IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 54

WCC No. 2000-0003

ALLEN J. HAAS,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

NEWMAN RANCH,

Employer.

ORDER GRANTING PROTECTIVE ORDER AND QUASHING DEPOSITION; ORDER DENYING MOTION TO COMPEL

Summary of Case: State Fund moves for a protective order to preclude deposition of investigator employed by attorneys defending a civil suit brought by claimant and to protect her investigative file. Claimant moves to compel production of that file and a memorandum of a State Fund attorney to the Tort Claims Division to the Court for in camera inspection. The rationale for the discovery is to support claimant's request for lump summing of domiciliary care benefits by showing the mental and emotional stress caused by investigations of claimant.

Held: Motion for protective order granted, motion to compel denied. The claimant is seeking attorney work product and attorney/client communication. He has shown no need for the information. His mental/emotional stress theory must be based on what he knew or perceived about the investigation. Details of the investigation are irrelevant.

Topics:

> **Constitutions, Statutes, Regulations and Rules. Mont.R.Civ.Pro. 26(b)(3).** Court granted protective order regarding contents of investigator's file and letter from attorney to State Fund to administrator of Tort Claims Unit of State of Montana. Contents of file contained work product and attorney/client communications; claimant had not shown relevance of those materials, much less justification to invade work product. Letter was privileged attorney/client communication.

Attorneys: Correspondence. Letter from counsel for State Compensation Insurance Fund to administrator of Tort Claims Unit of State of Montana regarding notice of tort claim filed by workers' compensation claimant was an attorney-client communication and thus absolutely privileged from discovery. Hearing Examiner for Workers' Compensation Court would be made available if counsel for claimant wished confirmation that letter was in fact attorney-client communication.

Benefits: Domiciliary Care. Where claimant argued ongoing relationship with insurer was detrimental to him and warranted lump sum of domiciliary care benefits, the only relevance of evidence of investigation into him involved the effect of the investigation upon him, including what he knew or perceived and how he reacted. Court thus granted protective order, and denied motion to compel, relating to details of investigation where such details involved attorney work product and attorney/client communications.

Discovery: Compelling Discovery. Where claimant argued ongoing relationship with insurer was detrimental to him and warranted lump sum of domiciliary care benefits, the only relevance of evidence of investigation into him involved the effect of the investigation upon him, including what he knew or perceived and how he reacted. Court thus granted protective order, and denied motion to compel, relating to details of investigation contained in investigator's file where such details involved attorney work product and attorney/client communications.

Discovery: Privileges: Attorney client. Letter from counsel for State Compensation Insurance Fund to administrator of Tort Claims Unit of State of Montana regarding notice of tort claim filed by workers' compensation claimant was an attorney-client communication and thus absolutely privileged from discovery. Hearing Examiner for Workers' Compensation Court would be made available if counsel for claimant wished confirmation that letter was in fact attorney-client communication.

Discovery: Privileges: Work Product. Where claimant argued ongoing relationship with insurer was detrimental to him and warranted lump sum of domiciliary care benefits, the only relevance of evidence of investigation into him involved the effect of the investigation upon him, including what he knew or perceived and how he reacted. Court thus granted protective order, and denied motion to compel, relating to details of investigation contained in investigator's file where such details involved attorney work product and attorney/client communications.

Discovery: Protective Orders. Court granted protective order regarding contents of investigator's file and letter from attorney to State Fund to administrator of Tort Claims Unit of State of Montana. Contents of file contained work product and attorney/client communications; claimant had not shown relevance of those

materials, much less justification to invade work product. Letter was privileged attorney/client communication.

¶1 The matter before the Court is State Compensation Insurance Fund's (State Fund's) motion to quash deposition subpoena duces tecum and for protective order. The subpoena is directed to Connie Campbell for a deposition noticed for August 2, 2000, and requests her to bring with her the following:

Investigative documents generated by and/or maintained by you in reference to investigative contacts and interviews conducted by you in reference to Allen J. Haas and/or his family members.

The notice of deposition and subpoena were previously vacated by Order dated July 17, 2000, because it could not be fully briefed and decided before the date of the scheduled deposition. The matter has now been fully briefed.

¶2 Also before the Court is a petitioner's motion to compel and supporting memorandum, which seeks to compel State Fund to comply with Court Rule 24.5.324 (4).

¶3 The motions for protective order and to quash are **granted**. Claimant's motion to compel is **denied**.

Discussion

¶4 The State Fund's motion for a protective order and to quash is supported by an affidavit of paul johnson (Johnson), an Assistant Attorney General for the State of Montana who is one of the counsel of record in this case and who previously defended Reed Scott (Scott), a State investigator, in a federal civil rights action brought by petitioner against him. Johnson's affidavit establishes that Connie Campbell (Campbell) is a paralegal who works for Agency Legal Services in the Montana Department of Justice. She was instructed by counsel defending Scott to investigate certain matters at issue in the case. The affidavit unequivocally establishes that her work was at the behest and direction of counsel representing Scott, and that she worked under their control. Documents in her file were prepared or assembled as a part of her investigation and in preparation for trial.

