IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 15

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED

and

THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers.

ORDER DENYING RESPONDENT'S REQUEST TO SUPPLEMENT RECORD

Summary: Following a judgment determining attorney fees due the petitioner, the petitioner filed an appeal with the Montana Supreme Court. On the same day of the appeal, she designated the record for appeal, stating that transcripts of the trial and other hearings were unnecessary to the issues she intended to pursue on appeal. Two months later, following the mediation required by the Rules of Appellate Procedure, she again filed a statement designating the record on appeal, repeating her original statement that transcripts of the trial and other hearings were unnecessary to the issues she intended to pursue on appeal. Only after the second statement did the respondent demand that petitioner/appellant supplement the record with a transcript of the evidentiary hearing regarding attorney fees.

Held: The request for supplementation of the record on appeal is governed by Rule 9 of the Rules of Appellate Procedure. Respondent's request to supplement the record is untimely under the rules and is therefore denied.

Topics:

> **Appeals (to Supreme Court): Record on Appeal.** Under Rule 9 of the Rules of Appellate Procedure the appellate must designate what portions of the transcript below, if any, are necessary to the appeal. Respondent then has ten days to demand that other transcript portions be included. An untimely request to supplement the record must be denied.

¶1 The petitioner in this matter has appealed this Court's decision regarding attorney fees. The matter presently before the Court is respondent's motion asking the Court to order the petitioner "to include the transcript of the evidentiary hearing held on May 13, 2003 as part of the record on appeal." (Respondent's Notice to Appellant of Intent to Procure an Order Supplementing the Record at 1-2.)

¶2 The salient facts are as follows:

> ¶2a On November 14, 2003, this Court filed its Decision and Judgment for Attorney Fees. *Bustell v. The Insurance Company of Pennsylvania,* 2003 MTWCC 66.
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> ¶2b On December 12, 2003, petitioner filed her Notice of Appeal from the decision and judgment.
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> ¶2c On the same day - December 12, 2003, petitioner filed a Description of Necessary Transcript in which she stated, "The transcript of the trial and other hearings held are unnecessary and the Appellant intends to exclude these from the record." (Description of Necessary Transcript at 1.)
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> ¶2d The mediation required by Rule 54 of the Rules of Appellate Procedure was held on February 11, 2004.
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> ¶2e On February 18, 2004, the petitioner filed another Description of Necessary Transcript in which she again stated, "The transcript of the trial and other hearings held are unnecessary and the Appellant intends to exclude these from the record." (Description of Necessary Transcript at 1.)
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> ¶2f On February 24, 2004, respondent filed Respondent's Notice to Appellant of Intent to Procure an Order Supplementing the Record. In that filing, respondent moved "the Court for an Order requiring Appellant to include transcript of the evidentiary hearing held on May 13, 2003 as part of the record on appeal." (Respondent's Notice to Appellant of Intent to Procure an Order Supplementing the Record at 1-2.)

¶3 The respondent's request to supplement the record is governed by the Rules of Appellate Procedure, specifically Rule 9. Rule 9 governs the record on appeal. With respect to transcripts, it provides in relevant part:

> . . . .
>
> (b) **The Transcript of Proceedings--Duty of Appellant to Order--Notice to Respondent if Partial Transcript Is Ordered--Costs of Producing**. Absent a stipulation filed with the clerks of the supreme court and the district court pursuant to Rule 54(c), within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of all of the proceedings not already on file for

> inclusion in the record. The order shall be in writing and within the same period a copy shall be filed with the clerk of court. Any attorney who orders a transcript of the evidence shall be personally liable for the payment of the costs of the transcript.
>
> If the appellant determines, on the basis of the issues raised on appeal, that the entire transcript is not necessary, the appellant shall, within the 10 days above provided order only such parts of the proceedings not already on file as the appellant deems necessary and also file and serve on the respondent a description of the parts of the transcript which the appellant determines to be unnecessary and which it intends to exclude from the record along with a statement of the issues which appellant intends to present on the appeal. If the respondent deems a transcript of the parts of the proceedings to be excluded to be necessary, the respondent shall within 10 days after such filing and service order such parts from the reporter or file and serve notice on the appellant in writing of respondent's intention to procure, at a date, time and place certain within 10 days of such notice, an order from the district court requiring the appellant to so do.
>
> . . . .

As applied to this case, the appellant (petitioner below), served her notice of her notice of her intent to exclude transcripts of any hearings upon the respondent on December 11, 2003. Under Rule 9, respondent had ten days thereafter to file its request to expand the record. Rule 54 of the Rules of Appellate Procedure do not extend that time. Rule 54(c) specifically provides:

> (c) **Supplementary Process**. The process required by this rule shall be supplementary to, and have no effect on, the parties' duties, obligations and time requirements otherwise provided for in these rules; provided, however, that the parties may, by stipulation filed with the clerk of the district court, hold the time requirements of other rules in abeyance pending completion of the process required by this rule. In the event the district court record has been transmitted to the supreme court, the parties shall file their stipulation with the clerk of the supreme court.

No stipulation was filed which would extend the time regarding designation of the record.

¶4 Respondent therefore failed to timely demand supplementation of the record. The petitioner/appellant's February 18, 2004 notice was redundant and superfluous. It did not extend the time for respondent to file its request.

ORDER

¶5 Respondent's request to order petitioner/appellant to supplement the record on appeal by ordering a transcript of an evidentiary hearing held on May 13, 2003, is untimely and is therefore **denied**.

DATED in Helena, Montana, this 25th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis - U.S. Mail and Faxed
Mr. Donald R. Herndon - U.S. Mail and Faxed
Submitted: February 24, 2004