IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 18

WCC No. 2000-0220

DONALD R. HOUSEHOLDER

Petitioner

vs.

REPUBLIC INDEMNITY COMPANY OF CALIFORNIA

Respondent/Insurer for

POVERELLO CENTER, INCORPORATED

Employer.

ORDER DENYING REQUEST FOR SANCTIONS

Summary of Case: Petitioner moves for discovery sanctions for the respondent's failure to produce food logs until after the depositions of two doctors.

Held: The sanctions are denied since (1) the request for production was too vague to give fair notice of the logs; (2) Rule 24.5.326 discovery sanctions are available only in connection with motions to compel, and none was required here; and (3) the respondent was unaware of the logs until after the first deposition. Further, petitioner presents only a weak case for prejudice. However, the documents should have been produced when the respondent discovered them and its almost two month delay in producing them is inexcusable.

Topics:

> **Discovery: Requests for Production.** Where the party knows of the existence of documents, its request for those documents should be sufficiently specific to identify them. A vague, all encompassing request for production which does not give reasonable notice that the documents are included in the request is insufficient and failure to identify and produce the documents is not sanctionable.
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notice that the documents are included in the request is insufficient and failure to identify and produce the documents is not sanctionable.

Discovery: Sanctions. Rule 24.5.326, which provides for discovery sanctions, applies only in connection with a motion to compel and is therefore inapplicable where documents are produced without a motion to compel.

Discovery: Sanctions. Sanctions under section 39-71-2914, MCA, which is similar to Rule 11 Mont.R.Civ.P., may be available if the party signing the discovery responses knows they are false.

Discovery: Supplementation. While Workers' Compensation Court rules do not expressly require supplementation of discovery responses, the Court expects parties to supplement their responses in accordance with Rule 26(3), Mont.R.Civ.P.

¶1 Petitioner (claimant) moves for sanctions for respondent's failure to earlier produce certain records of food pickups. The records in question were produced on March 26, 27, or 28, 2001. They are attached to the claimant's motion and supporting brief.

Facts

¶2 The facts are set forth in the briefs, the exhibits attached to the briefs, and affidavits submitted by the respondent insurer. The facts are sufficiently clear and undisputed that no hearing or further evidence is required to decide the motion.[(1)]

¶3 Briefly summarized, the claimant alleges that he suffered an aortic dissection as a result of work he performed for his employer on March 10, 2000.[(2)] The petition alleges that claimant was a manager for residences for developmentally disabled persons and as a part of his job purchased food and carried it into the residences. (Petition for Benefits ¶I.) According to the petition, the claimant suffered an aortic dissection while working. *(Id*.) The petition contends that the aortic dissection was a result of his job activities, (*id*. *at* ¶II), however, it fails to allege a direct connection between the condition and carrying any food. Similarly, the First Report of Occupational Injury submitted by claimant fails to set forth any specific activity which claimant believed triggered his condition. (Response to Petitioner's Motion for Sanctions, Ex. A.)

¶4 After this action was filed, respondent propounded an interrogatory asking claimant to identify his witnesses and summarize the testimony the witnesses would provide in support of his claim. (*Id*. at 2.) Claimant responded with a vague answer indicating that his witnesses would testify about his activities on March 10th, however, he did not indicate what those activities were. *(Id.)*

¶5 Nevertheless, respondent was aware, even prior to the filing of this action, of the nature of claimant's work-related activities on the day of his alleged injury. An adjuster for respondent interviewed claimant on June 1, 2000. During the interview, the claimant was

asked about March 10, 2000. He told the claims adjuster that he "had a real heavy day that day hauling a lot of, like 30 crates of milk . . . ." (Response to Petitioner's Motion for Sanctions, Ex. D at 9.) Claimant went on to say:

> Part of the job also entails doing the pickups from the different stores of food that is donated, from people, and it was just an extraordinarily hard day, working on all the stuff, then I did the cooking . . . .

