IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 62

WCC No. 2001-0392

KATHY A. BURNSIDE LUND

Petitioner

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Respondent/Insurer for

THE INDUSTRIAL COMPANY

Employer.

ORDER REGARDING DISCOVERY MOTIONS

Summary: Parties filed cross-motions to compel discovery. In addition, respondent sought a protective order while claimant sought attorney fees. The discovery sought by claimant is employer files, withheld documents from the claims file, and further answer of a contention interrogatory. Respondent is seeking medical records which claimant had previously agreed to produce.

Held: St. Paul shall seek the employer files to the extent that they have not been produced in another action brought by claimant against the employer; if the employer fails to cooperate it will be formally joined as a party and the Court's discovery rules will be enforced against it. As to claims file documents, the parties are ordered to comply with Court Rule 24.5.324(4) -(6). The request for further answer of the contention interrogatory is denied.

Topics:

Discovery: Generally. Discovery is not a game. The Court expects counsel to engage in discovery in a spirit of cooperation and collegiality. Hard ball tactics are condemned.

Discovery: Requests for Production. Employer has an obligation to cooperate with an insurer and the insurer cannot slough a discovery request for information and documents of the employer by merely alleging it is not a real party in interest. The insurer must demand the information from the employer and furnish it if possible. If

the employer is uncooperative, then it will be joined as a party and the Court's discovery rules enforced directly against it.

Discovery: Compelling Discovery. Employer has an obligation to cooperate with an insurer and the insurer cannot slough a discovery request for information and documents of the employer by merely alleging it is not a real party in interest. The insurer must demand the information from the employer and furnish it if possible. If the employer is uncooperative, then it will be joined as a party and the Court's discovery rules enforced directly against it.

Discovery: Requests for Production. The Court will not order discovery for discovery's sake. Where the claimant has already obtained documents from the employer in another action against the employer, the Court will not order that the documents be produced a second time.

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Discovery: Privileges: Attorney Work Product. The Court has a specific rule regarding production of claims file documents which the insurer alleges are protected by attorney-client or attorney work product privilege. Rule 24.5.324(4)-(6). The parties must follow that rule.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.324(4)-(6). The Court has a specific rule regarding production of claims file documents which the insurer alleges are protected by attorney-client or attorney work product privilege. Rule 24.5.324(4)-(6). The parties must follow that rule.

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Discovery: Requests for Production: Compelling Discovery. The Court will not compel a claimant to produce medical records she has made a good faith effort to obtain but has been unable to obtain because the medical provider fails to cooperate. The records sought should be subpoened.

Discovery: Interrogatories. The Workers' Compensation Court will not order a party to answer a contention interrogatory which asks for mental impressions of opposing counsel or which are so broad that they call for opposing counsel to lay out every

> item of evidence which might support the party's contention. If the Rules of Civil Procedure contemplate such interrogatory, this Court refuses to adopt such rule and is not required to do so. Such interrogatories lead to delay and mischief and are inappropriate in light of the expedited nature of Workers' Compensation Court proceedings.

¶1 Before the Court are cross-motions to compel discovery, a request for a protective order, and a request for attorney fees. Counsel have filed five-eighths inch of documents, consisting of briefs, affidavits, counter-affidavits, correspondence, and the discovery documents. The paperwork amounts to 117 pages, which counsel expects the Court to sort through. It is a sorry mess.

¶2 The petition in this matter seeks permanent partial disability benefits and additional medical benefits. The petitioner is Kathy A. Burnside Lund (claimant). She was injured on September 1, 1998, while working for The Industrial Company (Industrial) at the Stillwater Mine in Nye, Montana. At the time of her injury, Industrial was insured by St. Paul Fire & Marine Insurance Company (St. Paul). St. Paul concedes claimant suffered an industrial injury and notes that it has paid medical benefits to her. (Response ¶ 6 and Uncontested Fact 1.)

¶3 From the nature and ferocity of the discovery dispute, one would think this is a million dollar personal injury case and that the parties are gearing up for a protracted battle which may last for years. Lacking is the sort of cooperation and collegiality I have come to expect from counsel practicing before the Workers' Compensation Court.

