

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 2

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER REGARDING DISCOVERY

Summary: Insurer moved to compel discovery, including responses to interrogatories and requests to produce. Insurer also asked for continuance of trial in order to have time to obtain an independent medical examination.

Held: Where more than 20 days have elapsed since service of respondent's interrogatories, and petitioner made no request for an extension of time in which to answer, the WCC orders answers. ARM 24.5.323. Petitioner's generic agreement to produce records in the future is insufficient. Claimant's request that doctors forward medical records is not sufficient if time has lapsed and the records have not been produced. Where petitioner has undertaken to obtain the records, he has an obligation to further contact doctors to determine when the records will be forthcoming, whether there is anything he can do to expedite their release, and if not forthcoming, determine why not. Request for continuance to permit IME and receipt of medical records is denied where present petition seeks temporary total disability benefits based on respondent's alleged failure to comply with Coles requirements for termination of benefits. The Coles criteria are essentially mechanical ones and it is not clear to the Court what relevance the outstanding discovery or an IME has to that issue.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers; Compensation Court Rules: ARM 24.5.323. Where more than 20 days have elapsed since service of

respondent's interrogatories, and petition has made no request for an extension of time in which to answer, the WCC orders that answers be provided.

Discovery: Compelling Discovery. Where more than 20 days have elapsed since service of respondent's interrogatories, and petition has made no request for an extension of time in which to answer, the WCC orders that answers be provided.

Discovery: Independent Medical Examinations. Request for continuation to permit IME and receipt of medical records is denied where present petition seeks temporary total disability benefits based on respondent's alleged failure to comply with Coles requirements for termination of benefits. The Coles criteria are essentially mechanical ones and it is not clear to the Court what relevance the outstanding discovery or an IME has to that issue. An IME is appropriate where there are medical issues and the IME may result in opinions relevant to those issues. Where the litigation does not involve medical issues or the IME is not calculated to produce opinions relevant to the medical issues present in the case, the Court will not order an IME.

Discovery: Requests for Production. Petitioner's generic agreement to produce records in the future is insufficient. Claimant's request that doctors forward medical records is not sufficient if time has lapsed and the records have not been produced. Where petitioner has undertaken to obtain the records, he has an obligation to further contact the doctors to determine when the records will be forthcoming, whether there is anything he can do to expedite their release, and if not forthcoming, determine why not.

The Court has before it respondent's motion to compel discovery, along with a supporting brief, an answer brief, a reply brief, and eight exhibits. The matters raised by the motion do not warrant the amount of time, ink and effort expended on them. The discovery issues could and should have been handled by a telephone conference with the Court. However, since they were not, the Court will address them formally and enter its order regarding the motion.

The motion concerns petitioner's responses to respondent's first requests for production and respondent's second interrogatories to petitioner. Respondent argues that the petitioner's responses to the requests for production were inadequate and incomplete and asks that petitioner be ordered to further respond. It additionally states that petitioner has failed to answer second interrogatories propounded on October 3, 1996, and asks that petitioner be compelled to answer them. The Court will address the two discovery requests in reverse order and will then address other issues raised in the parties' briefs.

1. Interrogatories.

The rules of this Court require a party upon whom interrogatories have been propounded to answer the interrogatories under oath within 20 days of service of the interrogatories. ARM 24.5.323. The time may be extended by the Court, *id.*, but petitioner never requested an extension. Since the 20 days for answering the interrogatories expired long ago, respondent is entitled to an order compelling answers. Those answers shall be served within 14 days of this Order.

2. Requests for Production.

Respondent served its request for production seeking medical records and other documents on September 9, 1996. (Respondent's Brief in Support of Motion to Compel Discovery, Ex. 1.) On October 3, 1996, the petitioner served his responses. (Respondent's Brief in Support of Motion to Compel Discovery, Ex. 2.) However, the responses were not signed, other than a signature on the certificate of service. In many instances the petitioner informed respondent that he had requested the records and would produce them as soon as he received them. (Responses to requests 8-12.) With respect to non-medical documents he indicated that the documents would be produced in the "near future." (Responses to requests 13-15 and 17-22.) He furnished the records requested in requests 1 through 7. In response to request 16 that he produce executed originals of the attached medical releases, he noted that the releases referred to in the request were not attached. Petitioner did not object to furnishing any of the requested records.

On December 9, 1996, petitioner supplemented his responses and furnished the records requested in requests 11 and 12 and at least some of the documents requested in 17 and 18. (Respondent's Brief in Support of Motion to Compel Discovery, Ex. 4.)

Respondent specifically asks the Court to order petitioner to respond to requests 8, 9, 10, 14, 15, 19, 20, 21, and 22 and to fully answer 17.

Petitioner appropriately responded to 8, 9, and 10. He has requested the medical records and agreed to furnish them as soon as he receives them. In his response to the motion, he represents that he has not yet received those records. (Claimant's Response to Respondent's Motion to Compel Discovery.) While the records are within his control in the sense that he can request the named doctors to release them, he cannot control the timing of the doctors' responses. At least some of the doctors identified in this case reside in Arizona, where claimant now resides.

Nonetheless, petitioner has an obligation to further contact the doctors to determine when the records will be forthcoming, whether there is anything he can do to expedite their release, and if not forthcoming, determine why not. If such follow-up has been undertaken recently, then the claimant shall inform the Court and respondent. If such follow-up has not been done within the last three weeks, then petitioner shall follow-up in the manner

stated. In either event he shall prepare a written report concerning his efforts and the doctors' responses. Such report shall be filed and served within 14 days of this Order.

