IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 4

WCC No. 9904-8199

RUSSELL KLINE

Petitioner

vs.

FARMERS INSURANCE GROUP

Respondent/Insurer for

DIAMOND AUTO GLASS INCORPORATED

Employer.

ORDER GRANTING SUMMARY JUDGMENT DISMISSING PETITION

Summary: Claimant sought an injunction prohibiting insurer from communicating with his medical providers. Both parties moved for summary judgment.

Held: Insurer's are not prohibited from requesting medical information and opinions from claimant's medical providers, but must give notice to claimant or his/her attorney and, in the case of an interview, give claimant the opportunity to be present. In the case of written requests for information, a copy of the correspondence is sufficient.

Topics:

Discovery: Generally. Discovery procedures and rules of the WCC apply only to litigated cases, not to the day-to-day adjustment of claims which are not in litigation.

Medical Records: Confidentiality. Insurers are not prohibited from directly requesting medical information and opinions from claimant's medical providers, but must give notice to claimant or his/her attorney and, in the case of an interview, the opportunity to be present. In the case of written requests for information, a copy of the correspondence is sufficient. See, Linton v. City of Great Falls, 230 Mont. 122, 749 P.2d 55 (1983).

Physicians: Communications With. Insurers are not prohibited from directly requesting medical information and opinions from claimant's medical providers, but

must give notice to claimant or his/her attorney and, in the case of an interview, the opportunity to be present. In the case of written requests for information, a copy of the correspondence is sufficient. See, Linton v. City of Great Falls, 230 Mont. 122, 749 P.2d 55 (1983).

Summary Judgment: Disputed Facts. Insurer's recitation of facts deemed undisputed where claimant failed to set forth specific facts showing that the insurer's enumerated facts were actually at issue. Mere allegation that facts are disputed in not sufficient to put the facts at issue; the opposing party must set forth his own supported facts showing that there is indeed an issue of fact. ARM 29.5.329(3) and (7). See, Koepplin v. Zortman Min., Inc., 267 Mont. 53, 58-59, 881 P.2d 1306, 1309 ("When raising the allegations that disputed issues of fact exist, the nonmoving party has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice.")

¶1 The petitioner/claimant, Russell Kline, seeks an injunction prohibiting the respondent/insurer from communicating with his medical providers. Both parties move for summary judgment. Since neither party has sought oral argument, the record was deemed closed and the matter submitted upon filing of the last brief. ARM 24.5.329(5).[(1)]

The Petition

¶2 Claimant's petition alleges that the insurer has contacted his medical providers. He alleges that such contacts violate the discovery procedures of this Court and his right to medical confidentiality. He seeks an "Order directing the insurer to comply with the rules established for discovery of information by this Court" and a further "order directing the insurer to instruct their agents to cease engaging in independent ex parte communications with . . . [his] medical providers." (Writ of Supervisory Control to Restrain Insurer from Communicating Directly with Claimant's Medical Providers at 4.)

Uncontroverted Facts

¶3 In its Brief in Support of Motion for Summary Judgment the insurer set out a list of uncontroverted facts numbered 1 through 24. (There was no number 3.) In his answer brief the claimant "disputes FARMERS [sic] statement of uncontroverted facts", however, it appears that his disagreement with the facts is based on what he characterizes as "editorialized selected pieces of a whole body of facts" rather than any specific disagreement with the facts themselves. (Combined Brief in Opposition to Insurer's Motion for Summary Judgment and in Support of Claimant's Motion for Summary Judgment at 3.) In any event, he fails to set forth any specific facts showing that the facts enumerated in the insurer's brief are at issue. A mere allegation that the facts are disputed is insufficient to put the facts at issue; the opposing party must set forth his own supported facts showing

that there is indeed an issue of fact. ARM 29.5.329(3) and (7); *Koepplin v. Zortman Min., Inc.,* 267 Mont. 53, 58-59, 881 P.2d 1306, 1309 ("When raising the allegations that disputed issues of fact exist, the nonmoving party has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice."). Therefore, the facts enumerated by the insurer are deemed undisputed. Those facts are:

