IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 12A

WCC No. 9307-6831

CRAIG A. ADELS,

Petitioner,

vs.

CIGNA INSURANCE COMPANY,

Respondent/Insurer for

WEN DON CORPORATION,

Employer.

ORDER AMENDING PRIOR ORDER DENYING MOTION TO COMPEL

On February 16, 1994, this Court entered an order denying motion to compel; order bifurcating issues. That Order noted that in ***Kuiper v. District Court,*** *193 Mont. 452, 465, 632, P.2d 694 (1981),* the Supreme Court stated that the work product doctrine applies to a claim file from the moment it is opened, and that it reiterated the statement in the recent case of ***Palmer v. Farmers Insurance Exchange,*** *50 St.Rep. 1210, 1219 ((October 18, 1993)*. We construed the statement as affording work product protection to the **insurer's** claim file in this case. In doing so, we overlooked ***Cantrell v. Henderson,*** *221 Mont. 201, 208, 718 P.2d 318 (1985),* in which the Supreme Court limited its statement in ***Kuiper*** to **attorneys'** claim files.

The record shows that Mr. Henderson's statement was given to defendant's insurance company before the complaint was filed. There is no indication that an attorney had been hired or that the statement was made at the request of the attorney. We conclude that the holding in *Kuiper* does not extend to this situation. An insurance company claim file is not the same as an attorney's claim file, for purposes of the work product rule. We hold that Mr. Henderson's statement to defendant's insurer was not made "in anticipation of litigation" under Rule 26(b)(3). Therefore the District Court's order denying plaintiffs' motion to compel discovery of Mr. Henderson's statement to the insurance company is reversed.

Cantrell was followed in ***Tigart v. Thompson,*** *237 Mont. 468, 474-5, 774 P.2d 401 (1989)* and ***State ex rel. Burlington Northern Railroad Co.,*** *239 Mont. 207, 216, 779 P.2d*

885 (1989). These cases do not hold that work product protection never applies to insurers' claim files, only that it does not automatically apply.

In ***Burlington Northern*** the Supreme Court determined that certain witness statements were not work product. It specifically pointed out that the witness statements sought by the plaintiff were taken in the "regular course of business of the railroad's claims department business." It went on to note that the statements sought in ***Cantrell*** were taken in the regular course of the insurer's claims department business. *239 Mont. at 216*. However, the Court also noted that "no absolute rule can be formed to apply to every case" and that "a balance must be sought which requires appropriate disclosure of facts, without allowing a party to build its case on the other party's efforts." *Id*.

In ***Cantrell*** the Supreme Court noted that when the witness statements were taken by the insurer there was "no indication that an attorney had been hired or that the statement was made at the request of an attorney." In this case the insurer's attorney represents that he was involved **prior** to the time of the investigative report which is sought by the petitioner. That involvement strongly suggests that the investigative report was prepared in anticipation of litigation rather than in the ordinary course of the insurer's business.

IT IS HEREBY ORDERED that the Order of February 16, 1994 is therefore **reaffirmed.**

IT IS FURTHER ORDERED that the discussion regarding work product protection as extending to all materials in all claim files is **withdrawn.**

DATED in Helena, Montana, this 10th day of March, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

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