Request 17 asks petitioner to produce all correspondence, records, files and accident reports relating to the automobile accident in which Petitioner was involved on or about July 18, 1995. (Respondent's Bbrief in Support of Motion to Compel Discovery, Ex. 1 at 3.) Petitioner initially responded that he would provide the documents in the near future. (*Id.* at Ex. 2 at 3.) In his supplemental answers (*id.* at ex. 4 at 2), he responded as follows:

SUPPLEMENTAL RESPONSE: Enclosed are medical records from Stuart Alt, M.D., (Scottsdale Memorial Hospital) dated July 18, 1995 and from Richard Schooler, M.D., (Scottsdale Memorial Hospital) dated July 19, 1995 [sic].

These medical records apparently relate to the automobile accident and are therefore responsive to the request. However, the request is for far more than medical records. It encompasses accident and other reports, as well as files and correspondence relating to the accident. If no such documents exist, then petitioner should so indicate by further supplementing his answer. If any further documents exist, then his response should be supplemented by identifying the documents and by producing them. In either event, petitioner shall further respond within 14 days of this Order.

As to requests 14, 15, 19, 20, 21, and 22, petitioner indicated in his October 3 responses that the documents requested would be furnished in the near future. Whatever he may have meant by that, it is the Court's considered judgment that the "near future" is long past. Petitioner shall produce the requested documents within 14 days. If there are documents which he does not currently have in his possession but which he can authorize third parties to release, then he shall identify those documents and state what he has done to obtain them.

3. Request for Continuance.

In its briefs the respondent urges that the present trial setting be vacated on account of petitioner's non-compliance with its discovery requests. It states that it wishes to have an independent medical examination (IME) of claimant and that the medical records yet to be produced are essential to that examination.

It is not apparent to the Court at this time that a continuance is necessary. The petitioner seeks temporary total disability benefits based on respondent's alleged failure to comply with the *Coles* requirements for termination of benefits. The only medical issue raised in the petition, a request that respondent pay for a pain clinic, has been withdrawn. The *Coles* criteria are essentially mechanical ones and it is not clear to the Court what relevance the outstanding discovery or an IME has to that issue. Therefore, the request for a continuance is **denied without prejudice**. Respondent may renew the motion should it determine that

any of the outstanding discovery is relevant and that there is insufficient time to obtain it or to incorporate it into its defense in time for trial.

4. Independent Medical Examination.

In their briefs both parties mention an IME requested by respondent but which has not yet taken place. Respondent mentions the IME in connection with its need for complete responses to discovery. Petitioner states that he objects to the IME as unnecessary and inconvenient.

At present there is no motion pending before the Court with regard to the IME. Therefore, the Court will issue no order compelling or prohibiting the IME. For the guidance of the parties, however, the Court directs the parties to the recent Supreme Court decision in *EBI/Orion v. Blythe*, No. 96-100 (January 7, 1997), which indicates that IMEs under section 39-71-605, MCA, must be performed by *physicians licensed to practice in Montana*. That determination may have a bearing on the place of the examination and, thus, on the argument that it would be inconvenient for petitioner, who now lives in Arizona, to submit to an IME in Montana.

As further guidance, the parties should be aware that this Court has previously stated that while it has no rule similar to Rule 35, Mont.R.Civ.P, section 39-71-605, MCA, permits an IME at any time; thus, where it has jurisdiction over a pending dispute, the Court has the authority to compel an IME if appropriate. *Hansen v. National Union Fire Ins. of Pittsburgh*, WCC No. 9509-7391, order denying respondent's request for dismissal (October 17, 1995). An IME is appropriate where there are medical issues and the IME may result in opinions relevant to those issues. Where the litigation does not involve medical issues or the IME is not calculated to produce opinions relevant to the medical issues present in the case, the Court will not order an IME.

5. Respondent's Second Requests for Production.

In its reply brief the respondent notes for the first time that petitioner's responses to a second set of requests for production propounded December 2, 1996, are now overdue. While respondent requests the Court to compel responses, there is no motion pending concerning this discovery. Thus, the Court cannot at this time enter an order with respect to the discovery. However, it should be clear from the Court's rules concerning discovery, as well as the previous discussion, that upon proper motion the Court *will* compel responses if the second requests for production remain unanswered.

In issuing this Order, the Court has considered the comments and arguments of counsel made today during a telephone conference call.

ORDER

In summary, IT IS HEREBY ORDERED AS FOLLOWS:

1. Within 14 days of this Order, petitioner shall serve his answers to the respondent's second set of interrogatories.
2. Within 14 days of this Order, petitioner shall determine the status of his requests for the medical records he has not yet received and file and serve a written report regarding his efforts.
3. Within 14 days of this Order, petitioner shall supplement his response to request for production 17. In his supplemental answer he shall identify all other documents which were not produced but which fit the description set forth in the request. If he has the documents, he shall produce them. If he has not yet obtained them and can do so by requesting them, he shall describe his efforts to obtain the documents.
4. Within 14 days of this Order, petitioner shall produce the documents requested in requests 14, 15, 19, 20, 21, and 22. If there are documents which he does not currently have in his possession but which he can authorize third parties to release, then he shall identify those documents and state what he has done to obtain them.
5. The request to continue the trial setting is **denied without prejudice**.

DATED in Helena, Montana, this 13th day of January, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c:Mr. James G. Hunt

Mr. Jason G. Dykstra

Submitted: January 6, 1997