

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 42

WCC No. 2003-0782

RANDY DIETRICH

Petitioner

vs.

LIBERTY MUTUAL INSURANCE COMPANY

Respondent/Insurer.

ORDER GOVERNING SEQUENCE OF DISCOVERY

Summary: Respondent insurer seeks order precluding production of statements taken of the claimant's supervisors and co-employees, as well as the depositions of those supervisors and co-employees, until claimant is deposed. The motion is made following accusations and counter-accusations of lying by claimant, who claims he was injured at work, and the supervisors and co-employees, who claim that he was not.

Held: Claimant provided a written statement concerning the alleged accident and the insurer had an opportunity to take a recorded statement from him prior to its denying the claim but it failed to do so. Under those circumstances the Court finds no justification for deferring production of the recorded statements of supervisors and co-employees. However, since each party insists on taking depositions in a particular order, and there is a likelihood that there will be a race to issue deposition notices, the Court will intervene and dictate the order and rules for depositions. To set a level playing field, depositions of claimant, supervisors, and co-employees shall be taken sequentially on a single day, a supervisor designated by claimant to be deposed first, followed by claimant, then the others. Witnesses and attorneys are barred from discussing the testimony of any witness with any other witness who has not already testified.

Topics:

Discovery: Sequence. While the rules of the Workers' Compensation Court provide for limited discovery, they do not provide for control over the sequence of discovery. However, Rule 26(d), Mont.R.Civ.P., which permits district courts to control the sequence of discovery, provides guidance and is adopted and applied in a case where the parties disagree as to discovery sequence and the sequence.

¶1 Respondent, Liberty Mutual Insurance Company (Liberty), moves for an order compelling claimant to submit to a deposition prior to disclosure of recorded statement of co-employers and depositions of co-employees.

Factual Background

¶2 The following facts have been gleaned from the pleadings, the parties briefs, an Affidavit of Christine J. Stobb (Stobb), and attachments to the Stobb Affidavit:

¶2a Claimant is alleging he injured his finger at work on or about November 1, 2002.

¶2b Claimant went to the emergency room for treatment of his finger. In a written statement provided in late December 2002 to his employer, claimant admitted that he told ER personnel, "I got it [the injury] in the fan on my vehicle on my way to work" and that he had originally intended to file for unemployment benefits rather than workers' compensation benefits. In his statement he further said that he was actually injured during work and that co-employees at work were aware that he was injured at work. "Everyone was aware of the accident on location [at work], as far as tool pusher and crew [i.e., co-employees]." (Exhibit B to Affidavit of Christine J. Stobb.)

¶2c On January 3, 2003, claimant, through his attorney, offered to submit to a recorded statement to be taken by Liberty. The only conditions put on providing such statement was that his attorney be present. He also requested that Liberty provide transcripts of recorded statements given by other witnesses. (Ex. C to Affidavit of Christine J. Stobb.)

¶2d Liberty interviewed and obtained recorded statements from five co-employees.

¶2e On February 17, 2003, without interviewing claimant, Liberty notified claimant's attorney that it was denying the claim based on the statements of the co-employers but advised it would continue to investigate and intended to contact claimant for an interview. (Ex. D to Affidavit of Christine J. Stobb.)

¶2f Claimant then refused to be interviewed unless provided with transcripts of other recorded statements. (Exs. E, F to Affidavit of Christine J. Stobb.)

¶2g This litigation ensued.

¶2h Claimant propounded a request for production seeking transcripts of the recorded statements. Liberty demurred, responding that it would provide the recorded statements only after deposing the claimant. It then moved for a order compelling claimant's deposition before production of the interviews. (Motion to Compel and Request for Protective Order.)

Discussion

¶13 The rules of the Workers' Compensation Court provide for the issuance of orders limiting discovery. Rule 24.5.325 provides:

24.5.325 LIMITING DISCOVERY (1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (a) that the discovery not be had;
- (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) that discovery be conducted with no one present except persons designated by the court;
- (f) that a deposition after being sealed be opened only by order of the court;
- (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(2) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

The respondent's motion, however, does not seek to limit or restrict discovery, rather it requests the Court to control the timing and sequence of discovery.

¶14 This Montana Rules of Civil Procedure has a more apropos rule governing the timing and sequence of discovery. Rule 26(d), Mont.R.Civ.P., provides:

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

This Court has no counterpart, however, as in past cases, it looks to the Rules of Civil Procedure for guidance when its own rules are silent. See *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 849 P.2d 1036, 1037 (1993).

¶15 I find it appropriate to invoke the authority granted by the Rule 26(d). Accusations of "lying" are flying fast and furious in this case. Liberty obviously does not believe claimant's assertion that he was injured on the job and the claimant's own handwritten statement submitted to the employer in December 2002, amounts to an admission that he initially lied about the injury. Claimant on his part asserts that his supervisors at work "have purposely provided false statements." (Petition for Hearing, ¶ 6.)

¶16 Liberty asserts that claimant refused to be interviewed unless he was first provided with copies of co-employees statements. That is only partially true. He offered to be interviewed prior to Liberty's taking of the other statements. (Ex. C to Affidavit of Christine J. Stobb.) Only after Liberty had taken the other statements and denied his claim without even interviewing him did he insist on copies of the statements as a condition of his giving an interview. Moreover, he submitted a written statement which clearly states his contention that he was injured at work and co-employees were aware that he was injured at work. Under these circumstances, I see no justification for deferring the production of the statements. Indeed, I am bewildered why Liberty did not take claimant's statement prior to its denial. Its obligation to fully and fairly investigate his claim would seemingly require it to have done so. Once it denied the claim based on co-employee's statements, the die was already cast.

¶17 The order of depositions is another matter. Apparently both parties believe it will be to their advantage to get the first crack at depositions. As noted, Liberty is seeking to depose claimant first. Claimant's attorney, on his part, notified Liberty that he "fully intend[s]" to take the deposition of two or three of the claimant's supervisors before permitting deposition of his client. (Ex. F to Affidavit of Christine J. Stobb.) To date, the Court has received no notices of deposition but it is likely that if the Court does not step in to control the order of those depositions there will be a race to issue and file deposition notices without the usual courtesy and cooperation between counsel when scheduling depositions.

¶18 In light of the allegations and counter-allegations of lying, I find that justice will best be served by requiring the depositions of claimant, supervisors, and co-employees take place sequentially on a single day to be arranged between counsel. Only the parties, their attorneys, the witness being deposed, and the court reporter shall be present during each deposition. After deposing a witness, the attorneys shall be prohibited from discussing testimony given by the witness with any another witness who has not yet testified. Once a witness testifies, he or she is prohibited from discussing his or her testimony with any witness who has not already testified. Violation of this directive shall be punishable by contempt. **A copy of this Order, with the foregoing two sentences highlighted in yellow, shall be provided jointly by counsel to each witness and brought to his or her attention.** Finally, to provide both parties a level playing field, the first deposition shall be

of a supervisor or co-employee designated by claimant. The next deposition shall be of claimant. The remaining depositions shall be in any order designated by the claimant.

¶9 SO ORDERED.

DATED in Helena, Montana, this 13th day of June, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Ms. Carrie L. Garber

Submitted: June 11, 2003