IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 55

WCC No. 2000-0023

CHARLES FISCH, individually and on behalf of others similarly situated,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

DRY CREEK EXCAVATION,

Employer.

ORDER COMPELLING DISCOVERY

Summary of Case: Claimant seeks payment for past domiciliary care. He propounded interrogatories asking for the rates paid by the State Fund for domiciliary care. The State Fund filed untimely objections to the interrogatories and he moved to compel answers. Later, he filed a request for production for documents showing the manner in which domiciliary care rates were set for the five highest and lowest rates and the five median rates. The State Fund moved for a protective order, objection on relevance and privacy grounds.

Held:

(1) Where a party fails to timely object to discovery, its objections shall generally be deemed waived except as to materials that a non-party has a privilege or constitutionally protected interest. Whether the doctrine should be extended to personal privileges of a party, the Court reserves judgment. Further, even though objections are waived, the Court will not compel answers to patently irrelevant, wholly improper, or patently burdensome and onerous discovery. Here the information sought is simply rates: no privilege or private information is requested. Rate information sought prior to claimant's injury patently irrelevant and need not be produced. Claimant is entitled to the cost of his care, § 39-71-1107(1), MCA, which is best determined by looking at rates charged for similar care in the communities where claimant resided, but the discovery might possibly lead to some comparisons and in light of the lack of an objection, the Court declines to analyze the relevancy of the information further. State Fund ordered to answer interrogatories.

(2) Individual claimants receiving domiciliary care have a constitutional right of privacy that may be overcome only by a compelling state interest. There is no public right to know at stake here, so the Court need not balance the public's right to know against the right of privacy. *Montana Health Care Assoc. v. Montana Board of Directors of State Fund Compensation Mutual Ins. Fund,* 256 Mont. 146, 845 P.2d 113 (1993) and *Mountain States Telephone and Telegraphy v. Dept. of Pub. Serv. Reg.,* 194 Mont. 277, 634 P.2d 181 (1981) are inapposite. Claimant has failed to show any compelling interest in information pertaining to other claimants. The cost of domiciliary care can be established through the rates charged by private companies and individuals who provide the care. Therefore, claimant is not entitled to any information relating to individual claimants. However, since it is possible that domiciliary care might not be readily available and priceable, the rates might provide parameters for fixing a rate in this case and the requested documents may conceivably lead to admissible evidence. State Fund ordered to produce the documents in redacted form, redacting any information that could by any means be used to identify individual claimants.

Topics:

Discovery: Compelling Discovery. Where a party fails to timely object to discovery, its objections shall generally be deemed waived except as to materials that a non-party has a privilege or constitutionally protected interest. Whether the doctrine should be extended to personal privileges of a party, the Court reserves judgment. Further, even though objections are waived, the Court will not compel answers to patently irrelevant, wholly improper, or patently burdensome and onerous discovery. Here, information sought by interrogatories involved rates paid for domiciliary care, raising no issues of privilege or privacy regarding rates paid in institutional setting. Rate information regarding individual claimants receiving domiciliary care did raise privacy interests, requiring redaction of identifiers of particular individuals. Rate information prior to claimant's injury was patently irrelevant and need not be produced.

Discovery: Interrogatories. Where a party fails to timely object to interrogatories, its objections shall generally be deemed waived except as to materials that a non-party has a privilege or constitutionally protected interest. Whether the doctrine should be extended to personal privileges of a party, the Court reserves judgment. Further, even though objections are waived, the Court will not compel answers to patently irrelevant, wholly improper, or patently burdensome and onerous discovery. Here, information sought by interrogatories involved rates paid for domiciliary care, raising no issues of privilege or privacy regarding rates paid in institutional setting. Rate information prior to claimant's injury was patently irrelevant and need not be produced.

Discovery: Objections to Discovery. Where a party fails to timely object to discovery, its objections shall generally be deemed waived except as to materials that a non-party has a privilege or constitutionally protected interest. Whether the doctrine should be extended to personal privileges of a party, the Court reserves judgment. Further, even though objections are waived, the Court will not compel answers to patently irrelevant, wholly improper, or patently burdensome and onerous discovery.

Discovery: Requests for Production. Where individual claimants receiving domiciliary care have a constitutionally protected privacy interest in medical information, insurer ordered to produce information about rates paid to domiciliary care providers with identifiers of recipients redacted.

