

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 62

WCC No. 9907-8273

MARK FJELSTAD,

Petitioner,

vs.

FIREMAN'S FUND,

Respondent/Insurer for

NORTH AMERICAN ENERGY SERVICES,

Employer.

ORDER ON MOTION TO VACATE AND DISCOVERY MOTIONS

Summary: Claimant sought to compel answers to interrogatories about relationship between insurer and physician who performed independent medical examination, including number of IMEs particular physician had performed for insurer within last six years and total yearly compensation to physician, and to compel production of documents relating to same. Insurer moved to vacate trial setting because claimant sought to include in Pretrial Order issues not framed by petition and not mediated.

Held: While claimant is entitled to ask the Court to evaluate this physician's credibility in light of the frequency of his IMEs for this insurer, that point can be made without broad or unduly burdensome discovery. Respondent ordered to identify the total annual number of independent medical examinations the doctor has conducted at the request of the insurer over the last three year period, and the amount of compensation paid to the doctor by the insurer for such work. If that information is not readily available, the insurer may respond with an estimate for both. The request for any additional information, and for documents, is overly broad and burdensome. The Motion to vacate the trial is granted where claimant has raised new issues, such as that the settlement agreement should be reopened on grounds the insurer caused claimant mental distress, breached a fiduciary duty to him, or engaged in fraud. While newly articulated legal arguments or theories may often lie within the issues alleged in the petition, these new allegations are fact-based contentions not framed by the pleadings or subjected to full discovery. If claimant wants to litigate these issues, they must be mediated and a motion to amend filed in the WCC.

Topics:

Discovery: Independent Medical Examinations. Claimant sought to compel answers to interrogatories about relationship between insurer and physician who performed independent medical examination, including number of IMEs particular physician had performed for insurer within last six years and total yearly compensation to physician, and to compel production of documents relating to same. While claimant is entitled to ask the Court to evaluate this physician's credibility in light of the frequency of his IMEs for this insurer, that point can be made without broad or unduly burdensome discovery. Respondent ordered to identify the total annual number of independent medical examinations the doctor has conducted at the request of the insurer over the last three year period, and the amount of compensation paid to the doctor by the insurer for such work. If that information is not readily available, the insurer may respond with an estimate for both. The request for any additional information, and for documents, is overly broad and burdensome.

Discovery: Interrogatories. Claimant sought to compel answers to interrogatories about relationship between insurer and physician who performed independent medical examination, including number of IMEs particular physician had performed for insurer within last six years and total yearly compensation to physician, and to compel production of documents relating to same. While claimant is entitled to ask the Court to evaluate this physician's credibility in light of the frequency of his IMEs for this insurer, that point can be made without broad or unduly burdensome discovery. Respondent ordered to identify the total annual number of independent medical examinations the doctor has conducted at the request of the insurer over the last three year period, and the amount of compensation paid to the doctor by the insurer for such work. If that information is not readily available, the insurer may respond with an estimate for both. The request for any additional information, and for documents, is overly broad and burdensome.

Discovery: Request for Production. Claimant sought to compel answers to interrogatories about relationship between insurer and physician who performed independent medical examination, including number of IMEs particular physician had performed for insurer within last six years and total yearly compensation to physician, and to compel production of documents relating to same. While claimant is entitled to ask the Court to evaluate this physician's credibility in light of the frequency of his IMEs for this insurer, that point can be made without broad or unduly burdensome discovery. Respondent ordered to identify the total annual number of independent medical examinations the doctor has conducted at the request of the insurer over the last three year period, and the amount of compensation paid to the doctor by the insurer for such work. If that information is

not readily available, the insurer may respond with an estimate for both. The request for any additional information, and for documents, is overly broad and burdensome.

Mediation. Insurer moved to vacate trial setting because claimant sought to include in Pretrial Order issues not framed by petition and not mediated. Motion granted where claimant has raised new issues, such as that the settlement agreement should be reopened on grounds the insurer caused claimant mental distress, breached a fiduciary duty to him, or engaged in fraud. While newly articulated legal arguments or theories may often lie within the issues alleged in the petition, these new allegations are fact-based contentions not framed by the pleadings or subjected to full discovery. If claimant wants to litigate these issues, they must be mediated and a motion to amend filed in the WCC.

Procedure: Pretrial Order. Insurer moved to vacate trial setting because claimant sought to include in Pretrial Order issues not framed by petition and not mediated. Motion granted where claimant has raised new issues, such as that the settlement agreement should be reopened on grounds the insurer caused claimant mental distress, breached a fiduciary duty to him, or engaged in fraud. While newly articulated legal arguments or theories may often lie within the issues alleged in the petition, these new allegations are fact-based contentions not framed by the pleadings or subjected to full discovery. If claimant wants to litigate these issues, they must be mediated and a motion to amend filed in the WCC.

Procedure: Trial: Continuance. Insurer moved to vacate trial setting because claimant sought to include in Pretrial Order issues not framed by petition and not mediated. Motion granted where claimant has raised new issues, such as that the settlement agreement should be reopened on grounds the insurer caused claimant mental distress, breached a fiduciary duty to him, or engaged in fraud. While newly articulated legal arguments or theories may often lie within the issues alleged in the petition, these new allegations are fact-based contentions not framed by the pleadings or subjected to full discovery. If claimant wants to litigate these issues, they must be mediated and a motion to amend filed in the WCC.

