

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 89

WCC No. 9407-7090

BOBI JO CARY

Petitioner

vs.

**LUMBERMENS MUTUAL CASUALTY
COMPANY/KEMPER INSURANCE COMPANY and|
INTERMOUNTAIN CLAIMS OF MONTANA, INCORPORATED**

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

ORDER ON MOTION TO COMPEL; ORDER BIFURCATING ISSUE

Petitioner, Bobi Jo Cary (claimant), has filed a motion to compel the respondent to fully and properly respond to "Claimant's Request for Production Nos. 2 and 3." Specifically in question are the documents contained in Exhibit B-2 and Exhibit C-2. Respondent's answer brief with attached exhibits for an *in camera* inspection were filed on September 12, 1994, and claimant's reply brief was filed on September 14, 1994.

In recent discovery orders, the Court has discussed the protection afforded by attorney/client privilege and the work-product doctrine. **Blount v. Conagra, Inc.**, WCC No. 9304-6769 (March 16, 1994); **Adels v. Cigna Insurance Co.**, WCC No. 9307-6831, Order Amending Prior Order Denying Motion to Compel, (March 10, 1994) and **Yager v. Montana Schools Group Insurance**, WCC No. 9308-6872 (March 14, 1994). The review herein has been conducted pursuant to the guidelines set out in those decisions and the Court will not engage in a document by document discussion of the reasons for its determinations.

Claimant has made a broad request for all of the withheld documents, focusing on the primary issues of the her entitlement to further medical care, temporary total disability benefits and total rehabilitation benefits as a result of the July 24, 1992 injury. (Claimant's Motion to Compel) Also at issue is the question of the penalty.

Respondent asserts that the documents requested are protected by the attorney/client privilege and/or work-product doctrines relying on the **Palmer v. Famers Insurance Exchange**, 261 Mont. 91, 861 P.2d 895; **Kuiper v. District Court**, 193 Mont. 452, 465, 632 P.2d 694 (1981) and **Cantrell v. Henderson**, 221 Mont. 201, 718 P.2d 318 (1986). As noted in **Adels**, supra, "These cases do not hold that work product protection never applies to insurers' claim files, only that it does not automatically apply." In **Burlington Northern v. District Court**, 239 Mont 207, 216, 779 P.2d 885 (1989), the Supreme Court noted that "no absolute rule can be formed to apply to every case" and that "a balance must be sought which requires appropriate disclosure of facts, without allowing a party to build its case on the other party's efforts." Again it is noted that the primary issue in this matter is the claimant's entitlement to benefits. This Court in **Adels v. Cigna Insurance Co.**, WCC No. 9307-6831, *Order Denying Motion to Compel; Order Bifurcating Issues* (February 16, 1994) held:

However, the claimant must prove his entitlement to benefits as a prerequisite to any penalty. Section 39-71-2907, MCA. His interest in the documents is therefore a contingent one which can be safeguarded by bifurcating the penalty issue from the underlying claims. Bifurcation is expressly countenanced in bad faith actions against insurers. It is permitted in any action brought by an insured "where justice so requires" and is mandatory in a third party action against an insurer. Section 33-18-242(6), MCA. While the cited section does not govern a request for a penalty under the Workers' Compensation Act, it does provide both a precedent and guidance for reconciling the conflicting interests presented in this case.

In the event petitioner prevails on her claim for benefits, the Court will again review the documents it has determined to be protected, order their disclosure if appropriate, and schedule an expedited hearing to resolve the penalty issue.

Two sets of documents, comprising approximately 275 pages were submitted to the Court. Respondent failed to include the following pages in Exhibit B-2: 219, 268, 294 and 382. These pages must be forwarded to the Court immediately. The hearing examiner has determined the status of each document as follows:

Exhibit B-2

Pages

135-136 Attorney/client privilege

158 Attorney/client privilege

219-220 Must be forwarded to the Court for review

227-229 Attorney/client privilege

251 Attorney/client privilege
254 Attorney/client privilege
256 Attorney/client privilege
260-261 Attorney/client privilege
268 Must be forwarded to the Court for review
292-293 Attorney/client privilege
294 Must be forwarded to the Court for review
378 Attorney/client privilege
380-381 Attorney/client privilege
382-383 Must be forwarded to the Court for review
384-387 Work product
437-439 Discoverable by claimant
453-454 Discoverable by claimant
476 Discoverable by claimant
481-482 Discoverable by claimant
503 Discoverable by claimant
507-509 Discoverable by claimant
555-557 Discoverable by claimant
561-562 Discoverable by claimant
588 Discoverable by claimant
594-596 Discoverable by claimant
633 Discoverable by claimant
638-639 Discoverable by claimant
664 Discoverable by claimant
669-669 Discoverable by claimant
684-685 Discoverable by claimant
705-706 Discoverable by claimant

742-743 Discoverable by claimant

753 Discoverable by claimant

759-760 Discoverable by claimant

822-823 Discoverable by claimant

830 Discoverable by claimant

834 Discoverable by claimant

842 Discoverable by claimant

852-853 Discoverable by claimant

942-943 Discoverable by claimant

977-979 Discoverable by claimant

1016 Discoverable by claimant

1030-1043 Work product

1044-1069 Discoverable by claimant

Exhibit C-2

1076-1077 Attorney/client privilege

1080-1082 Attorney/client privilege

1090 Attorney/client privilege

1112-1113 Attorney/client privilege

1127-1137 Attorney/client privilege

1138 Discoverable by claimant

1139 Attorney/client privilege

1141 Attorney/client privilege

1143-1144 Attorney/client privilege

1189-1190 Attorney/client privilege

1193-1194 Attorney/client privilege

1220-1223 Work product

1268-1274 Discoverable by claimant

1281-1282 Discoverable by claimant

1299-1300 Discoverable by claimant

1314-1321 Discoverable by claimant

1360-1364 Discoverable by claimant

1385-1391 Discoverable by claimant

1411-1412 Discoverable by claimant

1423-1424 Discoverable by claimant

1442-1444 Discoverable by claimant

1454-1460 Discoverable by claimant

1474-1480 Discoverable by claimant

1487-1489 Discoverable by claimant

1512-1513 Discoverable by claimant

1529-1537 Discoverable by claimant

1544-1545 Discoverable by claimant

1567-1569 Discoverable by claimant

1590 Discoverable by claimant

1605-1614 Discoverable by claimant

1620, 1639, 1646, 1653 & 1654 Irrelevant

1669 Discoverable by claimant

1672 Discoverable by claimant

1676 Irrelevant

1688-1708 Discoverable by claimant

1709 Information prior to date of 4/19/94 discoverable. Other information within document subject to work product.

1710-1717 Work product - attorney/client privilege

In summary, on or before September 30, 1994, respondent shall provide all of those documents identified as being "discoverable by claimant" to the petitioner.

Respondent shall also produce for an *in camera* inspection by the Court those pages of Exhibit B-2, numbered 219-220, 268, 294 and 382-383.

THEREFORE, IT IS HEREBY ORDERED that the claimant's motion to compel production is **granted** as to those specific documents which are identified in this Order , and is **denied** as to the remainder of the documents.

This Order is authorized by the Judge of the Workers' Compensation Court and signed at his direction.

DATED in Helena, Montana, this 23rd day of September, 1994.

(SEAL)

/S/ Clarice V. Beck
CLARICE V. BECK
Hearing Examiner

c: Mr. Thomas A. Marra
Mr. J. David Slovak