

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 27

WCC No. 9007-5883

WILLIAM T. CHAGNON

Petitioner

vs.

TRAVELERS INSURANCE COMPANY

Respondent/Insurer for

TILLEMANN MOTOR COMPANY

Employer.

ORDER REGARDING DISCOVERY

This case is before the Court following remand by the Supreme Court. The sole issue presented for determination is the amount of attorney fees and costs. Petitioner's claim for attorney fees and costs was submitted on August 30, 1991. It contained a one page single spaced itemization of costs and a 28 page enumeration of attorney hours. Respondent, Travelers Insurance Company (Travelers), objected to the claim.

In subsequent exchanges, petitioner's attorney has deleted numerous items from his claim. Nonetheless, the parties are still unable to agree on the amount due petitioner. Travelers has two principal objections to the hours listed by petitioner's attorney. First, it alleges that many of the hours were spent on unrelated matters or matters on which the petitioner did not prevail. Second, it alleges that some of the itemized time was in excess of a reasonable time necessary to perform the particular work.

In interrogatories propounded on November 8, 1993, the petitioner asked Travelers to specifically identify each time entry it alleges, (1) was not incurred on matters decided by this Court in its Findings of Fact and Conclusions of Law; (2) was not related to an issue on which petitioner prevailed; or (3) was in excess of the amount of time justified by the case. Petitioner also propounded four additional interrogatories which will be discussed later in this Order.

On November 29, 1993, Travelers served its answers to the interrogatories. Travelers objected to every interrogatory and provided little responsive information.

On December 7, 1993, petitioner filed a MOTION TO COMPEL OR DISMISS OR FOR SANCTIONS. The motion asks the Court to order Travelers to answer petitioner's interrogatories. In the alternative petitioner asks the Court to dismiss Travelers' objections to the fees and costs requested by petitioner, and thereby award petitioner fees and costs by default. Travelers has filed a brief in opposition to the motion. In that brief and its attachments, it has provided some of the specific information requested by the interrogatories.

As a general matter, the rules of discovery are "liberally construed to make all relevant facts available to the parties in advance of trial and to reduce the possibilities of surprise and unfair advantage. . . ." *Wolfe v. Northern Pacific Ry.*, 147 Mont. 29, 40, 409 P.2d 528 (1966). Interrogatories must be fully and fairly answered. ARM 24.5.323(4) expressly requires that each interrogatory be answered "fully". The rule permits objections to be made for "good cause," providing in relevant part: "Objections may be made because of annoyance, expense, embarrassment, oppression, irrelevance, or other good cause." *Id.* Objections must be signed by the answering party's attorney, *Id.* This latter requirement is important because the attorney's signature constitutes a certification by him or her that the objection is (1) well grounded in fact, (2) warranted by law, and (3) "not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Section 39-71-2914(3), MCA.

After reviewing the answers to interrogatories and the parties' briefs, the Court concludes that Travelers' objections have no substantial basis and that its answers to most of the interrogatories are unresponsive. The information provided in Travelers' brief demonstrates the insubstantial basis of its original answers and objections.

The interrogatories propounded by petitioner are aimed squarely at determining Travelers' contentions in this case. Interrogatory 1 asks:

In Defendant's Objection to Reasonableness of Attorney's Fees, page 2, the Defendant stated: "A substantial number of the hours claimed to have been incurred by Claimant's counsel were not incurred before the Workers' Compensation Court and in pursuit of the issues addressed by the Court's Findings of Fact and Conclusions of Law;"

Please identify by date and entry each and every item contained in Petitioner's Amended Time Records submitted to the Workers' Compensation Court by letter dated March 8, 1993, to which this objection specifically applies.

The questions in Interrogatories 2 and 3 are identical except Interrogatory No. 2 pertains to Travelers' assertion that "[c]laimant failed to prevail on a number of issues before this Court and thereby is not entitled to attorney's fees pertaining to those issues," and Interrogatory

No. 3 pertains to Travelers' assertion that "[t]he hours set out in Claimant's attorney's Affidavit are far in excess of those justified by this case."

