

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 10

WCC No. 9007-5883

WILLIAM CHAGNON

Petitioner

vs.

TRAVELERS INSURANCE COMPANY

Respondent/Insurer for

TILLEMAN MOTOR COMPANY

Employer.

ORDER ON MOTION TO COMPEL OR DISMISS

The parties in this action are at present litigating the amount of the attorney fee due petitioner as a result of his successful prosecution of the underlying case. Initially, petitioner sought fees of \$125 an hour for 546 hours. (August 29, 1991 Affidavit of Randall O. Skorheim with attached time records.) On March 8, 1993, Mr. Skorheim submitted revised time records for 366 hours of work, reflecting his deletion of time spent on "proceedings before the Division, proceedings regarding repayment of temporary total disability, and time having to do with vocational experts." (Skorheim letter of March 8, 1993.) Respondent objected to the fees, asserting they are unreasonable, and requested an evidentiary hearing.

The matter before the Court is petitioner's MOTION TO COMPEL OR DISMISS. The motion arises out of petitioner's requests for production of billing statements, time and expense records, and payment records for work performed by respondent's counsel in this case. Respondent objected to the requests on the grounds of the attorney-client and attorney work product privileges. It also objected on the ground that "[t]he discovery of this information would not lead to admissible evidence."

It is apparent from the supporting memorandum filed by the petitioner that he seeks this information because respondent has asserted that the time spent by its attorney in defending this case is evidence of the unreasonableness of time spent by petitioner's attorney. Petitioner points to the following statement contained in DEFENDANT'S

OBJECTION TO THE REASONABLENESS OF ATTORNEYS' FEES at page 9 as making the attorney fee records of respondent's attorney an issue in the case.

Attorney for the Defendant has reviewed his own hours in this case and they come to less than 300. As with Claimant's attorney, a substantial portion of the hours incurred by Defendant's attorney were for the prosecution of the Petition before the Department of Labor and Industry. As previously noted, the Defendant was successful in the prosecution of this Petition and the record will reveal that the Defendant, not the Claimant's attorney, did the bulk of the work to successfully prosecute the claim.

Defendant asserts that where there is such a vast difference in the number of hours incurred by one party versus the other party in such a case that a question exists as to the validity of time spent by the party whose hours are far in excess of the other party's. It is difficult for the Defendant to imagine how the Claimant's attorney could have almost twice the number of hours in this case.

In DEFENDANT'S ANSWER BRIEF TO CLAIMANT'S MOTION TO COMPEL OR DISMISS the respondent argues that the fees of its counsel are irrelevant to any determination of reasonableness of the fees sought by petitioner:

. . . In none of the cases cited above or reviewed is there any reliance by this Court or the Supreme Court upon the hourly rate of the attorney representing the Defendant or the fees that the attorney for the Defendant charged his or her client. Quite simply, the fees charged by defense counsel do not appear to be a relevant factor in determining what fees the Workers' Compensation Court chooses to award a Claimant's attorney. Since this Court has decided a multitude of attorney fee award cases, as has the Montana Supreme Court, and has not considered the Defendant's fees and hourly rate to be a relevant factor to consider in their respective decisions, then it is logical to conclude that the discovery of this information would not lead to admissible evidence.

ANSWER BRIEF at 6.

It is not clear whether respondent is arguing that all evidence concerning the work of its counsel, including the time spent, is irrelevant and inadmissible, or merely arguing that the hourly rate and total amount of the fee should be excluded. If respondent is asserting that all evidence of the work and fees of its attorney is irrelevant, then petitioner's MOTION TO COMPEL OR DISMISS should be denied and all evidence and argument concerning those matters will be excluded at trial. If, however, the respondent is arguing that only the amount of its counsel's hourly rate and total fees are irrelevant, and it intends to offer at trial any evidence of the hours and/or work performed by its counsel, then it must produce all documents regarding time and billing records for work performed by its attorney.

Therefore, IT IS ORDERED that if respondent intends to offer at trial any evidence concerning the time spent and/or work performed by its attorneys in this case, then within

two weeks of this order the respondent shall produce and permit petitioner to inspect and copy all time records and itemized billing statements of its attorneys for work they performed in connection with this case. In the event respondent fails to produce the time and billing records, then it shall be precluded from introducing any evidence of time spent and work performed by its attorneys, and shall in any event be precluded from introducing any evidence concerning the fees or hourly rates charged by its attorneys in this case.

DATED in Helena, Montana, the 28th day of October, 1993.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim
Mr. Thomas A. Marra