¶1 Before the Court are cross-motions by the parties regarding discovery. Claimant, who is seeking payment for domiciliary care, moves to compel answers to interrogatories requesting the State Compensation Insurance Fund (State Fund) to provide information regarding wages it pays to domiciliary care attendants in other cases. State Fund moves for a protective order barring the request for production regarding domiciliary care rates on grounds that the information is privileged and irrelevant. The amount of paper expended by counsel in briefing the matter would make a small but nice fire on a cold evening.

Nature of the Controversy

¶2 This is an accepted claim. The claimant suffered severe spinal cord injuries in a July 9, 1998 automobile-train accident and there is no dispute that he needs some degree of home assistance. In an earlier telephone conference with counsel, I was informed that domiciliary care is presently being provided to claimant by WestMont, which is an institutional home health care provider, and paid for by the State Fund. However, the parties cannot agree on the amount due for past domiciliary care furnished by a private party. Claimant asks the Court to fix the rate.

The Discovery

¶3 Two sets of discovery are at issue. The first set was served February 29, 2000, and answered on March 29, 2000. Interrogatories 7 and 8 of that set are at issue here. State Fund interposed objections to the interrogatories:

INTERROGATORY NO 7: Please state the per hour rate that you are paying for **domiciliary** care of permanently, totally disabled claimants from the year 1993 to present.

RESPONSE: Objection. Relevance. The hourly rate paid for domiciliary care of permanently totally disabled claimants is determined on a case by case basis. The rate depends upon the location of the claimant's home, the type of care required,

availability of care from a home health agency and other factors individual to each particular claim.

INTERROGATORY NO 8: Please identify by list, all domiciliary care per hour payments made by the State Compensation Insurance Fund for permanently totally disabled claimants.

RESPONSE: Objection. Relevance. The hourly rate paid for domiciliary care of permanently totally disabled claimants is determined on a case by case basis. The rate depends upon the location of the claimant's home, the type of care required, availability of care from home a health agency and other factors individual to each particular claimant.

(Petitioner's Motion to Compel Discovery and Brief in Support at 2; emphasis added.) In its response to the motion to compel, the State Fund also argues that the information sought is privileged.

¶4 A second set of discovery requests were served July 12, 2000, and answered July 19, 2000. That set consists of a single request for production, to which the State Fund objected:

REQUEST FOR PRODUCTION NO. 5: Please produce complete copies of all documents prepared by State Compensation Insurance Fund employees in calculating the dollar value of domiciliary care benefits currently provided to: 1) the five permanently totally disabled claimants receiving the highest amount per hour of domiciliary care benefits; 2) the five permanently totally disabled claimants receiving the median per hour amount of domiciliary care benefits; and 3) the five permanently totally disabled claimants receiving the lowest amount per hour of domiciliary care benefits. It is not necessary that these documents in any way identify the identity of the benefit recipients.

RESPONSE: Objection. Relevance. In addition, the State Fund objects because answering the discovery constitutes an unreasonable invasion of privacy.

(Petitioner's Motion to Compel and Brief in Support and Response to Respondent State Fund's Motion for Protective Order at 2.)

Discussion

I. The Interrogatories

¶5 Claimant argues that the State Fund waived its objections to the interrogatories by failing to answer them in timely fashion.

¶6 Rule 24.5.323 required that the State Fund serve its answers and any objections to the interrogatories within 20 days. The Rule provides in relevant part:

. . .

(2) The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 20 days after the service of the interrogatories, unless the court lengthens or shortens the time. In no event shall answers be due in less than 30 days from the service of the petition.

. . .

(7) Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer. . . .

The interrogatories were served February 28, 2000. Adding three days for mailing, Rule 24.5.303(3), the State Fund's answers and objections should have been served by March 23, 2000. They were in fact served March 29, 2000, thus were late.

¶7 The waiver doctrine has been adopted by the federal courts under the Federal Rules of Civil Procedure (FRCP). In 1993 the FRCP were amended to specifically provide that failure to timely interpose an objection constitutes a waiver of the objection. Rule 33(b)(4) provides:

(4) All grounds for an objection to an interrogatory shall be stated with specificity. **Any ground not stated in a timely objection is waived** unless the party's failure to object is excused by the court for good cause shown. [Emphasis added.]

