IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 52

WCC No. 2002-0589

ADAM GANJE

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

HR LOGIC, INCORPORATED

Employer.

ORDER DENYING MOTION IN LIMINE

Summary: In a case involving a request for penalty and attorney fees (other matters being settled), claimant moves in limine to exclude any evidence by insurer which is not set out in the insurer's answers to interrogatories.

Held: Where the insurer has identified its witnesses and exhibits, claimant's motion in limine to exclude evidence not identified in answer to an interrogatory is denied since the insurer objected to the interrogatory requesting the written discovery regarding the matter and claimant failed to move to compel an answer.

Topics:

Discovery: Compelling Discovery. Court will not exclude evidence on the grounds that the party failed to identify the evidence in answer to written discovery requests where the answering party objected to the discovery and the propounding party failed to move to compel answers to the discovery.

Discover: Compelling Discovery. Where opposing party objects to written discovery, the party propounding the discovery must move to compel discovery. A party cannot sit on his or her hands and then seek to exclude evidence because it was not identified in response to the discovery.

Evidence: Exclusion: Failure to Provide Discovery. Court will not exclude evidence on the grounds that the party failed to identify the evidence in answer to

written discovery requests where the answering party objected to the discovery and the propounding party failed to move to compel answers to the discovery.

¶1 The only issue remaining before the Court in this matter is whether the insurer should be required to pay a penalty and attorney's fees. Claimant has filed a motion in limine

> to exclude any testimony, evidence or argument from the Respondent Liberty Northwest Insurance Company not contained in Respondent's Responses to Petitioner's First Combined Discovery Requests regarding the identity of witnesses, information or evidence regarding the reasonableness in the handling and the adjustment of Adam Ganje's claim for workers compensation benefits. The basis for the exclusion of this evidence is that it was requested in written discovery and Liberty Northwest failed and refused to provide the information as requested.

(Adam Ganje's Motion in Limine and Brief in Support at 1.)

¶2 Claimant does not specify the discovery request at issue, but simply attaches a copy of Respondent's Response to Petitioner's First Combined Discovery Requests. Interrogatory No. 10 concerns the reasonableness of respondent's conduct. The interrogatory and response are as follows:

> INTERROGATORY NO. 10: If you contend that you acted reasonably in the handling and adjustment of the claim for benefits which forms the basis of the Petition for Hearing then for each such action taken by you set forth a description, in as much detail as you may present to the Workers' Compensation Court, of each such action, identify the date each action was taken, and identify any documents which memorialize or record each such action.
>
> ANSWER: Objection; this interrogatory violates ARM 24.5.323(6) which limits interrogatories to 20 in the aggregate inclusive of subparts.

(Respondent's Response to Petitioner's First Combined Discovery Requests at 3.)

¶3 Claimant did not move to compel respondent to answer interrogatory number 10. The motion in limine is denied on that basis. If claimant disagreed with respondent's counting of subparts of interrogatories, or its interpretation of ARM 24.5.323(6), and desired a substantive answer of the interrogatory, the remedy was a motion to compel. Not having presented the issue on that basis, claimant cannot now ask the Court to exclude evidence on the basis of respondent's objection to answering the interrogatory.

¶4 Moreover, as noted by respondent:

> Liberty had already disclosed to Petitioner its potential witness with regard to the handling and adjustment of his claim. Pursuant to Court Rule 24.5.302, Liberty filed its Response to the Petition and listed as a potential witness Chris Stobb and briefly

> described the subject matter of her testimony as the "handling and adjustment of claimant's claim." Liberty further complied with the rule by listing the documents that it may us [sic] during trial, including the claim file. To state now that Petitioner is surprised or unfairly prejudiced is disingenuous. Petitioner knew who the adjuster was and chose not to take her deposition. Petitioner's failure to take the adjuster's deposition is not Liberty's fault or responsibility.

(Response to Motion in Limine and Brief at 3.)

¶5 Without suggesting a party may refuse to respond to an interrogatory and then fall back on prior witness and document disclosure in response to a properly filed motion to compel, the Court notes that claimant has not identified, nor even argued, any actual prejudice or surprise to warrant consideration of the extreme remedy he suggests.

The motion in limine is **denied**.

DATED in Helena, Montana, this 24th day of October, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: October 23, 2002