¶5 The documents in question are as follows:

a. Memoranda from Scott's counsel to Campbell directing her work in preparation for trial of Haas I;

b. Memoranda documenting phone calls from Scott's counsel to Campbell with respect to her work in preparation for trial of Haas I;

c. Correspondence between Scott's counsel, copied to Campbell and the client Tort Defense Division (i.e. Chief Defense Counsel Bill Gianoulias);

d. Campbell's notes and documentation regarding witness interviews and other tasks she completed at the direct request of Scott's counsel;

e. Specific correspondence and pleadings provided to Campbell by Scott's counsel for the purpose of assisting and directing her inquiry in preparation for the trial.

(Affidavit of Paul D. Johnson at 3.)

¶6 Rule 26(b)(3) of the Montana Rules of Civil Procedure governs the discoverability of materials prepared in anticipation of trial. It provides in relevant part:

> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> . . . .
>
> *(3) Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
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> . . . .

¶7 The petition in this case requests the Court to order all future domiciliary care benefits for claimant be paid in a lump sum. One of the basis for claimant's request is mental and emotional stress he suffered on account of an undercover investigation conducted into his disability during 1994 and 1995. (petitioner's brief in opposition of state fund's motion to quash deposition subpoena duces tecum and for protective order at 2.) Scott was one of the investigators. The purported relevance of Campbell's file is that it is yet another investigation and contributed to claimant's mental stress. He cites a brief note of Dr. English, a psychologist, who wrote that claimant's wife had indicated "that investigators from the State have been interviewing neighbors" (*id*. at 3) and that claimant "is preoccupied with concerns that the State is spying upon him." *(Id.)* From this, claimant's counsel argues:

> The significance and relevance of the 1998 [Campbell] investigation is obvious upon review of the medical testimony. Dr. English testified that the 1998 investigation caused yet another exacerbation of Haas' condition. On the heels of the earlier 1994 and 1995 investigations, the 1998 investigation had a similar affect, stirring the pot so to speak. . . .

(*Id*., citations to discovery omitted.)

¶8 Claimant's argument is without merit. Counsel and their investigator had every right to investigate the case in defending against claimant's law suit. The details of that investigation will not advance claimant's arguments. He does not contend there was any wrongdoing in the investigation, and has produced no evidence of such. The importance of the investigation, according to his own brief, was the **effect it had upon him. Thus, it is what he knew or perceived, and how he reacted, that are important to his theory of his case.** The requested documents and testimony of Campbell have no conceivable relevance to that theory. Claimant has failed to make even the slimmest case for needing either the documents or Campbell's testimony, and no purpose would be served by the Court reviewing the investigative file *in camera* or by further citation to authority. A protective order shall therefore issue.

¶9 Claimant, through its separate motion, argues that State Fund must comply with Rule 24.5.324, which requires a party objecting to production of documents on ground of privilege or work product to produce the documents to the Court and also provide a list of the documents. There are two sets of documents involved. The first set is Campbell's investigative file. The second set consists of copies of memorandum prepared by Ann Clark, an attorney for the State Fund.

¶10 The Court's entry of a protective order renders the rule inapplicable to Campbell's file. Moreover, I find no cause to require the documents to be filed for purposes of preserving the issue. As noted above, claimant has failed to make even a minimal case for any further exploration into the documents.

¶11 With respect to the Ann Clark memorandum, the State Fund provides the following information:

> In response to Request for Production No. 2 the document objected to is a letter to Bill Gianoulias. It is a two page document. The subject matter of the letter is a notice of claim filed by Allen Haas. The document is dated July 30, 1996. The author of the document is Ann Clark, legal counsel for the State Fund. The objections extend to the entirety of the document. The objection to production of the document is on the basis of attorney/client and attorney work product privileges.

(State Fund's Response to Petitioner's Motion to Compel at 2.) Bill Gianoulias is the administrator of the Tort Claims Unit of the State of Montana. The Tort Claims Unit is responsible for the handling and defense of tort claims for the State of Montana and its employees. The memorandum is therefore an attorney-client communication and is absolutely privileged. It is not discoverable and providing a copy to the Court would serve no purpose other than to confirm it is what it is represented to be. If counsel for claimant

wishes that confirmation, then the State Fund shall furnish the letter to Clarice V. Beck, the Court's hearing examiner, who will review it and determine its nature.

ORDER

¶12 The State Fund's motions for a protective order and to quash are **granted.** The deposition notice and subpoena duces tecum for Connie Campbell are quashed and shall not reissue.

¶13 The claimant's motion to compel is **denied** with the proviso that if claimant wishes the Court to confirm that the Ann Clark memorandum is what it is represented to be, it shall notify the State Fund, which shall then provide a copy of the memorandum to Clarice V. Beck for her review.

DATED in Helena, Montana, this 1st day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. Thomas E. Martello
Mr. Maxon R. Davis
Mr. Paul D. Johnson
Dates submitted: July 27, 2000 (Motion to Quash and Motion for Protective Order); September 1, 2000 (Motion to Compel)