

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 12

WCC No. 9302-6710

MICHAEL J. DAMBROWSKI

Petitioner

vs.

CHAMPION INTERNATIONAL

Respondent/Employer.

ORDER REGARDING TESTIMONY OF WILLIAM R. GOODRICH

The matters before the Court are various objections raised at trial by petitioner's counsel regarding testimony by William R. Goodrich. The Court reserved rulings on the objections and permitted Mr. Goodrich to testify. It invited the parties to submit post-trial briefs concerning the objections and indicated it would not consider any testimony to which an objection is ultimately sustained. The parties have submitted their briefs and the matter is now ripe for decision.

William Goodrich is a vocational rehabilitation consultant and was called on behalf of Champion International, which was both the employer and self-insurer under Plan I of the Workers' Compensation Act. Mr. Goodrich was called to testify concerning petitioner's claim of lost earning capacity. During his examination, petitioner objected to certain testimony. Initially he objected to testimony concerning the affect of ADA (the Americans With Disabilities Act) on labor market access. During colloquy with counsel it became clear that petitioner was objecting to any testimony concerning the foundation or basis for Mr. Goodrich's ultimate opinion concerning earning capacity. That foundational information was not provided in answer to an expert witness interrogatory. Petitioner expanded his objection after Mr. Goodrich identified materials he had reviewed and the analysis he had performed in reaching his opinions. Again, the basis of the objection was the failure of Champion to provide the information in advance of the trial. Petitioner's counsel ultimately interposed a general objection to testimony documents not specifically identified in response to discovery, including Mr. Goodrich's testimony as to the dollar amounts of petitioner's pre-injury and post-injury earning capacities.

The issue framed by the petitioner in his post-trial brief is:

Whether the court should exclude the vocational testimony of William Goodrich to the extent that such testimony includes opinions or foundational information which Defendant did not provide Petitioner in answer to Interrogatory No. 20.

The complete text of the interrogatory and its answer is as follows:

INTERROGATORY NO. 20: As to any of the individuals named in the preceding Interrogatory, state as to those witnesses who are expected to testify at the time of trial: the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER: Mr. Goodrich has reviewed the medical and factual record and studied the situation, arriving at opinions concerning the Claimants [sic] employment opportunities. He believes that the Claimant has not suffered an actual loss of present earning capacity. He does not believe that the 1987 injury precluded the Claimant from working at any position at Champion that Claimant would have pursued or have been entitled or capable of holding.

Mr. Goodrich may have other opinions and Employer will make him available for deposition at the Claimants [sic] convenience.

Ultimately, Mr. Goodrich testified to the ultimate opinions identified in answer to the interrogatory, expressing his opinion that petitioner presently has the ability to earn more, both as an employee of Champion and in employment outside of Champion, than he was earning at the time of his injury. Along the way, Mr. Goodrich provided testimony concerning the basis of those ultimate opinions, including his consideration of ADA. He also gave some intermediate opinions, such as the petitioner's earning capacity in specific dollars per hour both before and after the injury. Based on the trial colloquy with counsel, as well as the petitioner's brief, it does not appear that petitioner objects to Mr. Goodrich rendering his ultimate opinion that there was no loss of earning capacity, but rather objects to testimony regarding the foundation for that opinion and to testimony regarding any intermediate opinions reached in arriving at his ultimate opinion.

Respondent's answer to the expert witness interrogatory is sketchy at best. In general terms it identifies the subject matter of Mr. Goodrich's testimony and his ultimate conclusions, but it certainly does not recite intermediate opinions or the facts or grounds on which Mr. Goodrich based his opinions. If the petitioner filed a pretrial motion to compel a more complete answer, the Court would undoubtedly have granted it.

However, after considering all of the circumstances of this case, we have determined that the petitioner's motion should be denied.

Petitioner cites numerous Montana Supreme Court cases in support of his contentions that Mr. Goodrich's testimony should be excluded. Most of those cases, however, are instances

where the opposing party failed to identify the expert at all when responding to discovery. E.g., ***Miranti v. Orms*, 253 Mont. 231, 833 P.2d 164 (1992)**; ***Tacke v. Vermeer Manufacturing Company*, 220 Mont. 1, 713 P.2d 527 (1986)**; ***United First Federal Savings and Loan Association v. White-Stevens, LTD. and Thomas Stevens*, 253 Mont. 242, 833 P.2d 170 (1992)**; ***Smith v. Babcock*, 157 Mont. 70, 482 P.2d 1014 (1971)**. In other cases the identity of the expert was disclosed but the subject matter of his or her testimony was not, and the testimony is therefore excluded. E.g., ***Billings Clinic v. Peat Marwick Main & Co.*, 244 Mont. 324, 797 P.2d 899 (1990)**. In this case, however, the respondent identified the expert and the subject matter of his testimony, at least in general terms, including the expert's ultimate opinion regarding earning capacity. The cases cited by petitioner, as well as the ***Billings Clinic*** case, are therefore inapposite.