(*Id.)*

¶6 Respondent took claimant's deposition on December 28, 2000. At that time, he was queried regarding his activities on the day of his aortic dissection. He testified that his activities included picking up 18 crates of milk, unloading 10 of those crates earlier in the afternoon, and unloading the remaining 8 crates just prior to onset of his symptoms. (Householder Dep. at 46, 49, 51-52, 61.) During his deposition, the claimant testified that he kept a log of the food products he picked up during work and that after his aortic dissection he provided a computer disk of the log to his employer. (*Id*. at 47-48.)

¶7 Meanwhile, on December 1, 2000, claimant propounded interrogatories, including Interrogatory 7, which asked:

> Please identify all reports, statements, recordings, memoranda or testimony concerning any of the facts in this case and please produce copies of same. As to any such report, statement, etc., to which an objection to production is asserted, please describe the objected-to item and state in detail the factual basis upon which the objection rests.

(Motion for Sanctions at 3.) On December 22, 2000, the respondent replied to the request, as follows:

> A copy of all medical records in the possession of Respondent has previously been forwarded to Petitioner. In addition to the medical records previously produced, please find attached hereto as Exhibit A, a copy of the first report completed by Respondent, the claim for compensation completed by Petitioner and the transcript of the recorded statement given by Petitioner on June 1, 2000.

(Id.) It is this answer, and the failure to produce logs which claimant spoke about in his deposition, that gives rise to the present motion.

¶8 Mr. Kelly M. Wills, who is respondent's attorney, has filed an affidavit indicating that his first knowledge of the existence of the logs was on December 28th[(3)], when claimant was deposed. (Response to Petitioner's Motion for Sanctions, Ex. C (Affidavit of Kelly M. Wills).) On January 2, 2001, Mr. Wills contacted Larry DeGarmo (DeGarmo), who was claimant's immediate supervisor, to inquire about the logs. (*Id*., Exs. B & C.) Mr. DeGarmo was unaware of any computer disk or handwritten logs but promised to inquire. (*Id.)*

¶9 On January 3, 2001, the day after Mr. Wills' inquiry, Dr. Maxwell, the heart surgeon who operated on claimant, was deposed.

¶10 On January 5, 2001, DeGarmo met with Mr. Wills and provided him with food logs for January through March. The January and February logs were believed to have been completed by claimant, however, the logs for March 1 through 10 were believed to have been completed by one of the residents of the homes managed by claimant. (*Id*.) The logs were not immediately produced.

¶11 On March 13, 2001, claimant's attorney took the deposition of Dr. Stan Wilson, a cardiologist who had treated claimant over the years. At the time of the deposition, the respondent had not yet produced the logs.

¶12 The logs were finally produced on March 26, 27, or 28, 2001.

Discussion

¶13 Claimant cites Rule 24.5.324 as supporting his request for sanctions. That rule, however, sets out procedures and deadlines with respect to requests for production; it does not provide anywhere for sanctions. Rather, sanctions for discovery abuses are governed by Rule 24.5.326, which provides:

> RULE 24.5.326 FAILURE TO MAKE DISCOVERY--SANCTIONS (1) If a party fails to respond to discovery pursuant to these rules, or makes evasive or incomplete responses to discovery, or objects to discovery, the party seeking discovery may move for an order compelling responses. With respect to a motion to compel discovery, the court may, at the request of a party or upon its own motion, impose such sanctions as it deems appropriate, including, but not limited to, awarding the prevailing party attorney fees and reasonable expenses incurred in obtaining the order or in opposing the motion. Sanctions shall be imposed against the non-prevailing party unless the party's position with regard to the motion to compel was substantially justified or other circumstances make sanctions unjust. If the party shall fail to make discovery following issuance of an order compelling responses, the court may order such sanctions as it deems required and just under the circumstances. Prior to any imposition of sanctions, the court shall provide the party who may be sanctioned with the opportunity for a hearing.

On its face, the rule permits sanctions in connection with an order compelling discovery. Here the materials were provided without an order, therefore, relief under the rule is unavailable.

