

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 20

WCC No. 9611-7657

ESTATE OF JAMES JACQUES, Deceased,

by and through ANN JACQUES

Petitioner

vs.

BORDEN, INC.

Respondent/Insurer.

ORDER DENYING MOTION TO DISMISS AND MOTION TO COMPEL

Summary: Respondent moved to dismiss petition because claimant has not yet obtained an impairment rating by a medical doctor and also moves to compel further discovery, including (1) records of a psychologist relating to other impairment awards rendered by him; and (2) all medical records of claimant's twin sister on the ground those records may indicate that decedent suffered from a hereditary, rather than job-related, mental condition.

Held: Motion to dismiss denied where claimant has been ordered to obtain an impairment rating from a medical doctor and dismissal would only require another filing. Motion to compel also denied. Where the WCC has ruled the impairment award rendered by the psychologist is not admissible, his records are not relevant. As for medical records of the claimant's twin sister, a party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary and needs no citation. A party's medical records are within his or her control. The medical records of third parties are not.

Topics:

Discovery: Generally. Respondent's motion to compel production of medical records of claimant's twin sister, to support an argument claimant suffered from a hereditary, rather than work-related, mental condition, is denied. A party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary and needs no citation. A party's medical records are within his or her control. The medical records of third parties are not.

Discovery: Compelling Discovery. Respondent's motion to compel production of medical records of claimant's twin sister, to support an argument claimant suffered from a hereditary, rather than work-related, mental condition, is denied. A party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary and needs no citation. A party's medical records are within his or her control. The medical records of third parties are not.

Discovery: Requests for Production. Respondent's motion to compel production of medical records of claimant's twin sister, to support an argument claimant suffered from a hereditary, rather than work-related, mental condition, is denied. A party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary and needs no citation. A party's medical records are within his or her control. The medical records of third parties are not.

Medical Records: Confidentiality. Respondent's motion to compel production of medical records of claimant's twin sister, to support an argument claimant suffered from a hereditary, rather than work-related, mental condition, is denied. A party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary and needs no citation. A party's medical records are within his or her control. The medical records of third parties are not.

Respondent moves to dismiss the petition in this matter because petitioner has not yet obtained a psychological impairment rating by a psychiatrist. Petitioner did obtain an impairment rating by a psychologist (Dr. English), but this Court has ruled that rating inadmissible as a matter of law. Respondent argues that because no psychiatrist has yet to render an impairment rating, the petitioner's request for an impairment award is non-justiciable.

Respondent also moves to compel further discovery. Specifically, it seeks an order compelling petitioner to deliver records of patients whom Dr. English has rated for impairment. Respondent also seeks to compel petitioner to deliver **all** medical records of decedent's twin sister since those records may indicate that the decedent suffered from a hereditary, rather than job-related, mental condition.

The motions were heard on April 18, 1997. After considering the arguments advanced by counsel, I find the motions without merit.

The respondent has denied this claim not only because the impairment rating provided by petitioner was by a psychologist, and therefore inadmissible, but also because it reads the

impairment award statute as precluding psychological impairment altogether. At hearing, counsel for respondent indicated that it would adhere to its position regarding the statute.

The matter is justiciable. Since respondent intends to press its assertion that the Workers' Compensation Act precludes **any** impairment award for psychological impairment, the only purpose dismissal would serve would be to delay the resolution of the issue, require that the case be refiled after the petitioner's psychiatrist renders a rating, and thereby impose additional, wholly unnecessary costs in time and expense on the parties and the Court. The Court previously ordered that this matter proceed so the Court will have the psychiatrist's opinions as background to its ultimate ruling concerning whether a psychological impairment award is precluded by statute. The Court intends that its Order be carried out.

The motion to compel is denied for two reasons. First, as to Dr. English's other impairment ratings, the requested records are irrelevant. Dr. English's opinions have already been excluded by Order of the Court and impeaching his opinion is a waste of time.

Second, a party can only be compelled to produce those documents and items which are in his/her possession or under his/her control. That limitation is basic and elementary. It needs no citation. A party's medical records are within his or her control. The medical records of third parties, are not.

Accordingly, the motions are **denied**.

IT IS SO ORDERED.

DATED in Helena, Montana, this 22nd day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. J. David Slovak

Mr. Dylan E. Jackson