> 1. Petitioner, Mr. Kline, was injured in the course and scope of his employment with Diamond Auto Glass on or around August 22, 1998. (*See* Ex. 2 to respondent's Brief in Support of Motion for Summary Judgment [hereinafter "Respondent's Supporting Brief"]).
>
> 2. Mr. Kline filed a claim for worker's compensation benefits on August 24, 1998. (*See* Ex. 2 to Respondent's Supporting Brief.)
>
> 4. On January 15, 1999, Aloni George, BSN, RN, CCM, a medical case manager, wrote to Mr. Kline explaining that Farmers had hired her as his medical case manager and the role that she was to play in his case. (*See* Ex. 3 to Respondent's Supporting Brief.)
>
> 5. On January 20, 1999, Farmers received a copy of Mr. Angel's attorney retainer agreement and a letter from Mr. Angel dated January 19, 1999. (*See* Ex. 4 to Respondent's Supporting Brief.)
>
> 6. In the January 20, 1999 letter, Mr. Angel informed Farmers that Mr. Kline wished to "decline the services of Intracorp [Ms. George's company]." (*Id.)*
>
> 7. Apparently, Ms. George had a conversation with Mr. Angel on January 19, 1999, during which he informed her that she was to have no contact with Mr. Kline or his medical providers. (*See* Ex. 5 to Respondent's Supporting Brief.)
>
> 8. On February 16, 1999, Mr. Angel wrote to Farmers and attached a signed limited release. (*See* Ex. 6 to Respondent's Supporting Brief.)
>
> 9. In the February 16, 1999 letter, Mr. Angel suggested that Farmers employ a rehabilitation counselor. (*Id*.)
>
> 10. On February 24, 1999, Gerry Blackman, a vocational rehabilitation consultant, performed a job analysis of Mr. Kline's time of injury job. (*See* Exhibit 7 to Respondent's Supporting Brief.)
>
> 11. Thereafter, on March 5, 1999, Ms. Blackman wrote to Dr. Diebert [sic], Mr. Kline's treating physician, requesting that he respond to several questions regarding maximum medical improvement, restrictions, and an impairment rating. (*See* Exhibit 8 to Respondent's Supporting Brief.)

12. On March 24, 1999, Mr. Angel wrote to Farmers stating that "just because Mr. Kline was injured and has requested workers' compensation benefits, he has not waived the confidentiality he has with his physicians." (*See* Exhibit 9 to Respondent's Supporting Brief.)

13. In the March 24, 1999 letter, Mr. Angel also informed Farmers that he "would be happy to facilitate all requests for information which Farmers, or its agents, may need to evaluate" Mr. Kline's claim. (*Id*.)

14. Mr. Angel also asserted in the March 24, 1999 letter that Farmers did not have the right to request "new information" from Dr. Diebert [sic]. (*Id*.)

15. On March 30, 1999, Farmers' counsel, Ms. Fontenot, wrote to Mr. Angel asserting that Farmers has the right to contact Mr. Kline's health care providers in writing to request information necessary to adjust Mr. Kline's claim for compensation as long as Mr. Angel was carbon copied on the correspondence. (*See* Ex. 10 to Respondent's Supporting Brief.)

16. Mr. Angel subsequently wrote to Dr. Diebert [sic] with an edited version of the questions previously asked by Ms. Blackman. (*See* Ex. 11 to Respondent's Supporting Brief.)

17. On April 3, 1999, Ms. Blackman wrote to Gary Lusin, the physical therapist who performed the functional capacity evaluation, and requested that he comment on the time of injury job analysis. (*See* Ex. 12 to Respondent's Supporting Brief.)

18. On April 13, 1999, Mr. Angel wrote to Ms. Blackman advising that she was to have no further contact with Mr. Kline's medical care providers, in writing or otherwise. (*See* Ex. 13 to Respondent's Supporting Brief.)

19. On April 14, 1999, Ms. George wrote to Mr. Angel explaining that she was closing her file and that Mr. Angel had apparently confused her with Ms. Blackman in his April 13, 1999, letter. (*See* Ex. 14 to Respondent's Supporting Brief.)

20. On April 15, 1999, Ms. Fontenot wrote to Mr. Angel reiterating Farmers' position with regard to written correspondence with Mr. Kline's health care providers. (*See* Ex. 15 to Respondent's Supporting Brief.)

