IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 13

WCC No. 2001-0392

KATHY A. BURNSIDE LUND

Petitioner

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Respondent/Insurer for

THE INDUSTRIAL COMPANY

Employer.

DISCOVERY ORDER FOLLOWING *IN CAMERA* REVIEW

Summary: Insurer resists discovery of 30 pages of documents from its claims file. Claimant moves to produce.

Held: None of the documents are communications between attorney and client and are therefore not protected by the attorney-client privilege. Some, but not all of the documents do constitute either work product or, if not work product, contain mental impressions which are protected.

Topics:

Discovery: Claims File. An insurer's claim file is not protected by the work- product rule just because an attorney acting on claimant's behalf makes inquiries and requests concerning her benefits or corresponds with the employer concerning her discharge from employment.

Discovery: Claims File. The work-product rule does not protect documents prepared in the ordinary course of claim adjustment even if prepared after there is a threat or commencement of litigation.

Discovery: Claims File. Opinions or mental impressions prepared by an attorney, or at the direction or on behalf of an attorney, are entitled to greater protection than other work product.

Discovery: Attorney Work Product. An insurer's claim file is not protected by the work-product rule just because an attorney acting on claimant's behalf makes inquiries and requests concerning her benefits or corresponds with the employer concerning her discharge from employment.

Discovery: Attorney Work Product. The work-product rule does not protect documents prepared in the ordinary course of claim adjustment even if prepared after there is a threat or commencement of litigation.

Discovery: Attorney Work Product. Opinions or mental impressions prepared by an attorney, or at the direction or on behalf of an attorney, are entitled to greater protection than other work product.

¶1 Kathy A. Burnside Lund (claimant) injured her head and neck on September 1, 1998, while working for The Industrial Company (Industrial) at the Stillwater Mine in Nye, Montana. The insurer, St. Paul Fire & Marine Insurance Company (St. Paul), accepted liability for the injury but has denied benefits for permanent impairment, wage loss, and further medical care. It also maintains it has paid for all reasonable medical care. Through her petition claimant seeks permanent partial disability benefits and medical treatment.

¶2 Following the filing of the petition in this matter, discovery disputes arose between counsel for the parties, leading to this Court's December 6, 2001 Order Regarding Discovery Motions. (2001 MTWCC 62.) One area of dispute involved the insurer's claims file. St. Paul produced much of its claims file, but withheld certain documents based upon its assertion of attorney work product and/or attorney-client privilege. Claimant sought production of the withheld documents. In my December 6th Order, I directed St. Paul to describe each of the withheld documents as required by ARM 24.5.324. Once the documents were described, claimant was to then file a further motion to compel production identifying the specific documents she sought.

¶3 St. Paul's counsel, Mr. Joe C. Maynard, thereafter provided claimant's counsel, Mr. Timothy B. Strauch, with a "privilege log." Mr. Strauch believed the log was inadequate. To avoid protracted discussions on the issue, the Court's hearing examiner obtained the agreement of both counsel that Mr. Maynard would forward all of the withheld documents to the Court for *in camera* review.

¶4 Thirty pages of documents were thereafter received and were reviewed by the hearing examiner. After the initial review, the hearing examiner asked for further information from counsel regarding when counsel for the insurer and counsel for claimant were first involved in the claim, when demands were first made on the insurer, and how the documents fit within Montana precedent concerning work product. Additional argument was received from both counsel and considered by the hearing examiner. The matter was then deemed submitted for decision.

¶5 As an initial matter the hearing examiner reviewed the documents to determine if any of the documents are protected by the attorney-client privilege. In conducting that review, the hearing examiner was guided by *Kuiper v. District Court of Eighth Judicial Dist. of State of Montana*, 193 Mont. 452, 461, 632 P.2d 694, 699 (1981), in which the Montana Supreme Court said:

> The subject matter and author of each exhibit is critical to determining whether attorney-client privilege is applicable. That privilege only applies statutorily in Montana to communications made by a client to his attorney and legal advice given in response thereto, during the course of professional employment. Section 26-1-803, MCA.