A review of cases cited by Wright and Miller, Federal Practice and Procedure, § 2173, FN. 19, indicates that federal courts applied the waiver doctrine even prior to the 1995 amendments.

¶8 Some federal courts have imposed the waiver rule in absolute fashion, going so far as extending the rule to privileged materials, at least where the answering party can waive the privilege. *E.g., Davis v. Fendler,* 650 F.2d 1254, 1160 (9th Cir. 1981) (citing *United States v. 58.16 Acres of Land,* 66 F.R.D. 570 (E.D. Ill. 1975). However, some courts have not extended the waiver to privileged matters. *E.g., Bohlin v. Brass Rail, Inc.,* 20 F.R.D. 224 (D.C.N.Y. 1957); *Jayne H. Lee, Inc. v. Flagstaff Industries Corp.,* 173 F.R.D. 651, 657 (D. Md. 1997).

¶9 Some federal courts have also invoked the waiver rule even where the information sought is totally irrelevant, harassing and vexatious. *Cephas v. Busch,* 47 F.R.D. 371 (D.C. Pa. 1969). But other courts have taken a more enlightened view, holding that the failure to object does not require an order compelling the production where the interrogatory is burdensome and oppressive, *Cahela v. Bernard,* 155 F.R.D. 221 (D.C. Ga. 1994); the interrogatory is wholly improper, *Williams v. Krieger,* 61 F.R.D. 142, 145 (D.C.N.Y. 1973); or the court was unable to perceive any relevance of the questions, *Shenker v. Sportelli,* 83 F.R.D. 365, 367 (D.C. Pa. 1979).

¶10 Neither the rules of this Court nor the Montana Rules of Civil Procedure have adopted subsection (b)(4), and there is no Montana Supreme Court case adopting the waiver doctrine. However, the doctrine makes sense, flowing from the requirement that objections must be interposed within the time allowed for answering interrogatories. Lacking a timely answer, there is no objection. Lacking an objection, there is no basis to resist the discovery.

¶11 On the other hand, it is pointless to force a party to provide information that is plainly irrelevant or is burdensome and oppressive while of little value. The only purpose served by compelling a party to provide such information is to punish the party for its failure to timely object and to deter untimely responses. Litigation is not advanced; both time and money are wasted. There must be better ways to punish and deter.

¶12 Since it is this Court's discovery rules which are at stake in this proceeding, and I write on a clean slate, I find it appropriate to adopt the waiver doctrine with some modification. Specifically, where a party fails to timely respond to an interrogatory or request for production, the party will generally be deemed to have waived any objections to the discovery. This Court will compel the discovery ***unless*** it is patently irrelevant, wholly improper, or patently burdensome and oppressive with only marginal relevance to the issues of the case. Where the information sought concerns a non-party and is privileged as to the non-party or protected by a constitutional interest, the party's failure to object does not constitute a waiver of the privilege or interest. As to whether this same limitation on the waiver doctrine should be extended to personal privileges of the responding party, I reserve judgment.

¶13 With those ground rules set out, I turn to the actual interrogatories.

¶14 State Fund argues that the information sought by the two interrogatories would require it to produce personal information, including privileged health care information, of individual claimant's for whom it furnishes domiciliary care. As I read the interrogatories, however, they only request hourly wage or rate information paid by the State Fund for domiciliary care, nothing more. Moreover, Interrogatory 8 is redundant to Interrogatory 7. Interrogatory 7 asks for the rates the State Fund pays for domiciliary care, Interrogatory 8 asks for a list of per hour payments. Domiciliary care is ordinarily charged by the hour, so I discern no difference between the interrogatories. In any event furnishing a list of hourly rates paid for domiciliary care does not require the State Fund to divulge information about individual claimants, the nature of the care provided, the caregiver, or anything else.

¶15 The State Fund further argues that the rate information sought is irrelevant. Claimant counters that the standard is not whether the information sought is itself relevant and admissible but whether it might lead to relevant, admissible evidence. Rule 26(b)(1), Mont. R.Civ. P.

