IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9302-6701

STATE COMPENSATION INSURANCE FUND

Petitioner/Insurer

-v-

RONALD F. HILBIG

Respondent/Claimant.

ORDER RE: DISCOVERY

Presently before the Court is the motion to compel filed by the Claimant (Hilbig). The Petitioner (State Fund) has apparently procured several videotapes and still photographs of Hilbig, along with surveillance reports of investigators. Hilbig now acknowledges that the reports of the investigators are covered by the work product privilege and are not subject to disclosure. However, this leaves the Court with the question of what to do with the still photographs and videotapes.

In this regard, the Court has to balance several concerns. First and foremost is the Court's ultimate concern with full disclosure, a fair trial, and no ambush or surprise. Also, Hilbig has the right to determine somewhat in advance of trial if these photographs are genuine or have perhaps been altered. On the other hand is the State Fund's interest in preserving this evidence so that Hilbig will not be allowed to alter his testimony to lessen the impact of the photographs.

The Court looks to *Wright* and *Miller* for guidance. *Wright* and *Miller* suggest the better rule as being as follows:

> The values of surprise could be largely preserved by providing discovery or pretrial revelation of impeachment material which falls within the present category only at a time shortly before trial, and only after the party asked about the existence and nature of such material had been given an opportunity--ordinarily by deposition--to commit the inquiring party to a final version of the events and claims related to the impeachment material. This procedure should forestall most conforming testimony, and would afford a reasonably effective means of embarrassing those who might still attempt to meet the impeaching material in untruthful ways. At the same time, it would be possible to prepare to meet impeaching material which is susceptible of

> honest explanation or refutation. Having preserved the values of surprise, there would be no remaining reasons to deny discovery * * *.

8 *Charles A. Wright & Arthur R. Miller,* ***Federal Practice and Procedure*** § 2015 (1970).

Thus, the best course here seems to be as follows: The State Fund will have 60 days from the date of this order to depose Hilbig to force Hilbig to specifically set forth his position on the matters that might be illuminated by the still and moving pictures. Within 15 days of the deposition, copies of the photographs and videotapes will be turned over to Hilbig's counsel.

If the State Fund does not seek to use these photographs at trial, as it has stated in its brief, then it need not comply with this discovery requirement. However, failure to abide by this discovery procedure will mean that the photographs and videotapes will not be used at trial for any purpose.

Hilbig has not set forth any reason why he should be allowed to view the photographs and videotapes if they are not to be used at trial.

The final matter that needs to be addressed is the trial of this matter. The attorney for the State Fund is directed to schedule a telephonic scheduling conference with the Clerk of this Court so that the Court and the parties may sit down and set up a trial date.

DATED this 16th day of June, 1994.

/s/ JEFFREY SHERLOCK
DISTRICT COURT JUDGE

pc: Oliver H. Goe
Joe Bottomly