The client in the context of the withheld documents was St. Paul. None of the withheld documents reflect communications between counsel **for St. Paul** and any of St. Paul's adjusters or other employees, officers, directors, or agents. Thus, the privilege is inapplicable.

¶6 The remaining issue is whether any of the documents are protected under the work-product doctrine. The doctrine was first articulated by the Supreme Court of the United States in *Hickman v. Taylor*, 329 U.S. 495 (1947). That case considered the discoverability of memoranda and statements prepared by an attorney in anticipation of litigation following a tugboat accident. Initially, the Supreme Court noted that the *attorney-client* privilege

> does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

329 U.S. at 508. However, for reasons of policy and justice, the Court held that the materials were nevertheless protected by a "work product doctrine." The Court explained:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the

> Circuit Court of Appeals in this case [citation omitted] as the "Work product of the lawyer."

329 U.S. at 510-511.

¶7 As articulated by the Supreme Court, the work-product doctrine is not an absolute privilege. The Court held that "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511.

¶8 In Montana, the work-product doctrine is found in Rule 26(b)(3) of the Montana Rules of Civil Procedure, which provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . 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 a 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.

Interpreting the rule against the backdrop of *Hickman,* the Montana Supreme Court has held that the attorney work-product doctrine "[as] incorporated into Rule 26(b)(3), gives a **qualified immunity to materials prepared 'in anticipation of litigation,'** and **nearly absolute immunity to the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party to the litigation**.'" *State of Montana, ex rel., Burlington Northern Railroad Company v. District Court of the Eighth Judicial* District, 239 Mont. 207, 217, 779 P.2d 885, 892, quoting *Kuiper, supra*, 193 Mont. at 463, 632 P.2d at 701.

¶9 The Montana Supreme Court has addressed the application of the work-product rule to an insurer's claims file, although never in the context of a workers' compensation claim. The seminal case is *Kuiper v. District Court*, 193 Mont. 452, 632 P.2d 694 (1981), which involved a strict liability claim against a tire manufacturer for personal injuries. One of the work-product issues in that case was whether documents prepared **prior** to the commencement of litigation were covered by the work-product rule. The Court answered the question in the affirmative:

> When a claim file is opened, there is always some prospect of litigation and in 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.

193 Mont. at 465, 632 P.2d at 694. Although the Court referred to the "claim file," the "claim" file in question in *Kuiper* was that of the tire manufacturer's in-house counsel. This is evident from the Court's description of the documents at issue, which consisted primarily of memoranda or communications involving an individual identified as in-house counsel. 193 Mont. at 460-462, 632 P.2d at 699-700.

¶10 The *Kuiper* decision is important in other respects. First, it affirmed that notwithstanding the fact that a document is deemed to be work product a plaintiff is entitled to production of the document if he shows he "has a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Kuiper, supra*, 193 Mont. at 465, 632 P.2d at 701. Second, it reiterated the rule that "those portions of the documents which relate to the **mental impressions**" of the author of the document are entitled to greater protection. Quoting *In re Murphy*, 560 F.2d 326 (8th cir. 1977), the Supreme Court stated:

> "It is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product cannot be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. See Fed.R.Civ.P. 26(b)(3). In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See *Hickman v. Taylor, supra*. Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the nondiscovery of an attorney's mental impression. Absent such compelling showing, the attorney's opinion work product should remain immune from discovery." (Footnotes omitted). 560 F.2d at 337.

193 Mont. at 466, 632 P.2d at 701-702.

¶11 *Cantrell v. Henderson*, 221 Mont. 201, 718 P.2d 318 (1986), is important in the context of workers' compensation claims files because it expressly limits the "claims file" language of *Kuiper* to claims files maintained by attorneys. At issue in *Cantrell* was the protection afforded to a statement of the defendant truck driver which was taken by his employer's insurance company. The district court held that the statement was subject to the work-product rule and need not be produced. On appeal, the Montana Supreme Court reversed. It expressly limited the "claims file" language in *Kuiper* to an **attorney's** claim file:

> 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 an 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).