¶16 In light of the State Fund's failure to object to these interrogatories, the Court will order they be answered unless, on their face, they are unlikely to lead to relevant, admissible evidence. Claimant argues that the information sought will enable him to establish "domiciliary care reimbursement based on a reasonable rate at the prevailing market value." (petitioner's motion to compel discovery and brief in support at 4.) If his purpose is to recoup more than his actual cost for domiciliary care, then his efforts are misdirected: Domiciliary care benefits are to pay for the actual cost of care, no more and no less. The insurer's statutory obligation is to provide the care. § 39-71-1107(1), MCA. It does so by paying the cost of providing the care. If, on the other hand, his purpose is to establish a reasonable wage to be paid for past care provided by a private care provider who has not been paid and has not established a rate, then the discovery might lead to some possible comparisons. However, discovery of information back to 1993 (Interrogatory 7) and for all permanently totally disabled claimants receiving domiciliary care (Interrogatory 8), without limitation in time, is patently over-broad. Information prior to claimant's injury has no possible bearing on the issue. In light of the State Fund's failure to object, I decline to attempt any further relevance analysis and will order the State Fund to provide a list of hourly rates it has paid for domiciliary care since July 9, 1998.

I.

¶17 The State Fund's objections to Request for Production 5 were timely and twofold. First, it urges that the documents sought are irrelevant, second, that they violate the right to privacy of the individual claimants who receive the domiciliary care for which the information is sought.

¶18 The State Fund points out that the documents sought by the claimant contain personal and health care information as to other claimants who are receiving domiciliary care. Personal health care information is privileged. Disclosure is prohibited unless the patient consents or a specific statutory exception exists. § 50-16-525, MCA. In filing a claim for compensation, a claimant consents to the release of health care information to the insurer, but the consent extends only to the insurer and does not authorize further dissemination. Moreover, an individual's medical records and medical information is protected by the right of privacy. *State v. Nelson,* 283 Mont. 231, 242, 244, 941 P.2d 441, 448 (1997). "Medical records are quintessentially 'private' and deserve the utmost constitutional protection." *Id*. at 242.

¶19 Contrary to claimant's assertion, this case does not involve a balancing of the public's right to know with the right of privacy. The public has no right to individual medical information and the medical information sought here does not relate to any public regulatory function. Cases cited by the claimant which balance the public right to know with the right of privacy, i.e., *Montana Health Care Assoc. v. Montana Board of Directors of State Fund Compensation Mutual Insurance Fund,* 256 Mont. 146, 845 P.2d 113 (1993);

Mountain States Telephone and Telegraph v. Dept. of Pub. Serv. Reg., 194 Mont. 277, 634 P.2d 181 (1981), do not involve medical records and are inapposite.

¶20 To overcome the privacy interests of other individual claimants, the claimant in this action must show a "compelling state interest in the information." Mont.Const. Art. 2, § 10. He has not done so. The issue in this case is the rate at which domiciliary care should be paid for prior care for claimant. That rate will be determined by what it costs to hire that care in the communities where claimant was residing at the time. Claimant is entitled to no more, nor any less. There are other means available to claimant to establish the value of the domiciliary care furnished to him. There are private companies and individuals who furnish domiciliary care and claimant should be able to ascertain their rates.

¶21 The question remains whether, stripped of medical information pertaining to individual claimants, the requested documents might lead to relevant, admissible evidence. I find it "might." In the event domiciliary care is not readily available in one of the communities in which claimant was residing, and/or no "going price" of care can be determined from personal care providers in the community, then the information may provide a range within which the Court can fix a rate. State Fund does not argue that the information is sought is unduly burdensome or oppressive, so I need not weigh the potential of the evidence being used at trial against any hardship in producing it.

¶22 Since the information may be relevant but claimant has failed to show a compelling interest for obtaining any information regarding other claimants receiving domiciliary care, the State Fund shall produce the requested documents in redacted form, redacting any and all information which, by any means, could be used to identify the individual claimants. If claimant believes the State Fund has redacted too much information, it may request the Court to make an in camera comparison of the redacted records with the original records.

ORDER

¶23 1. Within 10 days of this Order, the State Fund shall provide the claimant with a list of all hourly rates paid by it for domiciliary care since July 9, 1998.

¶24 2. Within 10 days of this Order, the State Fund shall provide the claimant with the documents in Request for Production 5, however, it shall first redact all information which by any means could be used to identify any individual claimant.

DATED in Helena, Montana, this 13th day of September, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Monte D. Beck
Mr. Greg E. Overturf

Dates Submitted: Petitioner's Motion to Compel Discovery - July 3, 2000; Respondent's Motion for Protective Order - August 7, 2000; Petitioner's Motion to Compel - August 18, 2000