

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 66

WCC No. 9607-7573

JAMES TUMA

Petitioner

vs.

CONNECTICUT INDEMNITY COMPANY

Respondent/Insurer for

WESTERN ENERGY

Employer.

ORDER COMPELLING DISCOVERY AND VACATING DEPOSITION

Summary: Insurer moved to compel production of documents and to vacate deposition of physician until records were produced. The records remaining at issue related to: (1) petitioner's treatment for alcoholism and/or drug addiction, which he argued were privileged under section 53-24-206, MCA, though he did not contend they were irrelevant; and (2) African sleeping sickness respondent believed claimant may have suffered, which claimant argued were not in his possession.

Held: "A claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987). The fact that medical records are not presently in a claimant's possession does not relieve him of the obligation to obtain the records or provide a release that will enable the insurer to obtain the records. Both sets of records must be produced. The deposition is vacated in light of the possibility that some of the records may be relevant to cross examination of the physician. Trial is vacated where it is unlikely discovery will be completed before the current setting.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

Section 53-24-206, MCA. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were

privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Discovery: Depositions: Generally. Date for deposition of physician (and trial date) vacated where claimant had resisted production of certain medical records that were potentially relevant to cross-examination of physician and WCC granted motion to compel production of such documents. It was not likely discovery could be completed prior to deposition or trial dates.

Discovery: Compelling Discovery. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Discovery: Compelling Discovery. The fact that medical records are not presently in a claimant's possession does not relieve him of the obligation to obtain the records or provide a release that will enable the insurer to obtain the records.

Discovery: Objections to Discovery. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Discovery: Objections to Discovery. The fact that medical records are not presently in a claimant's possession does not relieve him of the obligation to obtain the records or provide a release that will enable the insurer to obtain the records.

Discovery: Records of Psychological Treatment. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits

waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Discovery: Requests for Production. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Discovery: Requests for Production. The fact that medical records are not presently in a claimant's possession does not relieve him of the obligation to obtain the records or provide a release that will enable the insurer to obtain the records.

Medical Records: Confidentiality. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Medical Records: Objections to. Claimant ordered to produce medical records related to treatment for alcoholism and/or drug addiction where he claimed the records were privileged, but did not argue they were not possibly relevant to litigation of his claim. Although section 53-24-206, MCA, relates to confidentiality of such records, "[a] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987).

Medical Records: Objections to. The fact that medical records are not presently in a claimant's possession does not relieve him of the obligation to obtain the records or provide a release that will enable the insurer to obtain the records.

The Court held a conference call today, October 16, 1996, with Mr. Victor R. Halverson, counsel for petitioner, and, Mr. Joe C. Maynard, counsel for respondent, to resolve outstanding discovery issues. The issues were handled on an emergency basis in light of a deposition of Dr. Gregory S. McDowell currently scheduled for October 18, 1996. The

specific motions considered were a Motion to Compel Production of Documents and a Motion to Quash and Supporting Brief. Both motions were filed by respondent. The latter motion asks the Court to quash Dr. McDowell's deposition until the additional discovery requested by respondent is provided.

The motion to compel seeks production of various medical records requested by respondent. The requests, along with the petitioner's responses, are set forth in Petitioner's Response to Respondent's First Combined Requests for Production and Interrogatories to Petitioner. A copy of the response was faxed to the Court on October 15, 1996, and has been docketed and filed in connection with the pending motions.

The requests for production at issue are numbers 2, 3, 4 and 5.

Request 2 asks petitioner to produce the records of several health care providers. Petitioner responded:

RESPONSE: Claimant has previously exchanged with defense counsel copies of all medical records in his possession. Plaintiff objects to the exchange of any records from Cedar Mountain on the grounds they are protected from disclosure as a matter of law; and those records are not in his possession.

During the telephone conference counsel informed the Court that the medical records which were not provided respondent are records of Dr. Cope, a physician who treated petitioner many years ago, and records of Cedar Mountain.

Petitioner does not object to producing Dr. Cope's records, however, to date efforts to locate those records have been unsuccessful. Dr. Cope no longer has them but has indicated that they may be in storage elsewhere. Petitioner's counsel agreed to follow up on the information provided by Dr. Cope and produce the records if they are located. Thus, no order on the part of the Court is required with respect to these records.

The petitioner resists production of the Cedar Mountain records. Initially, he indicates they are not in his possession. Nonetheless, insofar as he can obtain them or authorize their disclosure, they are within his control and properly the subject of a request for production. Petitioner further resists the request on the ground that "they are protected from disclosure as a matter of law." This type of objection is insufficient and does not inform either the requestor or the Court of the nature of the objection. However, during the telephone conference, Mr. Halverson identified section 53-24-306, MCA, as the basis for the objection.

Section 53-24-306, MCA, pertains to records of treatment for alcoholism and drug addiction. Subsection (1) provides: "The registration and other records of treatment facilities shall remain confidential and are privileged to the patient." But, generally, the privilege regarding medical records may be waived by the patient. Such waiver extends to

workers' compensation cases where the records pertain to a condition for which a claimant seeks compensation. "[A] claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Value Stores*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1987). Petitioner does not contend that the requested records are irrelevant, only that they are privileged. Therefore, they must be produced.

Request 4 specifically concern's Dr. Cope's records. That matter has been resolved.

Request 5 concerns records of African sleeping sickness. Petitioner responded that he "has no such records in his possession." As indicated earlier, the fact that medical records are not presently in the petitioner's possession does not relieve him from the obligation to obtain them or provide a release which will enable respondent to obtain them. Counsel for petitioner, however, indicated that he is unaware that any such records exist or that petitioner ever suffered from such condition. Respondent's counsel referred to some record which refers to the condition and will send a copy of the record to petitioner's counsel, who will then make further inquiry. If such records exist, then they shall be produced.

In light of the possibility that some of the records may be relevant to any cross-examination of Dr. McDowell, I am vacating his deposition. The deposition may be reset after the medical records discussed in this Order are obtained.

Finally, since it is unlikely that all discovery can be completed by November 4, 1996, the date scheduled for trial, the trial will be reset for December 9, 1996.

In summary, petitioner's counsel has agreed to continue his efforts to obtain Dr. Cope's records and will produce those records if they are located. Petitioner is further ORDERED to obtain and **produce** the Cedar Mountain records and, if they exist, any records pertaining to sleeping sickness. Dr. McDowell's scheduled deposition is **vacated** and may be **reset** upon production of the records discussed in this Order. Trial of this matter is **reset** for 1:00 p.m., December 9, 1996, in Billings, Montana, and the parties shall abide by the amended scheduling order which accompanies this Order.

SO ORDERED.

DATED in Helena, Montana, this 16th day of October, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Victor R. Halverson

Mr. Joe C. Maynard

Submitted: October 16, 1996