221 Mont. 208, 718 P.2d 322 (emphasis added).

¶12 *Clark v. Norris,* 226 Mont. 43, 734 P.2d 182 (1987), provides further elucidation as to what is and is not protected under the work-product rule. That case involved an action for medical malpractice. Plaintiff sought discovery of "the report of the liability claim [Dr.] Norris provided to his insurance carrier, and the incident report prepared by St. Peter's Hospital for its attorneys." 226 Mont. at 49, 734 P.2d at 186. The defendant doctor argued that his report was privileged because it was filed "*after* Clark had filed her claim with the medical/legal panel." 226 Mont. at 49, 734 P.2d at 186. The Supreme Court held that, under Rule 26(b)(3), "**it must be determined whether, in the light of the nature of the document and factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation**." *Id.*, 226 Mont. at 50, 734 P.2d at 186 (emphasis added). Because proceedings before the medical/legal panel "are a condition precedent to and an integral part of the litigation process," the Supreme Court found the doctor's report "was in anticipation of litigation and entitled to the qualified protection from discovery pursuant to Rule 26(b)(3), M.R.Civ.P." *Id*.

¶13 However, it declined to extend the same protection to the hospital's report, distinguishing between documents prepared in anticipation of litigation, such as the doctor's, and documents routinely prepared or required irrespective of litigation.

> While there are certain communications between a hospital and its attorneys which are protected, the attorney-client relationship does not automatically give rise to immunization of every piece of paper a hospital files with its attorney. A privilege cannot be created in a subject matter merely by transmitting it to an attorney. When a person employed by a corporation is instructed to make a report, the privilege of that report is to be determined by the employer's purpose in requiring the report. If the employer directs the taking of a report for confidential transmittal to its attorney, the communication may be privileged.

226 Mont. at 50-51, 734 P.2d at 187. On the record before it, the *Clark* Court was not persuaded "of the requisite confidential nature of the [hospital] reports necessary to warrant their immunity from discovery afforded an attorney-client relationship." *Id*. at 51. The hospital administrator had testified that hospital policy required that an incident report be prepared and that he kept such reports on file indefinitely and routinely forwarded them

to hospital counsel "regardless of whether litigation on that particular incident ever materializes." *Id*.

¶14 In *State of Montana, ex rel., Burlington Northern Railroad Company v. District Court of the Eighth Judicial District*, 239 Mont. 207, 779 P.2d 885 (1989), the Supreme Court reaffirmed the distinction between documents truly prepared in anticipation of litigation and those prepared as a regular business practice. At issue were witness statements taken by a senior claims examiner of the railroad just hours after an accident. The defendant railroad contended the witness statements were privileged work product "taken by an agent of defendant and . . . taken in anticipation of litigation." *Id*. at 215. Plaintiff responded that the "statements were simply statements taken **in the regular course of business** and are discoverable without any showing of need." *Id*. at 215-16, emphasis added. The Court agreed:

> We conclude that the holding in *Cantrell* controls the present issue, allowing discovery. The rules of civil procedure are premised on a policy of liberal and broad discovery. We therefore begin with the premise that these statements are generally discoverable. The statements at issue were taken in the regular course of the railroad's claims department business, just as in *Cantrell* the disputed statement was taken in the regular course of the insurer's business. In the present case the contemporaneous statements, taken within 24 hours of the accident, are unique and non-duplicable and should be available to both parties.

239 Mont. at 216, 779 P.2d at 891.

¶15 *Palmer by Diacon v. Farmers Ins. Exchange*, 261 Mont. 91, 861 P.2d 895 (1993), concerned when documents may be considered as prepared in anticipation of litigation. That case was a bad faith action arising out of the insurer's denial of a claim to recover uninsured motorist benefits. The insurer objected to producing materials dated **after** the *insured's* attorney threatened to sue for bad faith if the insurer denied the claim. The insurer argued that, "after that date, the unprivileged materials in the file were prepared in anticipation of litigation, thus were subject to the work-product doctrine." 261 Mont. at 114, 861 P.2d at 909. The Court agreed:

> Materials prepared after Palmer's attorney threatened to sue for bad faith if Farmers denied Palmer's claim, however, were prepared with an eye toward eventual bad faith litigation. Therefore, any materials dated after October 8, 1985, are subject to the work-product doctrine. Materials in the files dated after that date, therefore, are discoverable only upon the required showing discussed below.

