IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 32

WCC No. 2001-0309

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner

DECKER COAL COMPANY

Employer

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER DENYING REQUEST TO QUASH DEPOSITIONS
BUT LIMITING DOCUMENTS' SUBPOENA

Summary: The present action involves a dispute between two insurers as to liability for claimant's current condition. State Fund insured claimant's employer prior to July 1, 2000, Liberty insured it thereafter. Claimant suffered a back injury on February 17, 2000, and underwent back surgery, thereafter returning to work in June 2000. In September he experienced renewed back pain while driving trucks, a different job from the one he held at the time of his injury, and ceased that job. On October 30, 2000, he experienced more acute back pain and ceased working altogether, then had further back surgery in December 2000.

State Fund took claimant's deposition and then noticed the depositions of two supervisors who had been involved in the reporting of the September and October complaints. According to claimant, one supervisor told him not to report the September complaints as an injury. The other supervisor filled out a report stating that there was no new injury. Liberty, however, protested the depositions claiming that the are irrelevant and would work a hardship on the supervisors, who are too busy with their work. It also objected to the scope of documents requested by the State Fund from the employer.

Held: Liberty's objections to the supervisors' depositions are without merit. The supervisors may have information relevant to what happened at work and therefore bearing upon whether claimant suffered an aggravation for which Liberty may be liable. Employers and their supervisors have an obligation to provide testimony. They are not entitled to

special consideration with regard to testimony in workers' compensation litigation. Agreement was reached with regard to the scope of the documents' subpoena.

Topics:

Discovery: Generally. The test for permissible discovery is not that the discovery will produce relevant evidence but that it may lead to relevant evidence.

Discovery: Generally. Where the claimant is alleged to have sustained a subsequent aggravation of a preexisting condition or injury, the specific facts regarding a subsequent incident may be important to medical opinions. Thus, the accuracy of claimant's report concerning the subsequent incident is relevant to the aggravation issue. The discussions he had with supervisors is relevant to that determination and are discoverable.

Discovery: Depositions. Supervisors to whom claimant reported an inability to work on account of pain or a physical condition may be deposed where there is an issue concerning whether the claimant suffered an injury or aggravation of a preexisting injury.

Discovery: Depositions. The fact that the claimant's supervisors are "busy" is not grounds for quashing their depositions. Employers and their supervisors have the same obligation as every other citizen and resident of United States to give testimony in legal proceedings.

¶1 On June 7, 2001, the Court held a telephone conference call with Mr. Larry W. Jones, attorney for Liberty Northwest Insurance Corporation (Liberty), and Mr. Greg E. Overturf, attorney for the State Compensation Insurance Fund (State Fund). The conference was held to resolve a discovery dispute outlined in a letter from Mr. Jones dated June 5, 2001. During the conference, I ruled that the depositions and discovery could proceed and indicated that a minute entry to that effect would issue. However, in light of Mr. Jones' vigorous resistence to the discovery, I am issuing this order in lieu of a minute entry.

Factual Background

¶2 The factual background, as set forth below, is gleaned from the pleadings, from a deposition of Robert Waurio, and representations of counsel during the telephone conference. The facts, as set forth, are by no means intended to be a final determination of the facts. They merely set out the factual scenario presented to me in connection with the discovery dispute.

¶3 The dispute in this matter is between two insurers - the State Fund and Liberty. It involves Robert Waurio and Decker Coal Company (Decker). Waurio was working as a mechanic for Decker and suffered a back injury on February 17, 2000. At the time of his injury, the State Fund insured Decker and accepted liability for the injury.

¶4 Claimant's February 2000 injury led to back surgery on March 20, 2000. He returned to work in June 2000. Meanwhile, Decker changed insurers: As of July 1, 2000, Liberty insured Decker.

¶5 Claimant testified in his deposition that in September 2000 he was reassigned to driving trucks for Decker but that within a couple of days his back was hurting so badly he could not continue and was reassigned to mechanic's duties. (Waurio Dep. at 76-81.) According to claimant, on the day he stopped truck driving his immediate supervisor told him not to put anything regarding an injury on his time card for that day because "it wasn't an injury, or it wasn't a new injury is how he felt at that time. (*Id*. at 79.) Then on October 30, 2000, claimant was working in the shop and "felt something give in my back." (*Id.* at 83.) He went home and never returned to work thereafter. (*Id*. at 84.) He underwent additional surgery in December 2000. (*Id*. at 97.)

