IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 48

WCC No. 2003-0911

AMERICAN INTERSTATE INSURANCE COMPANY

Petitioner

vs.

HAROLD G. KURTH

Respondent.

ORDER ON PENDING MOTIONS

Summary: Insurer and claimant filed cross motions to compel and insurer a motion to continue the trial on account of discovery issues.

Held: The *pro sé* status of claimant and his opposition to continuing the trial in this case are essential factors in resolving the motions. The claimant's motion to compel discovery of files and information of a private investigator would require an *in camera* inspection and delay the trial. Since the claimant states he waives the motion in the event of delay, the motion is deemed waived. With respect to the insurer's motion to compel, it is well taken, however, in light of the likely difficulties in obtaining compliance with Court discovery rules and the fact that the claimant will be barred from presenting witness testimony he has not disclosed in compliance with the Court's scheduling order and exhibits he has not identified and produced, there is little potential prejudice to the insurer in denying its motion with the proviso that if new information emerges at trial which does potentially prejudice its case, then the trial will be suspended and resumed at a later date after further discovery.

Topics:

> **Discovery: Compelling Discovery.** Where claimant is proceeding *pro se*, is inarticulate, and is unlikely to comprehend and comply with further discovery orders, where he will be precluded at trial from introducing witness testimony and exhibits he failed to exchange in compliance with the Court's scheduling order, and where he objects to a continuance, the Court sees little potential prejudice to the insurer in denying its motion to compel and proceeding to trial with the proviso that

if new information emerges at trial which does potentially prejudice its case, then the trial will be suspended and resumed at a later date after further discovery.

¶1 The motions presently before the Court are American Interstate's motion for a continuance and cross-motions to compel discovery. Trial is scheduled for the week of June 14, 2004. The pretrial conference is scheduled for today, June 7, 2004. The motions at issue were submitted for decision only this last week.

Discussion

¶2 American Interstate is the petitioner in this matter and seeks an order allowing it to suspend benefits on account of the claimant's failure to submit to an Independent Medical Examination (IME). That is the sole issue it presents.

¶3 Respondent (Kurth) objects to an IME, alleging that he has undergone multiple IMEs and enough is enough. In addition, he has filed a counter petition in which he seeks payment for his attendance at a pain clinic, reinstatement of temporary total disability benefits, and rehabilitation benefits.

I. Mr. Kurth's Motion to Compel

¶4 I first deal with Mr. Kurth's motion to compel discovery. The motion is inarticulate and difficult to parse, however, it appears to be asking the Court to compel production of documents requested in Respondent's Second Request for Production of Documents.[(1)] The requested documents are ones authored by the claims adjuster and by Nancy Polsin, RN, the file sent to Mary Jane Barrett, a referral letter to Rick Clark (which American Interstate says does not exist), financial records for medical and rehabilitation costs paid by American Interstate, and files pertaining to private investigators who investigated Kurth. American Interstate's responses to the requests for production indicate that it has complied with all of the requests, insofar as it could discern what was requested, except as to files pertaining to private investigators. It indicates it does not intend to offer any surveillance or investigative material developed by a private investigator and objects to the production of those materials on grounds of attorney-work product and attorney-client privilege. It also alleges, somewhat perplexingly, that production of such material could pose a threat to unspecified individuals and constitute contempt of court.

¶5 Since it appears that American Interstate has complied with all requests, as best it could, except for the private investigative files, I deal only with the latter. As an initial matter, the objection based on contempt of court and danger to unspecified individuals is so uninformative as to be useless to the Court in evaluating the objection. As to the attorney-client privilege, it is unlikely that it covers all investigative materials; surveillance tapes may well come under the attorney work-product rule but are not attorney-client communications. As to attorney work product, the privilege is not absolute:

> Ordinary work product is discoverable to the extent that it is not privileged and is "relevant to the subject matter involved in the pending action." Rule 26(b)(1), M.R.Civ.P. However, a party can discover ordinary work product "prepared in anticipation of litigation or for trial 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." Rule 26(b)(3), M.R.Civ.P.
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> "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles* (1975), 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141, 154. Because of this purpose, opinion work product is subject to additional protection by the court.

Palmer by Diacon v. Farmers Ins. Exchange, 261 Mont. 91, 115-16, 861 P.2d 895, 910 (1993).