261 Mont. at 115, 861 P.2d at 910.

¶16 As in previous decisions, the *Palmer* Court noted that protection given to opinions within work product is "broader" than the opinions of only the attorney, protecting as well

"the **mental impressions** of an attorney **or other representative of the party concerning the litigation."** 261 Mont. at 116, 861 P.2d at 911 (emphasis added). However, it went on to point out that some opinions and mental impressions may be discoverable even though they constitute work product and are subject to greater protection than non-opinion work product. The Court cited cases from several courts, including the Ninth Circuit Court of Appeals, which had held that despite the extra protection afforded opinion work product, mental impressions may nonetheless be discoverable "when the mental impression is *directly at issue* in the case and the need for the material is compelling." 261 Mont. at 117, 861 P.2d at 911. The case under consideration furnished an example:

> In a bad faith case, such as the present case, where the issue is whether the insurer had a reasonable basis for denying the claim, the mental impressions and opinions of the insurer are directly at issue. The basis for denying such a claim lies only in the mental impressions of those representatives of the insurer who decided to deny the claim.

Id. While the Court refused to rule that such mental impressions were always discoverable in any bad faith case, it noted, "It is difficult to envision a circumstance in which the compelling need requirement would not be met when the mental impressions ***of a party*** are directly at issue in the case." *Id*. (italics in original, bold added). In contrast, the Court noted the work-product doctrine "protects materials containing the mental impressions of [the insurer's] **attorneys**." *Id*., emphasis added.

¶17 The Workers' Compensation Court has addressed the work-product rule in several cases. Those cases provide further instruction concerning the nature, scope, and application of the work-product privilege.

¶18 In *Adels v. Cigna Insurance Co.*, WCC No. 9307-6831 (1/6/94) and (3/10/94), one of the documents at issue was an investigative report. This Court held that the report was covered by the work-product rule despite the fact that it was a part of the insurer's claims file maintained prior to litigation. The significant fact to that determination was the fact that the insurer's attorney "was involved **prior** to the time of the investigative report which is sought by the petitioner." *Adels* (3/10/94) at 2. "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." (*Id*.)

¶19 In *Mutchie v. Old Republic Insurance Co.*, WCC No. 9411-7185 (1/20/95), the insurer produced redacted copies of notes and memos made by the claims adjuster. Counsel for the insurer argued the redacted portions were protected by the work-product rule. Citing Rule 26(b)(3), the Workers' Compensation Court "determined that most of [the redacted portions] were not made in contemplation of litigation or that petitioner has made a requisite showing of substantial need for the information." *Id.* at 2. The Court explained:

> The alleged industrial accident at issue in this case occurred on April 28, 1994. **Although the employer suspected that there might be future litigation over the matter, attorney involvement on behalf of the insurer did not occur until August of 1994. The entries in question were made prior to that time. Many involved the adjuster's contacts with the employer and management of the case.**
>
> The Montana Supreme Court has distinguished between claims files of attorneys and those of insurers. *Cantrell v. Henderson*, 221 Mont. 201, 718 P.2d 318 (1985). The work-product rule does not automatically apply to an insurer's claim file. *Tigart v. Thompson*, 237 Mont. 468, 474-5, 774 P.2d 401 (1989). **Information prepared in the regular course of a claims adjuster's work is typically not protected**.

Mutchie, *supra*, at 2 (emphasis added).

¶20 In *Mutchie*, the dispute also involved the reasonableness of the insurer's adjustment of petitioner's claim. As the Court noted:

> That dispute arose from the very beginning, as illustrated by the controversy over whether Dr. Digg's was selected by petitioner as his physician. . . . Some of the information contained in the adjuster's notes and memos may be relevant to petitioner's claim that the employer or insurer selected Dr. Diggs and denied him appropriate medical treatment.

Id. While ordering production of most of the notes and memos concerning that issue, the Court nonetheless held that portions discussing actual attorney advice and specific mental impressions were protected and need not be disclosed.