¶4 Claimant fired the first shot on November 8, 2001, with a motion to compel discovery. (Petitioner's Motion to Compel Discovery; Brief in Support.) She asserted that St. Paul's responses to her interrogatories and requests for production were inadequate and sought a Court order compelling further discovery, specifically:

> (1) production of documents and information from the employer (Industrial);
>
> (2) production of documents from St. Paul's claims file that St. Paul had declined to furnish her on the grounds they are attorney-client privileged or attorney work product;
>
> (1) a further, more complete answer to her interrogatory regarding St. Paul's contention, and;
>
> (2) verification of St. Paul's responses to discovery.

¶5 St. Paul fired its own salvo on November 19, 2001, with a motion to compel production of medical records. The motion noted that claimant had initially objected to production of some preinjury medical records but had later agreed to produce them, however, she had not done so at the time of the motion.

¶6 The matter became even more heated when, in response to St. Paul's motion, claimant asserted that the motion was unjustified. (Brief in Opposition to the Respondent's Motion to Compel at 2.) She requested monetary sanctions against St. Paul. (*Id.*) St. Paul on its part sought a protective order from certain discovery. (Respondent's Response to Petitioner's Motion to Compel Discovery and Respondent's Motion for Protective Order.)

I. Claimant's Motion to Compel

A. Waiver Argument

¶7 In her initial motion the claimant argues that St. Paul waived all objections to her interrogatories and requests for production because it failed to file its responses within the time provided by Court rules. St. Paul acknowledged it had indeed failed to file timely responses, but its counsel also asserted that the claimant's responses to discovery were untimely. St. Paul further noted that its attorney had on previous occasions "gratuitously and informally allowed Petitioner additional time to answer discovery in this case, and put frankly, Respondent expected the same courtesy in return." (Respondent's Response to Petitioner's Motion to Compel Discovery and Respondent's Motion for Protective Order at 3.) That response struck a cord with petitioner's counsel, who then withdrew the argument. (Reply Brief in Support of Petitioner's Motion to Compel Discovery at 1-2.) This sort of collegiality should have prevailed before the flurry of motions.

B. Employer's Files and Information

¶8 Claimant propounded interrogatories and requests for production asking St. Paul to provide information and files from Industrial. St. Paul interposed a general objection to the requested discovery on the ground that St. Paul is the "real party in interest" and its counsel "does not have access" to the employer's files other than those documents contained in St. Paul's claims file. My consideration of the objection generates enough heat to melt snow on a cold Montana winter day. Whether or not the employer is a party in this case, it has a duty to cooperate with the insurer. The insurer can insist that the employer fulfill that obligation. If the employer fails to cooperate in providing information or documents related to a workers' compensation injury, then this Court will make the employer a party to this action, subject the employer to the Court's discovery rules, and impose sanctions if it fails to comply with those rules. I trust that this will resolve this specific objection and make it clear that this Court abhors technical games of this sort.

¶9 That said, the Court must consider still St. Paul's allegation that claimant has already obtained the documents it requests during discovery in another civil action she has brought against the employer. (Respondent's Response to Petitioner's Motion to Compel Discovery at 5.) Claimant in reply says that she has some but not all of the documents but nonetheless insists on full discovery. (Reply Brief in Support of Petitioner's Motion to Compel Discovery at 2, 4.)

¶10 As to documents the claimant has already obtained in another proceeding, what purpose is served by producing them a second time in this proceeding? If there is an issue as to the authenticity of the documents, or their completeness, then counsel can surely address and resolve those questions between themselves. If they cannot resolve authenticity issues, the Court's Scheduling Order expressly provides for an award of costs if an objection to authenticity is not justified. Discovery done simply for discovery's sake is a waste of time and money. I condemn this sort of senseless discovery and decline to order production of documents which claimant has already obtained.

¶11 As to information and documents not previously produced, St. Paul shall use its best efforts to obtain the information and documents from Industrial. If Industrial fails to cooperate, then the Court will join it as a party, order it to respond to the petition, and enforce its discovery rules against it.

C. Claims File

¶12 In response to interrogatories and requests for production, St. Paul produced much of its claims file. (See Exs. A through C to the Petitioner's Motion to Compel Discovery.) However, it declined to furnish a number of documents based upon attorney work product and attorney-client privileges. (See Ex. C to the Petitioner's Motion to Compel Discovery.) Claimant seeks production of the documents withheld.

