

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 27

WCC No. 9304-6769

RICHARD BLOUNT

Petitioner

vs.

CONAGRA, INC.

Respondent/Insurer for

NORTHWEST FABRICS

Employer.

**ORDER PARTIALLY DENYING MOTION TO COMPEL;
ORDER DENYING MOTIONS FOR SANCTIONS**

Petitioner, Richard Blount (Blount), has filed a motion to compel production of certain documents. Both parties have also filed motions for sanctions. The motions have been briefed and are now ready for decision.

1. Motion To Compel Production

Blount seeks to compel production of ten documents from respondent's claim file. Respondent has refused to produce the documents, claiming protection under the attorney-client privilege and the work-product doctrine. The documents are identified as follows:

88, 100-102, 109, 110: Letters of counsel for insurer to third parties.

90, 91, 93 & 95: Letters of the insurance adjuster to "potential witnesses."

It is not clear in the Court record that the actual identities of persons receiving the letters were provided as directed in this Court's January 7, 1994 Order. Respondent at page 4 of its response does advise that "the privileged documents refer to the names of witnesses who have been named in discovery responses. All are available to testify."

The documents have been reviewed by the Court's law clerk and hearing examiner, who have provided descriptions of the documents for purposes of this Order.

The first group of documents are from counsel for insurer to employees of the employer. Respondent argues that the letters from its attorney are attorney-client privilege. While liability insurers often provide counsel to their insured, this is not such a case. Under the Workers' Compensation Act, an insured employer is immune from "any liability whatsoever for the death of or a personal injury to an employee covered by the Workers' Compensation Act. . . ." Under the Act, the insurer is directly liable to the injured employee. Section 39-71-407, MCA. The insurer's attorney represents the insurer, not the employer.

Correspondence from counsel to third persons may come under the protection of the work-product doctrine. *Kuiper v. District Court*, 193 Mont. 452, 632 P.2d 694 (1981).⁽¹⁾ However, such communications to third parties may also amount to a waiver of the protection. *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446 (1976). In this situation, the protection has not been waived. Counsel's letters were sent to workers of claimant's employer. The employer and insurer may have similar interests in this proceeding. The employer has an interest in resisting unfounded claims which could increase the employer's experience rating and drive up premiums for workers' compensation coverage. "Disclosure to parties with a common interest in the litigation does not waive work product immunity because it can be assumed that parties with a common interest will not disclose to opposing parties." *Id.* at 447. Accordingly, the correspondence between respondent's counsel and the third parties did not waive the work-product protection.

Blount claims that even if the letters are work-product, they should be produced because he has substantial need for them and cannot obtain the equivalent of the materials. Ordinary work product enjoys a qualified protection, and is discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3), M.R.Civ.P., *Palmer v. Farmers Insurance*, 50 St.Rptr. 1210, 1219 (1993). Blount has not made this required showing. He contends that the letters identify potential witnesses that he may not be aware of, or in the alternative, are letters to witnesses already identified by respondent, and are therefore relevant. The letters at issue here were sent to witnesses whose identities have already been disclosed by respondent. No new witnesses are identified in the letters. Blount can depose the witnesses identified by respondent. So far he has apparently not done so. Absent a deposition and evidence that the deposition failed to disclose needed information, Blount's request for the letters must be **denied**.

The other group of documents consist of letters from the insurance adjuster to "potential witnesses." Blount again claims that the "potential witnesses" might be witnesses yet to be identified that he therefore needs the letters to prepare his case. He also argues that if the letters are to Karen Carlson and Dave Rosteck, who are employees of his former employer, then they are relevant to his case.

Documents prepared by a party's agent, if prepared in anticipation of litigation, are protected under the work-product rule. **Kuiper** at 463. Thus it must be determined whether, in the light of the nature of the documents and factual situation in this case, the documents can fairly be said to have been prepared because of the prospect of litigation. **Clark v. Norris**, 226 Mont. 43, 50, 734 P.2d 182 (1987). In reviewing the letters, it is apparent that they were written in anticipation of litigation. Letters 93 and 95 contain statements regarding the defense of the claim, and were clearly written in anticipation of litigation. Letters 90 and 91 do not specifically refer to the litigation. However, the documents were prepared at a point in time after respondent had brought an attorney into the case. In light of the documents and the factual situation of this case, they appear to have been prepared in anticipation of litigation.

As already discussed, the work-product protection is not waived by the disclosure to third parties when the parties have a common interest in the litigation. The adjuster's letters were to employees of the employer. Those employees have been identified by respondent as potential witnesses. No "new witnesses" were identified in the documents, and, as already discussed, the employer's interests are aligned with the insurer. Blount has apparently not deposed the witnesses and has not shown an inability to obtain a "substantial equivalent" of the documents.

Blount also requests production of a tape-recorded statement (and/or its transcription) he made to adjuster Brad Jarvis on or about January 15, 1990. Respondent contends that the audio cassette failed to record the statement, thus no recorded statement or transcribed statement exists. Since a audio recording was at least attempted, the respondent should produce the original tape, if it exists, so that Blount can further analyze it.