¶21 Turning to the present case, the insurer argues that "the claimant is not entitled to any adjuster's notes whatsoever, with the exception of [notes concerning] direct contact with [claimant], once counsel is involved." (December 19, 2001 letter from Mr. Joe C. Maynard.) In its subsequent brief, the insurer urged that work-product protection was triggered by the threat of litigation following involvement of claimant's counsel even though the insurer had not yet involved counsel on its behalf. The insurer argues:

> Once Kathy obtained counsel, St. Paul was placed on notice that litigation might ensue. Accordingly, as in *Kuiper*, any notes compiled by Crawford were the result of an investigation geared toward the possibility of litigation and protected from discovery by the work product rule. The purpose of the work product rule is to allow a party to effectively prepare for litigation by preventing its records, contacts, and mental impressions from being subject to scrutiny by opposing counsel. Failing to apply the work product rule to an adjuster's file after a prospective plaintiff has retained counsel and made a claim for workers compensation benefits would circumvent the purpose of the work product rule by preventing an insurer from effectively preparing for litigation.

(Respondent's Brief in Opposition to Request for Adjuster's Notes at 2-3.)

¶22 On the facts presented, I am unpersuaded by the insurer's argument as to the time the work-product rule was triggered. The correspondence identified by the insurer as indicating the possibility of litigation, while involving claimant's attorney, either concerned requests that could just as well have come from claimant and which are by their nature part of the claims adjusting process, or is correspondence with the employer's counsel concerning claimant's job status. The correspondence was initially between Michael W. Cotter (Cotter), the attorney for claimant, and Carol Crews (Crews) of Crawford & Company, which adjusted the claim, and between Cotter and Colin Reid (Reid), an attorney for The Industrial Company, which was claimant's employer. Later on, other adjusters for Crawford were involved in the correspondence. The following is a summary of the correspondence:

> ¶22a On October 7, 1998, Cotter advised Crews that he had been retained by claimant regarding her September 1, 1998 injury. He requested copies of various materials, such as witness statements and medical records. (Ex. A to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)
>
> ¶22b On October 19, 1998, Cotter wrote to Reid regarding the termination of claimant's employment following her injury. He requested the immediate commencement of temporary total disability. (Ex. B to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)
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> ¶22c On October 23, 1998, Cotter again wrote Reid, noting that he had requested medical records from the insurer's adjuster and had not received them. He stated that claimant was unable to work and had not been released to work. He rejected an offer of work that had apparently been conveyed by Mr. Reid. (Ex. C to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)
>
> ¶22d On November 2, 1998, Cotter wrote to Crews, asserting that medical bills relating to the injury had not been paid and requesting immediate payment. (Ex. D to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.) On November 5, 1998, Crews sent back a copy of that letter, with a handwritten note stating, "We're paying them. I'll send you list in 30 days." (*Id*.)
>
> ¶22e On November 6, 1998, Cotter again wrote Crews, acknowledging her note about payment of medical providers and discussing payment for copies of file materials. (Ex. E to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)
>
> ¶22f During November and December 1998, there was additional correspondence between Cotter and Crews relating to payment of travel expenses incurred by claimant in obtaining medical care. (Ex. F-1 through F-3 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶22g On January 22, 1999, Cotter wrote to Leslie Davidson of Crawford and Company, noting that he understood Crews was not available until February. He stated that Reid had directed him back to Crews regarding payment of temporary total disability benefits and travel reimbursement. He wrote:

> The issues which were outlined in our letter of January 14 regarding continued temporary total disability benefits, as well as mileage incurred by Kathy for medical treatment, can be very easily resolved. We would ask that TCI or its insurer, St. Paul, make a determination as quickly as possible.
>
> We look forward to hearing from you. Thank you.

(Ex. G-1 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶22h On February 4, 1999, Cotter again wrote to Crews. He noted that she continued to deny travel reimbursement. He requested that claimant be referred to a neurologist in Columbus, near her home, to avoid the expense of travel. Crews wrote back in handwriting on the bottom of that letter: "Sorry, there's not a neurologist in Columbus." (Ex. G-2 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶22i On July 6, 1999, Cathy Anderson (Anderson), then the "adjuster in charge" of the case, wrote to Cotter, responding to a letter of his dated June 9, 1999. She denied "routinely contacting" claimant's physician without notifying Cotter. She indicated the doctor had placed claimant at maximum medical improvement and had recommended an impairment rating and functional capacity evaluation. Anderson stated she would inform Cotter when appointments for these evaluations were made. She also wrote:

> You requested copies of all notes, memoranda and telephone reports that I have generated regarding Ms. Burnside's claim. This information is my client's work product, and I am not free to release it to you. However, I have attached a copy of the payment records for your information.