¶6 To determine the validity of American Interstate's objections, the Court would have to conduct an *in camera* inspection of the materials, which could result in an order for production of some or all of the materials. Since there is insufficient time for the Court to gather and review the materials, and provide sufficient time for Kurth to review any materials produced as a result of the *in camera* inspection, the trial of this matter would have to be continued. Kurth, however, does not wish to continue the trial and indicates in his latest filing entitled Motion to Continue Scheduled Dates for Trial [sic], filed June 7, 2004, that he waives his motion to compel if it would result in a delay in the trial. I therefore deem the motion waived.

II. American Interstate's Motion to Compel

¶7 American Interstate seeks to compel production of exhibits and information supporting Kurth's requests for relief. Initially, it points out that Kurth has not provided copies of numerous exhibits that he lists in his Amended Petition (filed March 26, 2004). The remedy for that failure, however, is the exclusion of the exhibits if offered into evidence.

¶8 It also seeks to compel answers to interrogatories and production of documents. I have reviewed Kurth's answers and responses to the requested discovery. In most cases he simply stonewalled the questions and requests and provided no information. In others, he referred to attachments which he failed to provide. His answers and responses are plainly deficient and ordinarily would cause the Court to compel further answers and production. Kurth, however, is representing himself, as is his right. He is inarticulate and plainly does not understand Court rules and discovery obligations. It is obvious to me that attempting to

get him to comply with formal written discovery will be an arduous, time consuming task with little likelihood of ultimate compliance and little likelihood that compliance will put American Interstate in a better position to present its case and defend against Kurth's case.

¶9 American Interstate need only show that its request for an IME is reasonable in order to present its prima facie case. In *Liberty Northwest Ins. Corp. v. Marquardt,* 2003 MTWCC 63, ¶ 6, I noted:

> The plain purpose of section 39-71-605, MCA [allowing IMEs] is to allow insurers to obtain independent opinions and information concerning a claimant's disability status, his or her current medical condition and need for further treatment, and the relationship of the claimant's condition to the industrial injury or disease. In line with that purpose, they cannot be demanded for arbitrary or whimsical reasons. Thus, an insurer cannot compel repeated examinations simply because it does not like the results or opinions from the prior ones. On the other hand, an insurer is entitled to obtain a second, third, or even more IMEs or FCEs where there is an indication that claimant's medical condition has changed or there is some other sound reason for doing a repeat examination; for example, where the prior examination did not address the current medical issue.

Once American Interstate establishes a "sound reason" for its IME request, the burden shifts to Kurth to show that the request is unjustified or unreasonable. With respect to medical records and testimony that might support his opposition to the IME, he can rely only on exhibits he has disclosed and produced (or which the insurer already has) and witness testimony he has already identified. The rules requiring witness and exhibit disclosure protect American Interstate against surprise and allow it to fully prepare its case.

¶10 The same is true with regard to the issues that Kurth has affirmatively pled. He bears the burden of proof with respect to those issues. In carrying that burden he must rely on witness testimony he has disclosed and exhibits he has identified and produced or which are in the possession of American Interstate. Thus, American Interstate should have adequate information to prepare its defense, with a couple of exceptions, even without answers to its interrogatories and production of documents identified but not produced.

¶11 The exception is with respect to Kurth's work history since November 19, 2002 - the date as of which he seeks reinstatement of temporary total disability benefits, subsequent injuries, and subsequent medical treatment. American Interstate can pursue these subjects at trial and the Court will compel answers. If those answers, which must be given under oath, disclose information which constitutes surprise, the trial will be suspended and further discovery allowed if necessary for American Interstate to adequately respond.

III. Motion for Continuance

¶12 Since Kurth opposes a continuance and is limited to introducing witness testimony he has disclosed and exhibits he has identified and produced, I am denying American Interstate's motion for a continuance with the proviso that if new information comes to light during trial which constitutes surprise and affects American Interstate's ability to present its case, the trial will be suspended to allow for further discovery and will then be resumed at a later date.

ORDER

¶13 Kurth's motion to compel is deemed withdrawn. American Interstate's motions to compel and for a continuance are **denied** without prejudice. If new information comes to light during trial which constitutes surprise and affects American Interstate's ability to present its case, the trial will be suspended to allow for further discovery and will then be resumed at a later date.

DATED in Helena, Montana, this 7th day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. G. Andrew Adamek
Mr. Harold G. Kurth
Submitted: June 7, 2004

1. It appears from the attachments to Kurth's motion that his second requests for production are the same as his first requests for production.