IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9612-7668

JETTA ARDESSON,

Petitioner

vs.

MOUNTAIN VIEW CARE CENTER,

Respondent/Insurer for

LEGION INSURANCE,

Employer.

ORDER DENYING MOTIONS FOR TELEPHONIC DEPOSITION
AND TO ADD WITNESS AND EXHIBIT

The matters before the Court are two motions of respondent. In its first motion it asks the Court to order a telephonic deposition of Pam Spann. (motion to allow the taking of a telephonic deposition and memorandum in support.) In its second motion, it requests leave of Court to supplement its list of witnesses and exhibits by adding Robert Harris as a witness and a video tape taken by Mr. Harris as an exhibit. (motion for leave of court to add an exhibit and witness.)

Respondents attorney, Mr. Steven S. Carey, contacted Court staff and requested a telephone conference concerning the motions. The Court encourages telephone conferences as a way to expeditiously dispose of pretrial motions. However, upon review of the two motions in this case, I determined that the information provided in the motions were sufficient for me to rule on the motions and that further argument would not be helpful.

1.Telephonic Deposition.

Depositions are governed by Rule 24.5.322. The rule allows for video depositions and for depositions upon written questions but makes no specific provision for telephonic depositions. However, a telephonic deposition may be taken pursuant to subsection (8) of the rule, which provides, generally:

(8) Unless the court orders otherwise, the parties, by written stipulation, or by stipulation entered upon the record of a deposition, may provide that depositions may be taken before

any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Under this rule the parties may stipulate to a telephone deposition, and in past cases I have freely allowed parties to do so absent an indication that the witness credibility is a serious issue in the case, see Bonamarte v. Bonamarte, 263 Mont. 170, 866 P.2d 1132 (1994). There is no provision in the rules for a telephonic deposition absent the agreement of all parties.

2.Additional Witness and Exhibit.

The respondents motion to add a witness and an exhibit arises out of video taping of the claimant between September 22 to 27, 1997. The video was taken by Robert Harris who, if allowed to testify, would authenticate it. According to respondent, the video will show petitioner engaging in a number of activities that are inconsistent with the way she presented herself at trial.

The petition in this case was filed on December 9, 1996. It was originally set for trial during the week of February 24, 1997. By agreement of the parties, it was reset for the week of May 19, 1997. (order resetting scheduling order (February 18, 1997).) Upon an unopposed motion of petitioner, the matter was finally reset for trial during the week of August 25, 1997, in Butte. (order resetting scheduling order (May 9, 1997).) That scheduling order is still in effect and fixed a July 18, 1997 deadline for parties to exchange exhibits and their lists of exhibits. That deadline is now three months in the rear view mirror.

During that three months, a lot of road has been traveled. Respondent sought a continuance of the August 25th trial setting based on the unavailability of its claims examiner to testify at trial. She had, unbeknownst to respondents attorney, scheduled a vacation in Canada during the week of the trial. Under the circumstances presented to the Court, I found good cause for taking the claims examiners testimony at a later time but also determined it would be unfair to petitioner to vacate the trial setting. I therefore ordered the trial to proceed as scheduled so that petitioner could present her case, with the remainder of the case to be presented at a later time. (order regarding resetting of trial (August 22, 1997).) The initial phase of the trial took place on August 28, 1997. The trial was then recessed until a later time to be agreed among the parties and the Court. Thereafter, the resumption of the trial was set for October 22, 1997, exactly one week before the respondent filed its present motion.

To grant respondents motion would be to grant it a windfall based on this Courts indulgence in granting it the opportunity to present its witnesses at a later time. Granting the motion would also nullify the scheduling order. Respondent had over six months following the filing of the petition to conduct surveillance of the petitioner. The fact that observation of petitioner at trial on August 25th precipitated the surveillance is no excuse

for it failing to do so during that time since it could have deposed claimant during those six months and observed her physical infirmities.

Moreover, injecting the surveillance tape at this late date threatens to unnecessarily expand the limited issues presented by the petition and at the initial phase of the trial. At issue is the value of meals provided by employer. While resolution of that issue may involve some attention to the petitioners credibility, the type of attention invited by injecting surveillance into the case is unwarranted.

3.Investigative Report.

Finally, the Court notes that the respondent attached a copy of Mr. Harris investigative report of his surveillance to its motion to add the witness and exhibit. I have not read it, and I do not intend to do so. However, I will not order it expunged in case my ruling on the motion becomes an issue on appeal.

ORDER

The motions are denied.

DATED in Helena, Montana, this day of October, 1997.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar - Faxed & Mailed
Mr. Steven S. Carey - Faxed & Mailed
Submitted: 10/16/97