S SECOND CHOSEN PHYSICIAN IS NOT PERMISSIBLE

In the case at bar, the Defendant ostensibly seeks both an IME and FCE. However, in truth, as evidenced by its concluding request, the Defendant's Motion

accurately seeks to obtain additional opinions from a second defense physician Dr. Keith Anderson.

If the true issue were an FCE request, our appellate courts have now evaluated the issue of an FCE and held that a claimant should not be compelled to submit to an FCE, something which does not constitute actual medical treatment. *See, Musgrove Const., Inc. v. Malley*, 912 So.2d 227 (Ala. Civ. App. 2003). In its present motion, the Defendant does not even address this legal precedent.

Instead, the Defendant concludes its motion with a request that Plaintiff should be required to submit to a medical examination by yet another doctor it chooses, Dr. Keith Anderson. This request, as well, is contrary to the recent decision of our appellate courts in *Musgrove, supra*, as well as the holding of our appellate courts throughout the history of the Act. Quite clearly, the present request is not made for purpose of assessing future medical treatment. Plaintiff reached MMI long ago.

In *Health Care Authority of the City of Huntsville v. Henry*, 600 So2d 324 (Ala. Civ. App. 1992), our appellate courts addressed a claimant's refusal to submit to an additional medical evaluation. In *Henry*, the claimant was a registered nurse at Huntsville Hospital. While working in the emergency room, she sustained an accidental injury to the right knee. *Id.* at 325. Following her injury, the worker received extensive treatment for her injuries, including surgery and physical therapy by orthopedic surgeons. Thereafter, the Defendant sought (and filed a motion requesting) an additional examination by Dr. Richard McFague, a physical rehabilitation specialist (the same specialty as Dr. Keith Anderson). The worker opposed this request.

The trial court ultimately denied the employer's request for an additional medical evaluation by a new physician. Our appellate courts fully affirmed that denial.

In analyzing the issue, our Court of Civil Appeals first cited well-settled Alabama law:

> It is well settled that an injured employee may refuse medical treatment or surgical procedures where the refusal is not unreasonable and, further, that the determination of reasonableness is a question of fact for the trier of fact.

Id. At 327. In *Henry*, involving a factual issue identical to the present case, our Court of Civil Appeals held:

> In the present case no evidence was presented to indicate that there was a reasonable expectation that the examination could lead to treatment that would improve the employee's condition. In addition, we note that the employee did submit to treatment by a number of doctors recommended by the employer, which treatment we conclude, was preceded by an examination. Important here is the fact that she submitted to physical therapy, which worsened her condition, and there was no evidence presented that further treatment might improve her condition. Therefore, under the facts of this case, we cannot find that the trial court erred in denying the employer's motion.

Id. Likewise, in the case at bar, there exists not one shred of evidence or expectation that the examination could lead to treatment that would improve the employee's condition. He has submitted to extensive treatment from the Defendant's doctors for almost 5 years.

Quite clearly, the current request to see a new physician on the eve of a scheduled trial who practices solely in a specialty that offers no new treatment options to James Bryant, is designed for two purposes only, first to delay the case and second for the Defendant's trial preparations. As such, James Bryant's refusal to see yet a second physician chosen by his employer, is fully reasonable.

In *Jimico, Inc. v. Smith*, 777 So.2d 716 (Ala. Civ. App. 2000), our appellate courts also addressed the present issue and again agreed that a requested examination almost

identical to the one sought in the present case, was unreasonable, In *Jimico*, the employee suffered an injury to her arm and shoulder while lifting a piece of equipment. *Id.* At 717. She underwent surgeries and additional treatments thereafter, including physical therapy and medications, which proved unsuccessful. *Id.* The employee filed suit in December 1996. *Id.* The case was eventually set for trial to be held in June, 1999. On April 6, 1999, only two months before trial, the employer filed a motion seeking an "independent medical examination" by a neurologist. The trial court ultimately denied that motion.

In denying the request, the trial court specifically found that there was no reasonable expectation that the proposed examination would improve the employee's condition. *Id.* at 718. On appeal, the Court of Civil Appeals noted that there was substantial evidence in the record to support that denial, including the testimony that previously administered medications, surgeries, and therapy, had not improved the worker's condition; and, the employer sought the examination shortly before a scheduled trial to protect its own financial interests. *Id.* As such, our Court of Civil Appeals affirmed the decision denying a requested "IME." Likewise, in the case at bar, there is no evidence that any additional treatment will aid or improve the Plaintiff.

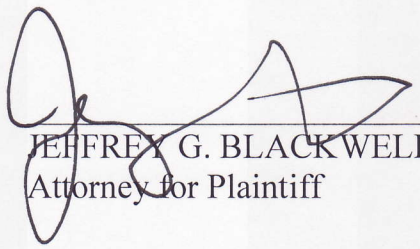
Quite clearly, this request which was made almost a year after MMI and the cessation of TTD benefits as well as on the eve of a scheduled trial, is designed for no purpose other than the Defendant's own financial interests.

Indeed, the Defendant simply states that it should be entitled to have another evaluation because the Plaintiff had one. This ignores the obvious fact that the Defendant has had its examination by its physicians for almost 5 years. The Defendant does not desire an equal footing, but instead, the unfair advantage of choosing multiple physicians. As noted in *Musgrove* there are multiple elements which must be proven by a Movant requesting a physical examination of a Plaintiff. One of these requirements is the "need" requirement. *Id.* at 245. That is, the Movant must show that the request, i.e., for yet

another doctor here, will produce evidence not available from any other source. *Id.* Moreover, the Movant must show that "the requested examination is necessary to place the parties on an equal footing with respect to the evidence." *Id.* at 246. In affirming a denial of the requested new evaluation, the appellate court specifically noted in *Musgrove* that there was medical testimony from physicians chosen by the Defendant and that the Defendant had possessed access to those physicians at all times. *Id.* Similarly, in the case at bar, the Defendant has already chosen a physician. That physician, chosen by the Defendant, has examined Plaintiff multiple times over the almost 5 years since the accident. The Defendant has possessed unfettered access to its chosen physician and has even sent its own case nurse to appointments. The Defendant cannot argue now that it needs a second physician. Moreover, the parties are not on equal footing and will never be so. The Defendant's has almost 5 years of medical access, medical examinations, medical directions, and medical opinions. Plaintiff's limited examination with his doctor certainly cannot match what the defense already has had the opportunity to gather. Allowing the defense to now obtain a second physician will only enhance this unequal position.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this honorable Court deny the Defendant's unreasonable request for an additional medical examination of the Plaintiff.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record on this the 3rd day of April 2009, by electronic filing, mailing same in the United States mail, postage prepaid and addressed as follows:

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