¶14 If claimant believes that discovery was deliberately withheld, then a remedy might arise under section 39-71-2914, MCA, which provides for sanctions where any court

document signed by an attorney or a party is not justified by facts or reasonable belief. The section provides:

> **39-71-2914. Signing of petitions, pleadings, motions, and other papers -- requirements -- sanctions.**
>
> (1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.
>
> (2) A party who is not represented by an attorney shall sign his petition, pleading, motion, or other paper and state his address.
>
> (3) The signature of an attorney or party constitutes a certificate by him that:
>
> (a) he has read the petition, pleading, motion, or other paper;
>
> (b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;
>
> (c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and
>
> (d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

If the respondent was aware that the request for production encompassed the materials which were finally produced in March but failed to identify them in its answer, then that failure may well be sanctionable under the statute since the omission was essentially a representation that the documents did not exist, and such representation was untrue.

¶15 There is, however, a three-fold problem in invoking statutory sanctions in this case. First, claimant has not requested sanctions under the statute. Second, the respondent was not aware of the existence of the documents when it answered the request for production. Third, the request for production was too vague and non-specific to give the respondent fair warning that claimant was seeking the logs. Thus, its failure to ascertain their existence when answering the request for production was understandable. The claimant and his counsel were aware of the existence of the logs and should have been aware that they

could potentially support or undermine the claim as to the amount of lifting claimant did on the day of his aortic dissection. They could, and should, have made a specific request for the logs rather than the all encompassing, indefinite request they did make.

¶16 That said, it should have been equally as clear to the respondent and its counsel on January 5, 2001, that at least the logs for March 10th were relevant and material to the claim made in this case. At that time, the respondent should have identified and produced the logs. It should have should have done so promptly. Its waiting until the end of March is inexcusable.

¶17 I do not consider here whether some form of sanctions might be available for the respondent's failure to promptly supplement its answer to the request for production. Claimant has not addressed what duty, if any, exists to supplement,[4] or invoked a rule or statute which would allow sanctions for such failure; I decline to do legal research or argument for him.

¶18 Finally, claimant vigorously asserts that the respondent's failure to provide the logs has prejudiced his depositions of Drs. Maxwell and Wilson. However, claimant's own knowledge of his physical activities on March 10th, as well as excerpts quoted by respondent from the doctors' depositions, raise significant doubt as to his assertions. Nonetheless, it is for claimant's counsel to assess the potential impact of the information on the physicians' testimony. Since the information could have been more timely provided, I will permit claimant to do supplemental depositions of the doctors. If the information turns out to be significant to their decisions, I will entertain a motion for the costs of the depositions.

ORDER

¶19 The motion for sanctions is **denied**.

¶20 The claimant is granted leave to take supplemental depositions of Drs. Maxwell and Wilson. If the depositions require a continuance, the trial will be rescheduled for a later time.

DATED in Helena, Montana, this 3rd day of May, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Kelly M. Wills
Date Submitted: April 27, 2001

1. Rule 24.5.326 requires a hearing before sanctions are imposed. However, based on the parties' filings, I find an insufficient basis to impose sanctions. A hearing is therefore unnecessary.

2. This Court has previously considered a case involving an aortic dissection, *Cheetham v. Liberty Northwest Ins. Corp.,* WCC No. 9612-7675, Findings of Fact, Conclusions of Law and Judgment (June 11, 1997). That case discusses the nature of the medical condition and the difficulties of proof in connecting the condition to work.

3. The Affidavit of Kelly M. Wills fixes the date as January 28, 2000. However, upon reading the contents of the Affidavit, the date should be December 28, 2000.

4. Rule 26(e), Mont.R.Civ.P. imposes a duty to supplement discovery answers. This Court has no corresponding rule and has not considered whether Rule 26(e) should apply. Nonetheless, attorneys and parties should be on notice that the Court expects them to promptly supplement discovery answers.