(Ex. H to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶22j On February 15, 2001, Anderson wrote to attorney Timothy B. Strauch (Strauch), who had by then associated with Cotter in representing claimant. She refused to authorize an exercise program for claimant and referenced an evaluation of claimant by Dr. Scott Ross. (Ex. I-1 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶22k On June 7, 2001, Strauch wrote to Anderson, noting that in terminating benefits and denying medical treatment on the basis of Dr. Ross's report, the insurer had ignored the opinion of treating medical providers. Strauch also disagreed with Dr. Ross's impairment evaluation. He made "written demand for payment of permanent partial disability benefits retroactive to August 8, 1999, as provided by statute, together with payment of all medical expenses incurred since that date." (Ex. I-2 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)

¶23 The insurer contends these contacts evidence disputes and the threat of litigation, making adjustment of the case following the initial contact by Cotter as in "anticipation of litigation." The letters exchanged during 1998 and early 1999 do not evidence a dispute so much as a request that the insurer (and employer) give attention to the matter, make determinations as to whether benefits are due, and pay benefits. While Cotter did assert a right to payment, the letters during 1998 and early 1999 do not reflect a final determination by the insurer or any statement that litigation was inevitable or even likely. Indeed, Cotter's letter of January 22, 1999, suggests expectation that matters would be "very easily resolved." (Ex. G-1 to Respondent's Brief in Opposition to Request for Production of Adjuster's Notes.)There is no indication that positions were entrenched and litigation imminent. The insurer's position that **all** entries following initial contact from Cotter must be deemed work product is without merit.

¶24 Moreover, even after it becomes likely that litigation will ensue on a workers' compensation claim, not **every** entry into a claim file is work product. Claimants are entitled to discovery records of ongoing adjustment decisions. Because insurance files continue to contain routine entries *after* litigation seems inevitable, the determination of work product involves scrutiny of each document to determine whether the document contains entries that are in fact prepared in contemplation of litigation.

¶25 St. Paul provided 30 pages of documents which it asserts are privileged. Each page is marked with a sticker bearing a five digit number. The hearing examiner has reviewed those documents *in camera*. Many of the pages are print-outs of a computerized diary system. Others are handwritten notes on various notepads or transmittal forms. A few are copies of statutes. Several are "claim progress" notes which constitute separate, brief records of phone calls or transactions. These notes cover some of the same time periods as the diary file notes.

¶26 The grid below identifies each document by its page number, contains a brief description of each page, and sets out the Court's order regarding production. The discoverability of the documents was judged on the basis of their content in the context of the letters produced by respondent and in light of Montana law reviewed above. Based on the hearing examiner's review and recommendations, the Court is ordering that St. Paul

produce most of the documents. The documents that are ordered produced were not, in the judgment of the hearing examiner, prepared in actual contemplation of litigation and do not reflect the mental impressions of the claims adjuster or St. Paul's attorneys regarding claims or defenses.

¶27 With regard to whether the adjuster was acting in contemplation of litigation at any particular point, it is noted that a document dated December 31, 1998, contains what appears to be a computer-generated prompt which asks, "Litigation involved y/n." The entry is "n," indicating no. (Page 00335.) An entry dated January 15, 1999, however, contains a reference reasonably construed as indicating the adjuster believed a threat of litigation existed. (Page 00250.) As will be clear from the below rulings, the hearing examiner determined that some documents after that date do appear to have been prepared in anticipation of litigation. Some contain opinions or mental impressions relating to possible litigation. Those entries are deemed protected by the work-product privilege.

¶28 Some of the documents ordered produced are records of communications among the adjuster, claimant's counsel, and Colin Reid (Reid), an attorney for the employer. Respondent has not asserted an attorney-client privilege regarding communications with Reid, nor is that privilege applicable. In the background of some of those communications, and other notes in the file which I am ordering the insurer to produce, is the possibility of a claim by claimant against *the employer* for wrongful termination. Because wrongful termination of employment is not a claim threatened against the *insurer*, the work-product doctrine is not applicable to St. Paul.

