

OREGON LAW UPDATE

Plaintiff Wants an Observer at a Physical Exam? They Better Have a Good Reason

case in point...

From the desk of Jeff Eberhard: Oregon law provides that when the physical or mental condition of a plaintiff is in controversy, the defense is entitled to an independent medical examination. Once requested, the plaintiff's attorney will then attempt to place a variety of conditions on that exam, such as the presence of an observer, tape recording, a complete copy of the doctor's file, access to the doctor's financial information, etc. This case update addresses whether a plaintiff can impose those conditions.

Claims Pointer: Insurers who request that a plaintiff sit for an IME, or other medical exam, should feel secure knowing that an examinee will have to show good cause for imposing limitations or conditions on the exam. At least for now, Oregon courts appear to be hesitant to allow examinees to impose such conditions, though the Supreme Court declined to assess the plaintiff's reasons in this case.

Lindell v. Kalugin, 353 Or 338 (2013).

Paul Lindell was injured when he was rear-ended by Alex Kalugin. Lindell sued Kalugin and the owner of Kalugin's vehicle, Countryside Construction, Inc. ("Countryside"). Lindell alleged that, as a result of the accident, he suffered from amnesia, headaches, and post-traumatic stress disorder, among other injuries.

Prior to trial, Countryside arranged for two defense medical examinations of Lindell, including a neuropsychological exam, under Oregon's rule on physical and mental examinations, ORCP 44. Lindell objected, stating that he would not submit to the exams, without being allowed to bring a friend, family member, or attorney with him. The trial court rejected Lindell's request. Lindell then sought a writ from the Oregon Supreme Court ordering the trial court to grant his request. The Supreme Court granted a modified version of Lindell's request, which the trial court refused to follow. Lindell then went back to the Supreme Court, renewing his request.

Looking at the issue for a second time, the Supreme Court rejected Lindell's request. Lindell claimed that allowing a third party to observe the exams was "sound public policy." Lindell further argued that "a third party observer or a recording is necessary to guarantee the fairness" of the examination. Countryside countered that research showed that people perform worse on medical examinations when they are being observed.

The Court noted that, under ORCP 44 A and ORCP 36 A, the party seeking to impose conditions on a medical examination must show good cause for

the condition. Lindell failed to demonstrate why he should be permitted to have a third party present for his defense examinations. The Court examined the lengthy history of ORCP 44 and acknowledged the pros and cons of permitting observers to attend medical exams. On the one hand, observers may help a nervous examinee feel at ease in a potentially stressful situation. On the other hand, the objectivity of the examination may be compromised by the presence of observers.

Ultimately, the Court declined to issue an opinion on the impact that the presence of observers would have on the intended purpose of a medical examination. Rather, the Court stated that whether or not an observer could be present at an IME was a question for the trial court. Additionally, the burden of establishing that requested conditions are supported by good cause rests with the examinee. The trial court has the discretion to determine whether or not that burden has been met. In this case, the trial court did not agree with the reasons offered by Lindell for why an observer should be present. According to the Supreme Court, that decision was reasonable. Therefore, the Supreme Court refused to compel the trial court to impose the conditions sought by Lindell.



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