¶13 Rule 24.5.324 of this Court's rules provides a specific procedure governing privilege and work product objections which are interposed in response to requests for production. It provides in relevant part:

> (4) If the request is for production of the file of a party and objection is made to such production on the grounds of privilege or work product, the objecting party shall produce all documents other than those specific documents which are subject to objection. Where the objection is only to part of a document, the document shall be produced with the objected portions deleted. The objecting party shall also provide in its response a list of documents which are subject to objections, specifically identifying:
> (a) the type of document;
> (b)the number of pages of the document;
> (c) the general subject matter of the document;
> (d) the date of the document;
> (e) where the document is a communication, the author of the document and her/his address and the relationship of the author and the addressee;
> (f) whether the objection extends to the entire document or only to portions of the document; and
> (g) the specific privilege, including work product, which is being claimed as to each document.

(5) Where the objecting party asserts that this minimal information would encroach upon the attorney-client privilege or the work product doctrine, the party must state how disclosure of the information would violate the privilege or doctrine.
(6) An objection based on a claim of attorney-client privilege or work product will be ruled on only upon the filing of a motion to compel, at which time the following procedure shall apply:
(a) along with its answer brief, counsel for the objecting party shall furnish the court with a copy of its original response to the request for production and the original or a copy of all documents which are identified in the motion to compel;
(b) where only parts of the document are subject to an objection, counsel for the objecting party shall identify those parts;
(c) the court will review the documents in camera and sustain or overrule each objection.

¶14 The procedures outlined in Rule 24.5.324(4)-(6) are specific. If the parties wish to engage in a discovery war, they must strictly comply with the rule. The letter from St. Paul's counsel listing the documents withheld failed to set forth all of the information required in subsection (4) above. Before I will rule on the claimant's request, St. Paul must provide **all** the information required in Rule 24.5.324(4). Claimant must then identify the specific documents she seeks and why she believes she is entitled to each of the documents; a blanket request for production of withheld documents is insufficient. St. Paul must then respond to claimant's request, addressing each of the claimant's contentions, and provide the Court with copies of the documents in question.

D. Contention Interrogatory

¶15 Claimant propounded the following interrogatory:

> INTERROGATORY NO. 6: Please state all facts and inferences known to you, your agents, representatives, employees, agents or attorneys, which support or corroborate your contentions 1-12, as stated in the Response to the Petition; the name, address, and telephone number of any person known to have knowledge with respect to such contentions; and an identification as to any writing, diagram, or report supporting such contentions.

(Ex. A at 4 to Petitioner's Motion to Compel). She received the following answer:

> ANSWER: Object on the grounds that Interrogatory No. 6 is vague, ambiguous, overly broad, violates the attorney-client privilege, and invades the attorney work product privilege. The basis for Respondent's contentions is contained within the claims file, medical records, and existing law.

(*Id.*) St. Paul's objection raises legitimate issues.

¶16 The interrogatory asks it to disclose "inferences" which support its contentions. That request clearly asks for mental impressions of opposing counsel and is out-of-bounds. See Rule 26(b)(3), Mont. R. Civ. P. ("In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.")

¶17 Claimant argues that although this Court does not have a discovery rule specifically addressing "contention interrogatories," it should adopt and follow Rule 33(b), Mont. R. Civ. P., which provides:

> **(b) Scope--Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.
>
> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

St. Paul has set out its contentions in its Response to Petition (8/28/2001). The interrogatory propounded to it by claimant essentially asks it to lay out in detail everything it may introduce at trial to support its contentions. *Moen v. Peter Kiewit Sons' Co.,* 201 Mont. 425, 434, 655 p.2d 482, 486 (1982), which claimant cites, holds, "The Workers' Compensation Court, while not governed by the Rules of Civil Procedure, **may** be guided by them . . . . [Emphasis added.]" "May" is the operative word. If the sort of interrogatory propounded in this case is within the contemplation of Rule 33(b), I decline to follow the rule.

