

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 35A

WCC No. 9801-7897

ROBERT C. KEMP

Petitioner

vs.

SEDGWICK CLAIMS

Respondent/Insurer for

SLETTEN CONSTRUCTION COMPANY

Employer.

AMENDED ORDER ON *IN CAMERA* INSPECTION

Summary: In opposing production of seventeen documents, respondents claimed attorney/client privilege or work product.

Held: Based upon hearing examiner's review of individual documents, and applying standards set out in earlier cases, some documents were found protected by privilege or work product. Three documents were surveillance reports. In prior cases, the WCC has found any privilege claim relating to surveillance reports waived with respect to matters covered in an investigator's testimony. Respondent is ordered to produce those portions of surveillance reports which concern any matter to which the investigator may testify at trial.

Topics:

Discovery: Privileges: Attorney client. Following respondent's objection to production of certain documents, hearing examiner conducted review of documents to determine what they were. Applying standards set out in earlier cases, e.g. Blount v. Conagara, Inc., WCC No. 9304-6769 (March 16, 1994), WCC finds some documents protected by attorney client privilege and others protected by work product doctrine.

Discovery: Privileges: Attorney work product. Following respondent's objection to production of certain documents, hearing examiner conducted review of documents to determine what they were. Applying standards set out in earlier cases, e.g. Blount v. Conagara, Inc., WCC No. 9304-6769 (March 16, 1994), WCC finds some documents protected by attorney client privilege and others protected by work product doctrine.

Discovery: Surveillance. Following respondent's objection to production of certain documents, hearing examiner conducted review of documents to determine what they were. With regard to surveillance reports, respondent was ordered to produce those portions which concern any matter to which the investigator may testify at trial.

¶1 In prior discovery orders, the Court has discussed the protection afforded by the attorney/client privilege and work-product doctrine. *Blount v. Conagara, Inc.*, WCC No. 9304-6769 (March 16, 1994); *Adels v. Cigna Ins. Co.*, WCC No. 9307-6831 (February 16, 1994 and March 10, 1994); *Yager v. Montana Schools Group Ins.*, WCC No. 9308-6872 (March 14, 1994). The review of the documents in this matter has been conducted pursuant to the guidelines set forth in those decisions.

¶2 Respondent provided the Court with documents identified from 1 through 17. The Court's hearing examiner determined the status of each document.

¶3 Document 7 consists of a one page letter with 28 pages of attachments to Mr. Doerr from Mr. Wills. This document is protected by the attorney/client privilege in its entirety as the attachments indicate the thought process of the attorney in conjunction with legal advice being rendered.

¶4 Document 9 consists of a one page letter by Mr. Luck and a second document which is not referred to in the letter. It has no names or information on the page. If any part of that document is considered non-discoverable, respondent must provide the Court with a redacted copy and an explanation of why it believes it is protected. Otherwise, the document (not the letter) shall be produced.

¶5 Documents 15, 16 and 17 are surveillance reports to which the respondent objects. In *Yager v. Montana Schools Group Ins.*, WCC No. 9308-6872 (March 14, 1994), the Court found that the protection was waived "with respect to matters covered in his (the investigator) testimony." Following the reasoning in *Yager*, respondent is directed to produce those portions of the surveillance report which concern **any** matter to which the investigator may testify at a trial. The Court has the complete reports in its file. Respondent must provide to the hearing examiner a copy of the reports with those parts redacted which it believes to be non-discoverable.

¶6 The following chart summarizes the disposition of the documents.

NUMBER	DATE	DESCRIPTION/PAGES	STATUS
1.	1/9/98	Kelly Wills letter 1 page	Attorney/client
2.	1/13/98	Kelly Wills letter 1 page	Attorney/client
3.	12/16/97	Kelly Wills letter 3 pages	Attorney/client
4.	12/16/97	Claim review - G. Doerr 1 page	Work product

5.	12/16/97	Kelly Wills telefax cover sheet 1 page	Attorney/client
6.	12/03/97	Kelly Wills telefax cover sheet 1 page	Attorney/client
7.	11/24/97	Kelly Wills letter 29 pages	Attorney/client
8.	11/20/97 11/23/97 11/26/97	File memos, claim review the 20th and 26th by Doerr	Produce 11/23/97- attorney/client applies to 11/20/97 & 1/26/97
9.	10/14/97	Brad Luck letter to Doerr 1 page letter and second document - "comm.journal"	Letter, attorney/client- produce "journal"
10.	5/12/97	Brad Luck letter - Panagopoulos 1 page	Attorney/client
11.	5/12/97	Brad Luck letter - Panagopoulos 1 page	Attorney/client
12.	2/14/97	Brad Luck letter -Panagopoulos 1 page	Attorney/client
13.	11/05/96	Memo conversation w/Luck 1 page	Attorney/client
14.	10/03/96	Panagopoulos letter to Luck 1 page	Attorney/client
15.	8/24/96	Surveillance report 6 pages	Produce in part
16.	8/12/96	Surveillance report 8 pages	Produce in part
17.	7/26/96	Surveillance report 7 pages	Produce in part

¶7 Respondent must comply with this Order on or before May 11, 1998.

DATED in Helena, Montana, this 6th day of May, 1998.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Thomas J. Murphy
Mr. Kelly M. Wills
Submitted: April 13, 1998