IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 36

WCC No. 2004-0997

PERRY ROSE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER REGARDING MOTION FOR EVIDENTIARY RULING

Summary: The respondent insurer moves for leave to present evidence of statements made by the claimant during mediation, asserting that the statements are not confidential since they were made directly to the attorney and claims adjuster for the respondent rather than to the mediator.

Held: The motion is denied. Confidentiality provisions governing mediation preclude the admission of statements made during the mediation even if the statements sought to be admitted were purportedly addressed to other parties rather than directly to the mediator.

Topics:

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2410, MCA (1991-2003). Confidentiality provisions governing mediation preclude the admission of statements made during the mediation even if the statements sought to be admitted were purportedly addressed to other parties rather than directly to the mediator.

Mediation: Confidentiality. Confidentiality provisions governing mediation preclude the admission of statements made during the mediation even if the statements sought to be admitted were purportedly addressed to other parties rather than directly to the mediator. § 39-71-2410, MCA (1991-2003).

Evidence: Privileges and Confidentiality: Mediation. Confidentiality provisions governing mediation preclude the admission of statements made during the mediation even if the statements sought to be admitted were purportedly addressed to other parties rather than directly to the mediator. § 39-71-2410, MCA (1991-2003).

¶1 The Montana State Fund requests a pretrial ruling as to the admissibility of statements made by the claimant during mediation. The statements, if admitted, could be construed as indicating the claimant's predisposition or intent to fabricate a new workers' compensation claim, and in fact the claimant alleges in his petition that he was reinjured.

¶2 The admissibility of communications during mediation proceedings is governed by section 39-71-2410, MCA (1991-2003), which provides:

> **39-71-2410. Limitations on mediation proceedings**. (1) Except as may be necessary for the workers' compensation court to rule on issues arising under 39-71-2401(4)(c) or 39-71-2411(7)(c), mediation proceedings are:
>
> (a) held in private;
>
> (b) informal and held without a verbatim record; and
>
> (c) confidential.
>
> (2) All communications, verbal or written, from the parties to the mediator and any information and evidence presented to the mediator during the proceeding are confidential.
>
> (3) A mediator's files and records are closed to all but the parties.
>
> (4)(a) A mediator may not be called to testify in any proceeding concerning the issues discussed in the mediation process.
>
> (b) Neither the mediator's report nor any of the information or recommendations contained in it are admissible as evidence in any action subsequently brought in any court of law.
>
> (5) Notwithstanding subsections (1) through (4), a mediator may issue a report and the parties and the mediator may be required to attend a conference before the workers' compensation court as set forth in 39-71-2411.

¶3 State Fund argues that the confidentiality provisions do not apply here because the statements it wishes to introduce at trial were made to the State Fund's attorney and claims adjuster, albeit during mediation, and not directed to the mediator. It relies on the literal language of subsection (2), which covers "communications . . . to the mediator and any information and evidence presented to the mediator. . . ." It argues that communications directed to other parties during mediation are exempt from confidentiality provisions even though the mediator is present and controlling the mediation proceedings. Its argument is without merit.

¶4 First, subsection (1)(c) contains a broader provision than set out in subsection (2), stating broadly and unequivocally that mediation proceedings are "confidential." The

provision is comprehensive and does not distinguish between communications directed specifically to the mediator and communications addressed to other parties.

¶5 Second, the mediator is a party to all conversations occurring during mediation. Attempting to characterize conversations as between parties rather than with the mediator is slicing the sushi far to thin. The mediator is in the middle of and party to all communications, thus he cannot be sliced out of the communications. Moreover, determining whether the communication was intended for the mediator or another party would require an evidentiary hearing, thus destroying the very confidentiality which the statute seeks to preserve.

¶6 Thirdly, the most impartial witness to statements made during mediation is the mediator. Thus, the mediator could be required to testify as to whether the communication in question was addressed to him or her or to the other parties. Section 39-71-2410(4)(a), MCA (1991-2003), expressly prohibits calling the mediator as a witness.

¶7 Fourthly, and finally, statements occurring during mediation, even if directed towards other parties, may require context, and may therefore require admission of other statements made to the mediator.

¶8 The motion to present evidence of statements made by the claimant during mediation is **denied**.

SO ORDERED.

DATED in Helena, Montana, this 19th day of April, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Daniel B. McGregor
Submitted: April 13, 2004