¶18 Whether or not the sort of interrogatory propounded by claimant is countenanced under Rule 33(b), this sort of interrogatory is inappropriate in the Workers' Compensation Court. This Court's rules are tailored to resolve disputes in months, not years. Trials are typically held within 75 days after the filing deadline, and a significant number of trials are scheduled on an emergency, expedited basis which provides an even earlier trial. Speedy trials are essential: Injured workers are often without income or unable to obtain needed medical care until the Court issues a decision. This Court's rules require that the parties set out their contentions. Rule 24.5.301(1)(c)[(1)] requires petitioner to set out his or her contentions. Rule 24.5.302(1)(a)[(2)] requires similar disclosure by the respondent in its response. The rules of discovery of the Workers' Compensation Court provide a full and fair opportunity for all parties to discover the factual basis for those contentions. Contention interrogatories or the sort propounded by claimant lead to mischief. This sort of interrogatory is bound to lead to motions to compel based on the adequacy of the answer.

When is the answer adequate? At trial, are the facts proffered by the interrogated party within those set out in answer to the interrogatory?

¶19 The request to compel further answer of the interrogatory is **denied**.

E. Verification

¶20 Claimant also moved to compel St. Paul to verify its answers. St. Paul has since verified its answers and the issue is moot.

II. Claimant's Request for a Protective Order

¶21 St. Paul requests the Court to issue a protective order with regard to the discovery sought by claimant. A protective order is unnecessary. In this Order, the Court spells out the discovery obligations of both parties.

III. Respondent's Motion to Compel

¶22 As set forth earlier in this decision (¶ 4), St. Paul seeks an order compelling claimant to produce medical records which she has agreed to produce in response to St. Paul's discovery. In her response to the motion, claimant has filed an affidavit indicating that she has in fact provided St. Paul with all medical records she was able to obtain. The glitch is the failure of some of the medical providers to provide medical records she asked them to provide. That glitch is not her fault. St. Paul can obtain the records by subpoena.

¶23 That this is an issue at all is an indication of the failure of the parties' counsel to consult and cooperate with one another.

IV. Request for Sanctions

¶24 Finally, I address claimant's request for monetary sanctions. Her request is set forth in her Brief in Opposition to the Respondent's Motion to Compel at page 2. She alleges that St. Paul's motion to compel production of her medical records was unjustified.

¶25 The request for sanctions is an escalation of the discovery dispute. In this case, it is not justified. Both counsel have played hardball. Both counsel have flunked the collegiality test.

¶26 Either counsel could have requested a telephone conference with the Court to resolve their ongoing disputes. Most pretrial disputes are resolved through telephone conferences, avoiding time consuming, and expensive disputes such as occurred in the present case.

V. Summing Up

¶27 I hope it is clear from the foregoing discussion that I have little patience for discovery disputes of the sort presented in this case. I have little patience for hardball tactics. I expect counsel to cooperate. I expect full disclosure of documents and information

relevant to the case. When disputes do arise, I am available for a telephone conference. If counsel wish the conference to be recorded, the Court will provide a court reporter. Injured workers deserve prompt resolution of their claims and insurers deserve a prompt determination of their liabilities.

ORDER

¶28 Claimant shall pare her discovery requests for her employer's documents to those documents she does not already have. Within seven calendar days of this Order, she shall serve her streamlined request upon St. Paul. St. Paul shall then have ten calendar days in which to respond. If the employer fails to fully cooperate in providing the documents requested, St. Paul or the claimant shall notify the Court. Upon such notice, the Court will join the employer as a party to this action and allow claimant to seek discovery directly from the employer.

¶29 Within seven calendar days of this Order, St. Paul shall provide claimant with a list of the claim file documents it has refused to produce and provide claimant with all information required by Rule 24.5.324(4) and (5). The claimant then has seven days in which to file a motion to compel. The motion must identify the specific documents she seeks and the reasons she believes she is entitled to the documents. Within 7 days thereafter, St. Paul shall provide the Court with copies of the documents in question and its response to the motion. The Court's hearing examiner will then review the documents *in camera* and determine which documents must be disclosed.

DATED in Helena, Montana, this 6th day of December, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Timothy B. Strauch
Mr. Joe C. Maynard
Submitted: November 30, 2001

1. (c) a short, plain statement of the petitioner's contentions;

2. (a) a short, plain statement of the respondent's contentions;