¶6 Liberty began paying benefits, and continues to pay benefits while claimant convalesces from the second surgery. However, it filed a *Belton* type petition seeking indemnification from the State Fund. In its response to the petition, the State Fund alleges that the claimant reached maximum medical improvement prior to the onset of his back problems in the fall of 2000 and that he suffered a new injury or occupational disease after he reached MMI. It denies liability.

Discussion

¶7 State Fund has noticed up depositions of Wayne Kadarmes (Kadarmes), supervisor, and Don Reynolds (Reynolds), the mine manager, and has also issued a subpoena duces tecum for production of various documents. Liberty vigorously objects to the taking of both depositions and urges that the documents' subpoena is too broad.

¶8 The objections to the taking of the depositions are **overruled**. As noted in the factual summary, Kadarmes told claimant not to report an injury arising out of his truck driving in September. With respect to Reynolds, claimant testified in deposition that he talked to Reynolds about the October 30, 2000 incident. (*Id*. at 89.) Reynold's also signed a claim form for the October 30th incident, a form on which is the employer, presumably Reynolds, wrote "THERE WASN'T ANY TRAUMATIC HAPPENING OR ACCIDENT." (*Id.* at 92 and Dep. Ex. 2.)

¶9 Liberty argues that the depositions are irrelevant since the question in this case is a medical one concerning causation. However, the medical question may be affected by the claimant's medical history, specifically what occurred and what he experienced in September while driving trucks and on October 30th. The accuracy of his statements concerning those events is therefore at issue. He reported his back pain to Kadarmes and Reynolds, and their testimony concerning his reports may well be relevant to the Court's assessment of his testimony and ultimately to medical determinations. Moreover, both

Kadarmes and Reynolds immediately took the position that claimant had not suffered a new injury either as a result of his truck driving or the October 30th incident. Their discussions with him may have influenced his reports concerning the role of his work in September and October.

¶10 The discussion in the foregoing paragraph shows that the supervisors' testimony may be highly relevant to a determination of what in fact happened at work in September and October. Moreover, discovery does not have to be relevant. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), Mont.R.Civ.P.

¶11 Liberty also says that the depositions will result in hardship on both Kadarmes and Reynolds because they are "busy" with their work. I am not *one bit* sympathetic with this argument, indeed it is offensive to the Court. Decker is a large company. It has many employees. Some of those employees may be injured and their injuries may result in litigation. That is a cost of doing business. Testifying in Court is not only a cost of doing business but a civil obligation of *every* citizen and resident of this great country.

¶12 With respect to the documents' subpoena, the conference held on June 7, 2001, resulted in a pared down list of documents being faxed to Mr. Jones and the Court on June 8, 2001. That list is as follows:

> ¶12A Mr. Waurio's personnel file.
>
> ¶12B Mr. Waurio's time cards from 08/01/00 through 11/01/00. (or last day worked)
>
> ¶12C Any and all notes, memoranda or correspondence involving Robert Waurio's claims of injury at Decker Coal Co.
>
> ¶12D Decker's policy manuals or other documentation regarding Safety/Loss Management, procedures for reporting injuries, procedures for change in job duties, training for job duties, and Gainsharing program.

(Overturf letter to Jones, dated June 8, 2001.)

¶13 A further telephone conference was had on June 8, 2001, and the list was further delimited. Mr. Jones objected to the breadth of the last request, and I agreed it is overbroad. In our discussion, the last request was limited by agreement to the time period of June through October 2000, and to the areas of the mine in which claimant worked. With respect to job duties, it was limited to jobs which claimant performed.

ORDER

¶14 Liberty's objections to the depositions of Don Reynolds and Wayne Kadarmes are **overruled**. The depositions shall take place as scheduled.

¶15 The documents' subpoena issued by the State Fund is limited in accordance with Mr. Overturf's June 8, 2001 letter and the agreements reached in our June 8, 2001 conference call.

DATED in Helena, Montana, this 11th day of June, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Greg E. Overturf