IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 17

WCC No. 2000-0249

HARRY DARRAH

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

ORDER STRIKING WITNESSES

Summary of case: Petitioner previously moved, successfully, to strike respondents motion for summary judgment as untimely (it was three days late). Respondent now moves to prohibit expert testimony by a physician and two vocational experts on the ground that petitioner's disclosure did not comply with the Court's scheduling order.

Held: The motion is granted. The doctor may, however, testify as to opinions set forth in medical records timely disclosed to respondent.

Topics:

> **Procedure: Scheduling Order.** Failure to comply with expert disclosure requirements in the Scheduling Order will result in preclusion of the expert testimony.
>
> **Witnesses: Experts: Disclosure.** Failure to comply with expert disclosure requirements in the Scheduling Order will result in preclusion of the expert testimony.

¶1 On January 15, 2001, the respondent in this case served and filed a Motion for Summary Ruling. Petitioner moved to strike the motion because it was three days late under the Court's scheduling order. Applying the deadlines fixed in the scheduling order, I struck the motion. (Order Denying Motion for Summary Ruling (January 24, 2001.))

¶2 Now the shoe is on the other foot. Respondent moves to preclude expert opinions of three of petitioner's experts because the experts and their opinions were not "sufficiently or timely disclosed." (Motion to Strike Expert Opinions of Dr. Patrick Walton and Petitioner's Vocational Expert at 1.)

¶3 The original deadlines for expert disclosure are long past, however, on February 1, 2001, petitioner moved to vacate the trial. One of the reasons advanced in support of the motion was, "Petitioner's counsel wishes to add an expert witness and believes it important that petitioner be allowed to present testimony in regard to issues pending before the Court." (Request to Vacate and Reset Trial Date at 1.) There was no opposition to the motion, therefore the Court granted it and issued a new Order Resetting Scheduling Order setting the following deadlines and requirements with respect to identification of expert witnesses:

2) IDENTIFICATION OF WITNESSES: On or before March 30, 2001, the parties shall exchange a list of:

> a) the names of all witnesses, including expert witnesses, not already identified in the pleadings, along with a summary of the subject matter of their testimony;
>
> b) the names of all expert witnesses, 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 of the expert's opinions; and

(Order Resetting Scheduling Order (February 1, 2001).)

¶4 On March 26, 2001, claimant filed a list of exhibits and witnesses. However, he failed to provide the information required in 2 (b). The information furnished with respect to Dr. Walton and the petitioner's vocational experts was as follows:

> Dr. Patrick Walton - Matters regarding treatment of Petitioner and opinion concerning ability to work.
>
> Mark Schwager - Matters regarding his on-site job analysis.
>
> Kathy Kleinkopf - Matters regarding Petitioner's future potential earning capacity in alternative employments.

(Petitioner's List of Witnesses and Exhibits (March 26, 2001).) On its face, the disclosure does not comply with the Scheduling Order.

¶5 Petitioner does not argue that his disclosure complied with the Court's Order, rather he argues that had respondent requested additional information he would have provided it. Petitioner's Response To Motion to Strike Expert Testimony. He also asserts that counsel could have obtained the information through interrogatories and depositions. He offers to "supplement" his disclosure.

¶6 I am unsympathetic to petitioner's arguments. Where counsel play hardball, the Court has no choice but to enforce the letter of its rules and orders. Petitioner successfully invoked the deadlines in the scheduling order to obtain this Court's Order denying

respondent's initial motion for summary ruling as untimely. There is an old saying that he who lives by the sword dies by the sword.

¶7 The disclosure concerning opinions of the vocational experts is inadequate, therefore they are barred from expressing opinions should they testify. Dr. Walton was apparently claimant's treating physician and his records should have been disclosed pursuant to paragraph (3) of the scheduling order and Rule 24.5.317(1) of the Workers' Compensation Court's Rules. To the extent that such records were timely disclosed and contain opinions made during the course of treatment, the disclosure is adequate and the doctor may testify. However, he may not testify as to opinions not set forth in medical records which were not timely disclosed.

ORDER

¶8 Based on the foregoing discussion, both Kathy Kleinkopf and Mark Schwager are prohibited from giving expert opinion testimony in this case. Dr. Walton's opinions shall be limited to those expressed in records timely furnished to the respondent.

DATED in Helena, Montana, this 20th day of April, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Todd A. Hammer