Travelers's answer to the first interrogatory was:

Objection. Respondent objects to this Interrogatory on the grounds that it seeks the mental impressions of counsel for the Respondent contrary to Rule 26(b)(3), M.R.Civ.P. [See also the Montana Supreme Court's most recent decision on opinion work product set out in *Palmer v. Farmers Insurance Exchange*, Supreme Court Cause No. 91-523, decided October 18, 1992.] Without waiving said objection, Respondent will cite to Petitioner the often cited language from attorney fee cases by the Workers' Compensation Court which provides:

....

Respondent objects to every single entry listed by Petitioner's counsel that is contained on the attached Exhibit "A".

(The 'Exhibit "A"' referred to in the answer is a list of costs and time records of petitioner's attorney, as amended.(1)) In answer to both interrogatories 2 and 3 the Travelers states: "ANSWER: See answer to Interrogatory No. 1."

Travelers' contention that the interrogatories seek "mental impressions of counsel" is without merit. *Palmer v. Farmers Insurance Exchange*, 50 St. Rep. 1210 (Oct. 18, 1992), cited by Travelers as supporting the objection, concerned the production of documents protected by the attorney-client privilege or the attorney work-product doctrine. The documents were contained in an insurer's claim file, which the district court ordered the insurer to produce in response to a motion to compel production. The interrogatories in this case do not request production of documents and do not request Travelers to divulge the contents of any specific documents.

The "mental impressions" language invoked by Travelers is found in Rule 26(b)(3), Mont.R.Civ.P., which permits a party to obtain an opponent's trial preparation materials under extraordinary circumstances. The rule allows a court to order discovery of trial preparation materials but provides that in doing so "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." The rule applies only to the discovery of documents and tangible things. "The work product doctrine furnishes no shield against discovery by interrogatories or by deposition of the facts that the adverse party has learned or the persons from whom such facts are learned." *Eoppolo v. National Railroad Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1985).

Moreover, the attorney work-product rule and the protection against disclosure of "mental impressions" contained in attorney work-product documents, do not preclude a party from

inquiring into an opponent's contentions, even though the answer to the inquiry may necessarily require disclosure of opinions of fact or law. It is well established that "[a]n interrogatory may properly inquire into a party's contentions in the case and the factual basis thereof." *Continental Illinois National Bank & Trust v. Caton*, 136 F.R.D. 682, 684 (D. Kan. 1991) (applying the Federal Rules of Civil Procedure); accord, *Burke v. Superior Court of Sacramento County*, 455 P.2d 409, 415 (Cal. 1969) (applying California Rules of Civil Procedure). Rule 33(b), Mont.R.Civ.P. expressly contemplates interrogatories into a party's contentions, providing in relevant part:

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. [Emphasis added.]

While this Court has not adopted the Montana Rules of Civil Procedure, it has often looked to those rules for guidance when its own rules do not specifically address a procedural issue. The Supreme Court has expressly approved that practice. *Murer v. State Compensation Insurance Fund*, 257 Mont. 434, 436, 849 P.2d 1036 (1993).

One purpose of contention interrogatories is to eliminate noncontroversial matters and identify, narrow and clarify the remaining issues. *State ex rel. Road Commission v. Petty*, 412 P.2d 914, 917 (Utah 1966). "Interrogatories seeking to elicit what a party's contentions will be at the time of trial are not objectionable as the responses to these questions will help narrow the issues tried." *Leski, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 107 (D. N.J. 1989). Rule 33(b) of the Federal Rules of Civil Procedure, as amended in 1970, is identical to its Montana counter-part. Cases applying the rule have held that factual opinion and contentions may be elicited under the rule, and that "[m]ixed questions of fact and law and questions which seek to discover a party's legal theory based on the facts elicited from other interrogatories are permissible under Rule 33(b)." *Moore's Federal Prac. & Proc.*, ¶ 33.17[2.--1] at 33-84 to 33-85.

Interrogatories Nos. 1 through 3 in this case are within the contemplation of the discovery rules. The identification of the specific time entries to which Travelers objects will aid and expedite the resolution of the attorney fees issue. The interrogatories do not seek privileged information, and they should be fully and fairly answered. Travelers's quotation of language from a prior decision of the Workers' Compensation Court is unresponsive and does not identify what items are contested. Its assertion in the last sentence of its answer (objecting "to every single entry listed by Petitioner's counsel") is disingenuous. If accepted at face value, the objection means that Travelers is contending that petitioner's attorney is entitled to no compensation whatsoever for the work he performed. Travelers' arguments in its brief are inconsistent with such a position.