21. On April 14, 1999, Mr. Angel filed a Writ of Supervisory Control in this Court.

22. On May 5, 1999, Ms. Fontenot wrote to Mr. Angel requesting an update on the information requested from Dr. Diebert [sic] and Mr. Lusin. (*See* Ex. 16 to Respondent's Supporting Brief.)

23. Subsequently, Farmers received a letter from Mr. Angel with Dr. Deibert's response to Mr. Angel's questions attached. (*See* Ex. 17 to Respondent's Supporting Brief.)

24. Mr. Angel wrote to Gary Lusin on May 28, 1999, requesting information regarding Mr. Kline's ability to perform the job described in Ms. Blackman's job analysis. (*See* Ex. 18 to Respondent's Supporting Brief.)

(Brief in Support of Motion for Summary Judgment at 2-3.)

¶4 Claimant does set forth three additional facts of potential significance. First, he alleges that the insurer's medical case manager, Aloni George, made medical appointments for him without his knowledge. (Combined Brief in Opposition to Insurer's Motion for Summary Judgment and in Support of Claimant's Motion for Summary Judgment, [hereinafter "Combined Brief"] final ¶ at 3.) The allegation is based on paragraph 5 of an affidavit of claimant's attorney, and the paragraph is based on inadmissible hearsay information.[(2)]

Rule 803, Mont.R.Civ.P. Inadmissible evidence will not be considered on a motion for summary judgment. *Carelli v. Hall,* 279 Mont. 202, 207, 926 P.2d 756, 760 (1996). The only admissible evidence proffered on this point was the affidavit of Ms. George, who states that on February 19, 1999, she was given permission by claimant's attorney to schedule medical appointments for claimant.

¶5 Second, claimant alleges that Ms. George attempted to participate in his physical examinations. (Combined Brief at 3 last ¶.) The allegation was based on a note of the claims examiner concerning an appointment with Dr. Stephens. (Ex. 6 to Combined Brief.) An affidavit of Ms. George states that note concerning Dr. Stephens was with respect to another client (Affidavit of Aloni George) and there is no other indication in the multitude of exhibits presented in connection with the motion that claimant was ever treated or seen by Dr. Stephens. In any event, there is no allegation that Ms. George or any other representative of the insurer was present at any examination of claimant or pursued any request to be present.

¶6 Third, claimant alleges that the insurer's vocational provider, Ms. Blackman, **engaged in private interviews with**, as well as wrote to claimant's physicians. (Combined Brief at 4 ¶3 and at 2 last full ¶.) The allegation that Blackman conducted private interviews or ever spoke directly to any physician is utterly unsupported. The singular citation claimant makes for this allegation is a letter Ms. Blackman wrote to Dr. Mark C. Deibert asking him if claimant was at MMI and requesting an impairment rating, medical restrictions, and an opinion whether claimant could return to his time-of-injury job. (Ex. 8 to Combined Brief.) Claimant's attorney was copied with the letter. (*Id.*) Claimant has not presented a shred of evidentiary support for his allegation that the vocational provider, case manager, or anyone else employed by the insurer ever spoke directly with any medical provider.

Summary Judgment Standards

¶7 Summary judgment may be granted only where uncontroverted material facts establish that the moving party is entitled to judgment as a matter of law. ARM 24.5.329(2); *Schelske v. Creative Nail Design, Inc.,* 280 Mont. 476, 482, 933 P.2d 799, 802 (1997). In this case both parties agree that the issues raised in the petition are essentially legal ones which may be properly resolved by summary judgment. (July 13, 1999 Minute Entry.)

Discussion

¶8 Initially, one issue the parties should have considered is whether the Court has the power to issue an injunction, for that is in essence the relief requested by the claimant. However, there is an insufficient basis in any event to grant the relief requested by the claimant. The Court therefore treats the case as a request for declaratory judgment and does not address whether it can issue an injunction.

¶9 In his petition the claimant argues that the discovery procedures applicable to actions filed in this Court apply to medical information sought by the insurer prior to litigation. While the assertion is not made in claimant's summary judgment brief, it warrants an answer. That answer is the Court's rules apply only to litigated cases. The rules have no application to or place in the day-to-day adjustment of claims which are not in litigation.