In two recent cases the Montana Supreme Court has considered the exclusion of expert witness testimony where the information furnished is incomplete but nonetheless identifies the expert and the general nature of his proposed testimony. The cases are ***Montana Power Company v. Wax*, 244 Mont. 108, 796 P.2d 565 (1990)** and ***Scott v. Dupont De Nemours & Co.*, 240 Mont. 282, 783 P.2d 938 (1989)**. In ***Wax*** the Court affirmed a trial court decision excluding expert testimony. In ***Scott*** the Court affirmed a District Court decision allowing such testimony. While the Court has not established a bright line distinguishing the two cases (the ***Wax*** decision does not mention or discuss ***Scott***), both opinions indicate that it is within the trial court's sound discretion to determine whether to admit the testimony. As noted in ***Scott***, refusing to allow the expert testimony is "an extreme sanction" when the "defendant's offense was incompleteness in its answers to interrogatories not failure to answer."

Pretrial discovery rules require "broad disclosure of knowledge of the case on the part of all parties." ***Smith v. Babcock*, 157 Mont. at 92**. In the words of the Montana Supreme Court, "The days of disclosure are here." ***United First Federal Savings and Loan Association v. White-Stevens, LTD. and Thomas Stevens*, 253 Mont. at 248**. In the context of expert witnesses, the purpose of that disclosure is to provide opposing counsel with the opportunity to prepare for cross-examination and to obtain rebuttal experts. ***Smith v. Babcock*, 157 Mont. at 92**. We will therefore look at the circumstances in this case to determine if the incomplete interrogatory answer created undue surprise or unfairly restricted petitioner's ability to cross-examine Mr. Goodrich.

We conclude that petitioner was not unduly surprised by Mr. Goodrich's testimony and that his ability to cross-examine Mr. Goodrich was not substantially prejudiced. Vocational experts frequently appear in the Workers' Compensation Court. Petitioner's counsel, Rex Palmer, is experienced in workers' compensation matters and has previously taken the deposition of Mr. Goodrich in ***Gerlach v. Champion International, WCC No. 9007-5873***. Indeed, in the ***Gerlach*** case Mr. Goodrich was paired off against Norman Johnson, the vocational expert also used by Mr. Palmer in this case. At the commencement of trial of

this matter, Mr. Palmer indicated that the parties had contemplated submitting the depositions of Mr. Goodrich and Mr. Johnson taken in the previous case, presumably the **Gerlach** case. In his cross-examination of Mr. Goodrich, petitioner's counsel demonstrated that he was familiar with Mr. Goodrich and with the facts upon which Mr. Goodrich based his opinion. He conducted a skilled and effective cross-examination.

Petitioner also had ample time and opportunity to seek further information concerning Mr. Goodrich's testimony. Respondent's answers to interrogatories were served April 23, 1993. The trial was held on September 21 and 22, 1993, five months later. Petitioner was aware of respondent's tender of Mr. Goodrich for deposition but neither sought to depose Mr. Goodrich nor moved to compel a more complete answer to his interrogatory. The circumstances leading up to the objection suggest that petitioner was not surprised by Mr. Goodrich's testimony but rather was "laying in wait to object at the time of trial," **Montana Power Company v. Roberta Wax, 244 Mont. at 109**. Petitioner's arguments concerning the inadequacy of answers to the interrogatory are well taken. Nonetheless, the extreme sanction requested by the petitioner is unwarranted under the circumstances.

In overruling the petitioner's objections to Mr. Goodrich's testimony, the Court does not intend to approve or condone incomplete answers to expert interrogatories or to any other interrogatories. The Court expects full and complete disclosure by all parties and will enforce the rules requiring such disclosure.

IT IS HEREBY ORDERED, for the foregoing reasons, that the petitioner's motion to exclude expert testimony of William Goodrich is **DENIED**.

DATED in Helena, Montana, the 29th day of October, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Rex Palmer
Mr. Bradley J. Luck