In discussing Interrogatory No. 1, in its brief Travelers identifies a number of issues upon which petitioner did not prevail, and then states:

Since Petitioner's counsel did not prevail on these fundamental issues, then he is not entitled to 100% reimbursement for the time spent pursuing Petition No. 9007-5883. *Roberts v. Buttrey Foods*, supra, at pp. 6-7. Accordingly, the time that Petitioner's counsel has submitted must be reduced, in total, to reflect that fact. For example, Petitioner's counsel submits 32.9 hours for work performed on proposed findings of fact, conclusion of law and a supporting brief. Given the fact that Petitioner's counsel prevailed on about 40% of the issues submitted, the 32.9 hours should be reduced accordingly to reflect this fact. The same reduction should automatically be applied to all of the time submitted by Petitioner's counsel. However, this does not include a further reduction for proposed time spent by Petitioner's counsel on side issues which were unsuccessfully pursued or on issues that were raised by Respondent [Travelers], where Respondent [Travelers] was successful.

(Travelers' Brief at 5-6, emphasis added.) Then Travelers goes on to identify examples of time entries for work relating solely to unsuccessful issues. Travelers also provides examples of what it contends were "inflated time". It attaches a copy of petitioner's amended time records, which has been highlighted by Travelers' expert witness to "reflect his opinion that those submitted services are not recoverable." (Travelers's Brief at 10-11 and Ex. 1.)

The information provided by Travelers in its brief is the type of information sought by petitioner. However, it is incomplete. Interrogatories Nos. 1 through 3 require Travelers to identify each time entry to which it objects. It must therefore supplement its answer to provide all the information that is requested.

In Interrogatory No. 4 petitioner asks Travelers to list all of the arguments and law supporting its contention that petitioner's attorney is only entitled to fees based on the difference in the amount awarded petitioner and Travelers' outstanding offer. Travelers republishes its answer to Interrogatory No. 1, then lists nearly five pages of case citations. However, since the information requested by this interrogatory is more appropriately addressed in legal briefs, the Court will not order Travelers to further answer the interrogatory.

There is no Interrogatory No. 5.

Interrogatory No. 6 asked in relevant part:

...

Please indicate whether or not the Defendant accepts the Montana Supreme Court Order herein as res judicata to this supposed issue and, if not, please specify each and every statute or case law authority upon which Defendant will rely in support of Defendant's position.

As with Interrogatory No. 4, the matter addressed by this interrogatory is best left to the parties' legal briefs. No further answer is necessary.

Finally, Interrogatory No. 7 asked:

Does the Defendant deny receiving "Claimant's Answers to Insurer's Interrogatories to Claimant" in Workers' Compensation Division # 2-86-02762-8 dated March 16, 1988?

Travelers replied:

ANSWER: Objection. The Workers' Compensation Procedural Rules do not contain a provision for a request for admission. Interrogatory No. 7, as submitted, is a request for admission and is therefore improper. Without waiving said objection, Respondent [Travelers] states that the Court file containing all relevant pleadings and discovery speaks for itself.

This type of hyper-technical response is contrary to the spirit of the discovery rules and is unacceptable. The interrogatory asks if a document was received by Travelers. Its phraseology may appear to be a request for admission but the information it seeks is properly sought through an interrogatory. Referring petitioner to the Court file does not answer the question. Travelers shall answer this question directly and fairly.

THEREFORE, IT IS HEREBY ORDERED THAT on or before January 14, 1994, Travelers shall supplement its answers to Interrogatories Nos. 1, 2, 3 and 7. The supplementary answers shall fully and fairly respond to those interrogatories.

DATED in Helena, Montana, this 30th day of December, 1993.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim

Mr. Thomas A. Marra

1. The original record of attorney hours consisted of 28 pages, reflecting 546 total hours. Petitioner later filed an amended record consisting of 19 pages and reflecting 366 total hours.