¶10 Claimant's further contention, which is argued in his brief, that insurers are prohibited from directly requesting medical information and opinions from claimant's medical providers is similarly without merit. In seeking benefits, the claimant waived his privilege with respect to medical information pertaining to his industrial injury. *Linton v. City of Great Falls,* 230 Mont. 122, 134, 749 P.2d 55, 63 (1988). Moreover, as pointed out in *Linton, Id*. at 133, 749 P.2d at 62, section 50-16-311(2)(e), MCA (1998)[(3)], expressly provides that a claimant's consent is not required for release or transfer of medical information to a workers' compensation insurer. *Linton,* which was decided subsequent to *Japp v. District Court,* 623 P.2d 1389 (1981), does not even preclude the insurer from personally interviewing the claimant's physician, holding:

> Clearly, the insurer or employer **is entitled to** all medical information pertaining to claimant's claim through the usual methods of discovery as well as exchanges between the parties and **personal interviews with those who have treated the claimant**.

Id., (emphasis added). All that *Linton* requires is that prior to any interview, the insurer provide the claimant with notice and an opportunity to be present. "What the [Workers' Compensation] Act does not contemplate are private interviews between the employer or insurer without the knowledge or opportunity of the claimant to be present." *Id.* The Court went on to say, "[A] personal interview between defendant insurance company and

claimant's treating physician must be done openly to allay any suspicion that there is something available to one party and not to the other." *Id.* at 134, 749 P.2d at 134.

¶11 While the question phrased in *Linton* was "whether the Workers' Compensation Court erred in allowing State Fund to have private interviews and correspondence with Linton's physicians," the Court addressed only the interviews, not the correspondence. However, the rationale adopted by the Supreme Court with respect to interviews, i.e., requiring them to "be done openly to allay any suspicion that there is something available to one party and not to the other," applies as well to correspondence.

¶12 In summary, *Linton* holds that the insurer is not required to obtain the consent of claimant to seek medical information or to channel all its requests through the claimant or his attorney. It requires only that claimant or his attorney be notified in advance of any interview so that he or she may be present during the interview. In the case of correspondence, it requires that the claimant or his attorney be copied with the correspondence.

¶13 The adversarial process urged by the claimant has no place in the day-to-day adjustment of claims. One of the principal goals of the Workers' Compensation Act is to return the injured worker to work as quickly as possible. § 39-71-105(2), MCA.[(4)] Another purpose is to make the system self-administering with minimum reliance on lawyers. § 39-71-105(3), MCA.[(5)] Requiring insurers to rely upon claimants and attorneys to obtain medical records and opinions would delay exchange of medical information, delay the return of the worker to work or the initiation of rehabilitation, and provide no significant benefit to claimant. It would put attorneys in charge of the flow of information.

¶14 The documentation and affidavits filed in connection with the parties' motions for summary judgment show that requests for medical information were made in writing and that those requests were copied to the claimant's attorney. Claimant has failed to establish any improper conduct on the part of the insurer. Accordingly, his petition is dismissed.

JUDGMENT

¶15 The petitioner is not entitled to relief. His petition in this matter is **dismissed**.

¶16 Petitioner is entitled to neither attorney fees nor costs.

¶17 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶18 4. Any party to this dispute may have 20 days in which to request a rehearing from this Order Granting Summary Judgment Dismissing Petition.

DATED in Helena, Montana, this 18th day of January, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Joe C. Maynard
Ms. Alison Fontenot - Courtesy Copy
Submission: August 12, 1999

1. ARM 24.5.329(5) provides:

> (5) If either party desires a hearing on the motion, a request must be made in writing no later than the time specified for the filing of the last brief. The court will thereupon set a time and place for hearing. If no request for hearing is made, any right to hearing afforded by these rules will be deemed waived. The court may order a hearing on its own motion.

2. The affidavit reports that the claimant told his attorney that he was "upset because Ms. George had scheduled him for a doctor's appointment at a time that he could not make it." (Ex. 4 to Combined Brief at 2 ¶5.)

3. The section cited in *Litton* has been repealed and replaced by section 50-16-527(4), MCA. The replacement section contains a parallel provision providing for disclosure of a claimant's medical information to the insurer.

4. Section 39-71-105(2), MCA provides:

> (2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

5. Section 39-71-105(3), MCA provides:

> (3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.