IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 61

WCC No. 2000-0220

DONALD R. HOUSEHOLDER

Petitioner

vs.

REPUBLIC INDEMNITY COMPANY OF CALIFORNIA

Respondent/Insurer for

POVERELLO CENTER, INCORPORATED

Employer.

ORDER REGARDING EXPERT WITNESS

Summary: Claimant's attorney sought access to the employer's premises for the purpose of taking measurements to be used by his expert witness. Instead of contacting opposing counsel he went to the employer's site and requested access by talking to one of the employer's supervisors. When refused, he then attempted to call opposing counsel, who was unavailable. He then talked to a board member of the employer, who granted permission. He and his expert proceeded on site and took the measurements. Respondent moves to exclude the expert's testimony on the ground that claimant's attorney's conduct was unethical and contrary to the Court's discovery rules.

Held: Claimant's attorney's communications violated the Rules of Professional Conduct and improperly circumvented the Court's rules for discovery. Respondent is entitled to discovery to determine what information was gleaned from the visit. Claimant's attorney shall personally pay the attorney and court reporter fees incurred in connection with that discovery. After discovery, the respondent may renew its motion to exclude the expert's testimony if it believes that the violation caused irreparable harm to its case.

Topics:

> **Ethics.** It is improper for a claimant's attorney to directly contact the employer since insurer's counsel represents the interests of the employer as well as the insurer. Such contact violates Rule 4.2 of the Rules of Professional Conduct.

Discovery: Generally. Parties are bound by and must follow the rules of discovery of the Workers' Compensation Court.

¶1 The matter before the Court is respondent's motion to exclude testimony of an expert witness on account of improper communications between claimant's counsel and the claimant's employer. The facts, as set forth below, are essentially those set out by claimant's attorney in opposing the motion (Petitioner's Brief Opposing Motion to Exclude Expert Witnesses filed October 22, 2001) but also include facts which appear in the Respondent's Brief in Support of Motion to Exclude Expert Witness but which are not controverted by the claimant.

¶2 In his petition to this Court, claimant alleges that he suffered an aortic dissection as a result of delivering food and drink for developmentally disabled persons served by his employer, Poverello Center, Incorporated (Poverello). Claimant alleges his delivery of food and milk to the Joseph residence at Poverello precipitated his aortic dissection. Joseph is one of the disabled clients served by Poverello. His residence is on Poverello property and Poverello is apparently responsible for his welfare and sustenance.

¶3 Claimant's attorney, Mr. Howard Toole, hired Dr. Brent Ruby (Ruby), a physiologist, to testify regarding the nature and degree of stress the claimant suffered when delivering groceries and milk for Joseph. On March 30, 2001, without contacting the attorney for the respondent insurer, Toole, Ruby, and the claimant showed up at the "Joseph residence" for the purpose of obtaining measurements to be used by his expert witness. Specifically, their purpose was "to measure the distance that Petitioner walked from the driveway to the residence when moving groceries and milk crates just prior to his aortic dissection." The distance was significant to Ruby's opinions.

¶4 Upon arrival at the Poverello facility, the trio were met by the manager of the facility. The manager was a Poverello employee. He recognized claimant and advised Toole "that no entry or communication would be allowed." (Petitioner's Brief Opposing Motion to Exclude Witness at 1.) Toole then attempted to call Mr. Kelly M. Wills, the attorney for respondent Republic Indemnity Company of California (Republic). Wills was not available. What transpired thereafter is described by Toole in his brief:

The facility manager then took the cell phone and called Elizabeth Rantz, MD, head of the Poverello board of directors. The undersigned took the phone back, explained to Rantz that we were there to measure distances along sidewalks and into the kitchen area, and Rantz consented to this work.

(*Id.* at 2.) The trio proceeded onto Poverello property and made measurements upon which Ruby will rely when testifying.

¶5 The respondent alleges that Toole's communication with Rantz violated the Rules of Professional Conduct and circumvented the Court's rules pertaining to discovery. I agree.

¶6 Rule 4.2 of the Montana Rules of Professional Conduct provides:

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Toole argues that his communication with Rantz was not prohibited because it did not involve "substantive communications." (Brief at 4.) He further asserts, "Respondent cites no case purporting to hold that the attorney-client privilege precludes the exchange of pleasantries or the type of brief discussion that actually occurred here regarding admission to the premises." (Brief at 5.)

¶7 Toole's arguments demonstrate a fundamental misunderstanding of Rule 4.2. The rule does not merely proscribe "substantive" conversations. It refers to the "subject of the representation," in other words anything to do with the controversy pending before the Court. That includes discovery of information relevant to the case. Indeed, if Toole were correct, an attorney could directly contact an adverse party to request discovery. As to Toole's further arguments, Rule 4.2 has nothing to do with attorney-client privilege, and a request to inspect premises of an adversary is **not** a mere exchange of pleasantries.

¶8 Toole's attempt to call Wills is convincing evidence that he recognized the need to seek Will's permission for his visit. The fact that Wills was unavailable is no excuse for Toole proceeding to talk to Rantz and then inspecting the property. Rule 4.2 is not contingent upon the availability of the adverse party's attorney: it is a flat-out prohibition. Moreover, Toole should have called Wills before even going to the property.

¶9 If this case involved a liability insurer, Toole's communication with Rantz would not only be prohibited but egregious. Toole's only possible defense to his communication with Rantz is that Wills represents Republic only. However, he does not make that argument. Moreover, while a workers' compensation insurer is directly liable to the claimant, the employer's interests are affected and the employer is invariably named in the caption of the case. At minimum, the employer is required to cooperate with the insurer in the litigation. The employer's interests will often dovetail with those of the insurer since its premiums may be affected by its loss experience. Representation by Wills of both insurer and employer with respect to the claim made in this case presents no inherent conflict of interest. Toole knew or should have known that Will's representation probably extended to the employer. If in doubt he could and should have contacted Wills.

¶10 As respondent points out, the claimant and his attorney could and should have sought discovery through the Court's discovery procedures.

¶11 The question remaining is remedy. Respondent urges that Ruby should be precluded from testifying altogether since his testimony may be based on illicitly obtained information. However, an argument can be made that the information upon which Ruby's testimony may be based could have been, and still can be, obtained through legitimate discovery under this Court's rules. Court supervised discovery provides protections which Toole's unilateral expedition did not, specifically the opportunity for respondent to observe and validate the measurements under controlled circumstances. On the other hand, it is not proven at this point that the measurements, which are undoubtedly discoverable, are erroneous.

¶12 Taking into account the concerns expressed in the previous paragraph, I conclude that respondent should be allowed to take the depositions of Ruby and the claimant to determine what information was obtained during the March 30, 2001 on-site visit. The cost of the depositions - both for the court reporters and the attorney fees of the respondent's counsel - shall be the personal responsibility of Mr. Toole. He is prohibited from assessing those costs against any amounts recovered by the claimant.

¶13 After taking the depositions of Ruby and the claimant, respondent may renew its motion to exclude Ruby's testimony or for other relief. However, to prevail on any further request for relief, it must demonstrate that the information obtained on March 30, 2001, could not have been obtained through legitimate discovery or that the information obtained on March 30, 2001, irreparably prejudiced the respondent's ability to meet Ruby's testimony.

SO ORDERED.

DATED in Helena, Montana, this 5th day of December, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Kelly M. Wills
Submitted: November 16, 2001