Page #	**Description of Document**	**Order**
00422	Diary File Notes dated 11/09/98.	Produce unredacted.
00405	Handwritten note from Carol Crews dated 11/4.	Produce unredacted.
00397	File or system notes dated 11/16/98.	Redact material concerning unrelated death claim (upper part of page). Produce unredacted the note labeled Burnside (lower portion of page.)
00376	"Metracomps Activ Special Handling Instructions" dated 11/20/98.	Produce unredacted.
00363	Diary File Notes dated 12/02/98 and 12/04/98.	Produce unredacted.

00334	Carol Crews Note re "Plan of Action with Target Dates," approximate date 12/31/98.	Produce unredacted.
00335	Email to Kim Mobley from Carol Crews dated 12/31/98.	Redact material regarding reserves. Produce remainder of page.
00336	Message regarding claim review meeting dated 12/18/98.	Produce unredacted.
00337	Fax Transmittal cover sheet dated 12/17/98 from Carol Crews to Colin Reid/Jodi McGee.	Produce unredacted.
00338	Copy of WC statutes.	Produce unredacted.
00339	Transmission Verification Report dated 12/17/98.	Produce unredacted.
00340	Copy of WC statutes (identical to 00338).	Produce unredacted.
00292	Handwritten note dated 12/22/98.	Work product. Do not produce.
00255	Handwritten "Memo to file" on Speed Letter form dated 2/19/99.	Produce unredacted.
00256	Identical to 00255.	Produce unredacted.
00257	Identical to 00255 and 00256.	Produce unredacted.
00252	Diary File Notes bearing date 3/15/99, reflecting entries dated 12/28 and 12/29/98 and 1/15/99.	Redact entries regarding reserves. Produce remainder unredacted.
00250	Diary File Notes bearing date 3/15/99, reflecting three entries dates 1/15/99.	Work Product. Do not produce.
00248	Diary File Notes bearing date 3/15/99, reflecting entry made 2/2/99.	Produce first sentence of entry, but redact remaining sentences of entry as work product, including mental impressions of claims adjuster regarding dispute.

00246	Diary File Notes bearing date 3/15/99, reflecting entries made 2/2/99.	Produce unredacted.
00244	Diary File Notes bearing date 3/15/99, reflecting entries made 2/2, 2/5/, 2/23, 3/5, and 3/9/99.	Redact 3/9/99 entry regarding reserves. Otherwise, produce unredacted.
00223	Untitled, undated document with reference to "Plan of Action," apparently prepared by Cathy Andersen.	Produce unredacted.
00047	Handwritten notes on "Claim Progress" form with entries dated 2/9/99 through 2/7/01.	Produce, but with entry for 4/19/99 regarding reserves redacted. (Note that redaction already accomplished with white tape in copy provided to court, but writing underneath still visible on that copy.)
00048	Evidently continuation of "Claim Progress form," showing no entries.	Produce unredacted.
00049	Handwritten notes on "Claim Progress" form with entries dated 10/14/98 through 11/30/98.	Produce unredacted.
00050	Handwritten notes on "Claim Progress" form with entries dated 12/21/98 through 1/8/99.	Produce, but redact 12/21 entry re reserves if redaction desired by respondent.
00051	Handwritten notes on "Claim Progress" form with entries dates 11/30 through 12/15/98.	Produce unredacted.
00052	Evidently continuation of "Claim Progress form," showing no entries.	Produce unredacted.
00053	Handwritten notes on "Claim Progress" form with entries dated 9/28 through 10/13.	Produce unredacted.

00054	Evidently continuation of "Claim Progress form," showing no entries.	Produce unredacted.

¶29 Respondent must comply with this Order on or before March 8, 2002. Respondent must provide **legible** copies to claimant's counsel.

SO ORDERED.

DATED in Helena, Montana, this 1st day of March, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Timothy B. Strauch
Mr. Joe C. Maynard
Submitted: February 11, 2002