

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 12

WCC No. 9307-6831

CRAIG A. ADELS

Petitioner,

vs.

CIGNA INSURANCE COMPANY

Respondent/Insurer for

WEN DON CORPORATION

Employer.

ORDER DENYING MOTION TO COMPEL; ORDER BIFURCATING ISSUES

Petitioner, Craig A. Adels (claimant), has filed a motion to compel production of two documents contained in the claim file of the respondent insurer, Cigna Insurance Company (Cigna). Cigna objects to disclosure of the documents, citing the work product doctrine.

The first document at issue is described by Cigna as a March 27, 1991 investigator's report. The second consists of the insurance adjuster's notes. The documents have been provided to the Court for an in camera inspection. In light of the disposition of the claimant's motion, the Court has not reviewed the documents. They will be retained in a sealed envelope. If at a later date it becomes necessary to review them, I will do so.

Claimant advances three grounds for his motion to compel. First, he argues that the investigator's report and parts of the adjuster's notes are not within the work product rule because they were prepared before the insurer hired counsel. Second, he contends that Cigna waived any work product claim regarding the investigator's report. Finally, he argues that his interest in disclosure of the two documents overcomes the prima facie presumption against disclosure.

The work product rule is set forth in Rule 26 (b)(3), Mont.R.Civ.P., which states:

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule [relating to expert witnesses], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in

anticipation of litigation or for trial by 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 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

While the Montana Rules of Civil Procedure do not directly apply to the Workers' Compensation Court, the rules provide guidance when its own rules are silent. ***Moen v. Peter Kiewit Sons' Co.***, 201 Mont. 425, 434, 655 P.2d 482 (1982). In questions involving the work product rule, this Court has specifically looked to Rule 26. It is therefore appropriate to do so in this case.

The Montana Supreme Court has held that the work product doctrine applies from the moment a claim file is opened:

. . . When a claim file is opened, there is always some prospect of litigation and an investigation must be conducted geared to the ultimate eventuality of litigation. Therefore, we feel that work product protection must be afforded from the time the claim file is opened.

Kuiper v. District Court, 193 Mont. 452, 465, 632 P.2d 694 (1981). That holding was reiterated in ***Palmer v. Farmers Insurance Exchange***, 50 St.Rep. 1210, 1219 (October 18, 1993). In ***Kuiper*** the Supreme Court observed that "[n]ormally, claim files are commenced in anticipation of litigation." 193 Mont. at 459. Both ***Kuiper*** and ***Palmer*** involved liability insurance policies covering tort claims and that underlying rationale may not apply with equal force to claim files opened in workers' compensation cases. However, in light of the expansive and specific holdings in both cases, it is inappropriate for this Court to speculate whether the Supreme Court might at some future time conclude that work product protection is triggered at a later time in workers' compensation cases. I therefore conclude that the protection extends to both of the documents sought in this case.

Counsel for Cigna, Andrew J. Utick, also represents in his brief that he "was in fact involved in this claim prior to the preparation of the investigative report." *Defendant's Response To Petitioner's Motion To Compel Production Of Documents Claimed To Be Privileged at 7*. An attorney's signature on documents filed with the Court represent his certification of the accuracy of statements made of personal knowledge. Mr. Utick's involvement in the case at the time of the documents were generated thus places the documents under the umbrella of the work product doctrine whether or not the holdings in ***Kuiper*** and ***Palmer*** might be limited by some future Supreme Court decision.

Claimant points out that the types of materials he seeks herein are routinely produced by workers' compensation insurers. Since the protection of the work product doctrine may be waived, that observation is not legally persuasive.

In this case Cigna did not waive the protection of the work product doctrine. Voluntary waiver may be found where a party "voluntarily **disseminated** the documents in question." *Kuiper v. District Court*, 193 Mont. 452, 460, 632 P.2d. 694 (1981) (*emphasis added*). Claimant has supplied the Court with a copy of a letter from Cigna to another insurer which apparently provided disability insurance coverage to claimant. In that letter Cigna promised to send the disability insurer "a copy of our investigator's report as soon as it arrives." Cigna denies that the investigative report was ever sent to a the disability insurer or any other third party, and claimant has provided no evidence to contradict that denial. A promise to disclose does not amount to actual disclosure. There was no waiver by Cigna.

Claimant also argues that he needs the documents so he can rebut respondent's allegations of fraud and that they are also necessary to prove that the insurer acted unreasonably and should therefore be assessed a 20% statutory penalty. He contends that the relevancy of the documents to those issues overcome the protection ordinarily afforded work product.

The "fraud" allegations mentioned by claimant refers to Cigna's contention in its *Response To Petition For Hearing* that claimant collected temporary total disability benefits while working. Cigna also contends that later on, while receiving wage supplement benefits, the claimant also failed to report earnings which would have disqualified him from receiving those benefits. A number of discovery methods are available to claimant through which he can inquire into the factual basis of Cigna's defenses. He has not shown that he has utilized those methods and that they proved to be inadequate. Thus, he has neither demonstrated a substantial need for the documents nor shown that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26 (b)(3), Mont.R.Civ.P.

Claimant's penalty arguments stand on a different footing. The adjuster's knowledge and his reasons for denial of benefits are highly relevant to the penalty issue. The Court agrees that the two documents sought by claimant may be crucial to that issue and that there is no other satisfactory way to obtain the information contained in the documents. Cigna's argument that he can determine what the adjuster knew by asking him overlooks the claimant's right to fully test the adjuster's memory and probe inconsistencies between his testimony and documentary evidence available to or created by the adjuster at the time benefits were denied.

However, the claimant must prove his entitlement to benefits as a prerequisite to any penalty. Section 39-71-2907, MCA. His interest in the documents is therefore a contingent one which can be safeguarded by bifurcating the penalty issue from the underlying claims.

Bifurcation is expressly countenanced in bad faith actions against insurers. It is permitted in any action brought by an insured "where justice so requires" and is mandatory in a third party action against an insurer. Section 33-18-242 (6), MCA. While the cited section does not govern a request for a penalty under the Workers' Compensation Act, it does provide both a precedent and guidance for reconciling the conflicting interests presented in this case.

In the event claimant prevails on his claim for benefits, the Court will review the two documents sought by claimant, order their disclosure if appropriate, and schedule an expedited hearing to resolve the penalty issue.

IT IS THEREFORE ORDERED AS FOLLOWS:

- 1) The petitioner's motion is **denied**.
- 2) The petitioner's claim for a penalty is **bifurcated** and shall be considered only after his underlying claims are resolved.
- 3) In the event petitioner prevails on some or all of his underlying claims, he may renew his motion to compel.

DATED in Helena, Montana, this 16th day of February, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston, III
Mr. Andrew J. Utick