¶1 This matter was set for trial in Billings during the week of October 18, 1999. On October 7, 1999, claimant filed a motion to compel seeking answers to interrogatories and production of documents. On October 12, 1999, respondent filed employer/insurer's response to petitioner's motion to compel, wherein it supplemented prior answers to interrogatories and requests for production, but renewed its objection to claimant's Interrogatory No. 12.

¶2 That same date, respondent filed both a motion to vacate current trial setting and respondent's motion to compel. The motion to vacate argued that claimant is seeking to litigate issues neither pled nor mediated and not fully explored in discovery. In addition, the

motion to vacate argued that respondent's counsel had only recently received information regarding a medical provider from whom he sought further discovery. Also, depositions of doctors important to the case had not been completed due to the doctors' own schedules. Finally, respondent's motion to compel sought supplementation of claimant's responses to specific interrogatories and document requests.

¶13 On the morning of the same date, October 12th, the Court received a proposed final pretrial order via fax from counsel for the claimant. Counsel for the parties participated in a pretrial conference with staff attorney Jay Dufrechou on the afternoon of October 12th. Counsel did not reach agreement on the issue properly before the Court. Counsel for respondent reiterated that claimant sought to litigate issues not previously raised. Before close of business that same day, claimant faxed to the Court petitioner's brief opposing motion to vacate.

¶14 Having considered the motions, responses, and pleadings on file, the Court orders as follows:

¶15 Respondent's motion to vacate the trial date is **granted**. The Court agrees with respondent that issues recently proposed by claimant are not covered by the petition for hearing. This includes allegations that the settlement agreement should be reopened on grounds that the insurer subjected claimant to great mental duress, breached a fiduciary duty to him, made negligent misrepresentations or engaged in fraud, and/or is barred by laches or estoppel. While newly articulated legal arguments or theories may often lie within the issues alleged in a petition, under the circumstances of this case, the Court finds the new allegations involve fact-based contentions not framed by the pleadings and not subjected to full discovery. If claimant seeks to litigate such issues, the issues must first be mediated and then a motion to amend filed. Further, the Court finds that discovery is not complete and the case is not ready for trial.

¶16 With regard to claimant's motion to compel, the issue of Interrogatory No. 12 appears ripe for ruling by the Court. That interrogatory provides as follows:

INTERROGATORY NO. 12: With reference to Dr. Gary Rappaport, please state the following:

- For each of the last six years, the total yearly number of independent medical examinations that Dr. Rappaport has performed at the request of the insurer.
- For each of the last six years, the total yearly compensation that this insurer has paid to Dr. Rappaport for his performing independent medical examinations.
- For each of the last six years, the total yearly compensation and/or remuneration that this insurer has paid to Dr. Rappaport for any reason.

- Please consider this a request for production of each and every DOCUMENT for each of the last six years which reflects the total yearly compensation described above in subparagraphs b and c.
- Please consider this a request for production of each and every DOCUMENT which provides a summary of any of the information requested by subparagraphs a, b, and c above.
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- Please consider this a request for production of each and every DOCUMENT which Dr. Rappaport has provided to this insurer 1) regarding his qualifications/foundation to perform an IME, 2) regarding his work/services for this insurer.

¶7 Respondent objects to the interrogatory and document request "on the grounds that it is overly broad, burdensome, and harassing in nature, and otherwise seeks production of documentation and information that is not reasonably calculated to lead to the discovery of admissible evidence." Respondent also argues that "records of this nature are not kept in the normal course of the insurer's business and would be unduly burdensome to assemble."

¶8 The Court understands that claimant's likely contention is that it should evaluate Dr. Rappaport's credibility in light of the frequency with which he conducts independent medical examinations at the request and expense of the insurer. However, claimant can make his point without the extensive and burdensome discovery sought. The Court will grant claimant's motion to compel only insofar as it seeks information identifying the total annual number of independent medical examinations Dr. Rappaport has conducted at the request of the insurer over the last three-year period, and the amount of compensation paid to Dr. Rappaport by the insurer for such work (sub-parts (a) and (b) of the interrogatory). If that information is not readily available, the insurer may respond with its estimates for both. The motion to compel is denied insofar as it seeks production of documents within Interrogatory No. 12. The Court finds any additional information sought by the claimant, and the request for documents, to be overly broad and burdensome.

¶9 Since the Court has vacated the trial date, the Court will not consider other discovery issues raised by the recently filed discovery motions. The various motions and responses indicate some movement by the parties toward cooperation. Some issues existed only because the trial date was approaching. The Court directs the parties to confer and to attempt to resolve any remaining or arising discovery differences. If differences persist, the parties are directed to request an early preliminary pretrial conference pursuant to ARM 24.5.318(8). The Court will not look favorably upon any discovery motions filed on the eve of the new trial date.

¶10 A new scheduling order will issue from the Court, including deadlines for completion of discovery. Any requests for extension must be presented to the Judge.

DATED in Helena, Montana, this 15th day of October, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Chris J. Ragar

Mr. G. Andrew Adamek

Date Submitted: October 12, 1999