2. Motions For Sanctions

Blount also seeks sanctions against respondent. Blount argues that if respondent refuses or is unable to produce the tape recording of the statement taken by the adjuster in 1990, the Court should preclude respondent from asserting that Blount voluntarily quit his job and lost no work as a result of his injuries. (Apparently the adjuster will testify that Blount said that he voluntarily quit his job.)

Respondent denies the existence of either a tape-recorded statement or a transcript of such statement. According to the adjuster, the attempt to record the interview of Blount failed; the tape did not record and therefore could not be transcribed. Blount vigorously disputes the adjuster's testimony and contends that the tape was in fact transcribed. Thus, he wants sanctions. In response, respondent reiterates denial that the tape exists and injects its own request for sanctions. It argues that Blount's assertions are ludicrous, amount to a charge of perjury and violate Rule 11, Mont.R.Civ.P., ⁽²⁾ and section 39-71-2914, MCA. The latter section provides:

39-71-2914. Signing of petitions, pleadings, motions, and other papers -

requirements - sanctions. (1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.

(2) A party who is not represented by an attorney shall sign his petition, pleading, motion, or other paper and state his address.

(3) The signature of an attorney or party constitutes a certificate by him that:

(a) he has read the petition, pleading, motion, or other paper;

(b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;

(c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and

(d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

Whether respondent or its adjuster has intentionally concealed or destroyed a taped interview is a factual matter which cannot be resolved by counsel shouting back and forth at each other through their briefs. While Blount fails to identify any smoking gun, he does recite circumstantial evidence which, if believed, might lead a fact finder to conclude that the tape was concealed or intentionally destroyed. Among other things, he claims that:

1) The respondent in answer to written discovery initially denied that any statement had been taken of Blount.

2) In response to a request for production, the respondent furnished a copy of its claims file with sequentially numbered pages without disclosing that it had removed 200 documents from the file.

3) The adjuster at his deposition, and later in written discovery, admitted that he had attempted to take a recorded statement but claimed that the tape did not record and that no transcript existed.

4) In answer to discovery seeking information regarding surveillance, respondent failed to disclose that surveillance had occurred and failed to produce a surveillance tape it had made.

5) The adjuster testified at deposition that in an interview four years ago Blount said he quit his job voluntarily. The adjuster's handwritten notes of the conversation, which is also the same conversation which the adjuster says he unsuccessfully attempted to tape, does not mention such a statement.

6) An experienced adjuster would have made sure that the tape recorder was working or at least sought another recorded statement.

Not having the benefit of actual testimony, not having observed the witness; and unaware of what additional evidence might be presented, the Court cannot draw the inference requested by Blount. Far more is needed to impose sanctions. On the other hand, Blount has identified circumstances which, if proven would at least make the requested inference plausible. While his request for sanctions may be zealous, it is not beyond the pale of legitimate advocacy.

As noted in the foregoing list of alleged facts, Blount's attorney states that the copy of the claim file furnished in response to a request for production was sequentially paginated (and apparently without interruption) and that he was **not** told that any documents had been removed, thus leading him to believe that he had received the complete file. The respondent's written response to the request for production also indicated that the copy furnished was complete. In response to a request for "a **complete** copy of the claims file," the respondent replied, "Please see the enclosed three volumes." Blount's attorney was later told (two weeks before trial) that **some** documents had been removed, and thereafter learned that about 200 documents had in fact been removed. **If this is what in fact occurred**, the conduct of respondent and its counsel were unacceptable and tantamount to a misrepresentation. Counsel practicing before this Court should be aware that concealing the removal of documents from a requested file without interposing an objection or notifying the other party regarding the removal is unacceptable. Although petitioner has not asked for sanctions on this particular matter, the Court will conduct a further hearing to determine whether further action by the Court, including sanctions, is appropriate.

ACCORDINGLY, IT IS HEREBY ORDERED:

1) Blount's motion to compel production of document Nos. 88, 100-102, 109, 110 and 90, 91, 93 & 95 is **denied**.

2) Blount's motion to compel production of the tape on which the insurance adjuster attempted to record his statement is **granted** if that tape exists.

3) The cross-motions for sanctions are **denied**.

4) Counsel for the parties are ordered to appear before Judge McCarter on **Tuesday, March 29, 1994, at 1:00 p.m., in the Federal Building, Room 217, Great Falls, Montana**. At that time they should be prepared to discuss respondent's alleged failure to provide the insurer's entire file and the surveillance information in response to Blount's discovery requests.

DATED in Helena, Montana, this 16th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Michael W. Cotter

Mr. Steven S. Carey

1. In **Kuiper** certain letters to third parties were classified by the Court as falling under work-product protection.

2. Rule 11 provides that:

Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleading need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fees. [Amended effective May 1, 1990.]