

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 63

WCC No. 9907-8288

JOHN McFERRAN

Petitioner

vs.

CONSOLIDATED FREIGHTWAYS

Respondent/Insurer/Employer.

ORDER VACATING AND RESETTING TRIAL

Summary: At the commencement of trial, claimant objected to exhibits provided after the exchange date. Claimant had not placed these objections in the Pretrial Order. Claimant did not provide respondent with medical records of physician, although copy of opinion written to claimant's counsel was provided. Claimant argued medical records themselves were not necessary where opinion was stated in letter.

Held: Trial setting vacated. Claimant should have provided the medical records long before the opinion letter under the Court's standing rules and the Scheduling Order regarding exchange of medical records. When surprised by the opinion letter, respondent should have requested an extension of dates set out in the Scheduling Order. If objecting to late exhibits, claimant's counsel should have noted those objections in the Pretrial Order. Litigation in the WCC is not a game of hide the ball. The rules and orders of the Court require full, fair, and early disclosure of information and evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

Topics:

Discovery: Generally. Trial setting vacated where parties did not comply with discovery deadlines and rules set out in WCC rules and orders. Claimant failed to provide copies of medical records of physician whose opinion he intended to introduce at trial, relying instead on assertion that exchange of copy of opinion letter was sufficient. When surprised by the opinion letter, respondent should have moved for an extension of deadlines set in the Scheduling Order, rather than proceed on the assumption new information produced in response to the opinion letter would be admissible though late. If objecting to late information, claimant should have noted that objection in the Pretrial Order. Litigation in the WCC is not a game of hide the ball. The rules and orders of the Court require full,

fair, and early disclosure of information and evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

Medical Records: Exchange. Trial setting vacated where parties did not comply with discovery deadlines and rules set out in WCC rules and orders. Claimant failed to provide copies of medical records of physician whose opinion he intended to introduce at trial, relying instead on assertion that exchange of copy of opinion letter was sufficient. When surprised by the opinion letter, respondent should have moved for an extension of deadlines set in the Scheduling Order, rather than proceed on the assumption new information produced in response to the opinion letter would be admissible though late. If objecting to late information, claimant should have noted that objection in the Pretrial Order. Litigation in the WCC is not a game of hide the ball. The rules and orders of the Court require full, fair, and early disclosure of information and evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

Medical Records: Objections to. Trial setting vacated where parties did not comply with discovery deadlines and rules set out in WCC rules and orders. Claimant failed to provide copies of medical records of physician whose opinion he intended to introduce at trial, relying instead on assertion that exchange of copy of opinion letter was sufficient. When surprised by the opinion letter, respondent should have moved for an extension of deadlines set in the Scheduling Order, rather than proceed on the assumption new information produced in response to the opinion letter would be admissible though late. If objecting to late information, claimant should have noted that objection in the Pretrial Order. Litigation in the WCC is not a game of hide the ball. The rules and orders of the Court require full, fair, and early disclosure of information and evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

Procedure: Pretrial Order. Trial setting vacated where parties did not comply with discovery deadlines and rules set out in WCC rules and orders. If objecting to late information, claimant should have noted that objection in the Pretrial Order. Litigation in the WCC is not a game of hide the ball.

Procedure: Trial: Continuance. Trial setting vacated where parties did not comply with discovery deadlines and rules set out in WCC rules and orders. Claimant failed to provide copies of medical records of physician whose opinion he intended to introduce at trial, relying instead on assertion that exchange of copy of opinion letter was sufficient. When surprised by the opinion letter, respondent should have moved for an extension of deadlines set in the Scheduling Order, rather than proceed on the assumption new information produced in response to the opinion letter would be admissible though late. If objecting to late information, claimant should have noted that objection in the Pretrial Order. Litigation in the WCC is not a game of hide the ball. The rules and orders of the Court require full, fair, and early disclosure of information and

evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

¶1 This matter came to trial in Billings on October 18, 1999. At the commencement of trial the claimant objected to the introduction of Exhibits 26, 27 and 31, as well as testimony based on or reflected in those exhibits. Claimant reported that the exhibits were not provided to him until October 7, 1999, long after the exchange date of September 10, 1999, and were therefore untimely. On the other hand, claimant failed to list his objection to the exhibits in either the proposed or the final pretrial order. According to claimant he "reserved" his objections to the exhibits at the time of the pretrial conference because he did not receive the exhibits until October 7, 1999, and had not had time to review them. He argued that the exhibits presented new medical and vocational information which came as a surprise and that he did not have time to prepare counter-evidence.

¶2 Initially, it is plain that the respondent failed to provide the exhibits within the time specified by the Court's Scheduling Order. Respondent did not seek nor obtain an extension of time.

¶3 However, it is equally plain that the claimant's objections to the exhibits were untimely. He received them October 7. The pretrial conference was not until October 12, 1999. The Court's hearing examiner, Jay Dufrechou, informs me that he told claimant that the objections must be in the Final Pretrial Order, and the Court's own Scheduling Order required them to be in his Proposed Pretrial Order presented on October 12, 1999. Leave was not granted to postpone identification of the objections to the time of trial. Moreover, it is no excuse that claimant's attorney had not read the exhibits as they are not that voluminous and there were five calendar days between receipt of the exhibits and the pretrial conference. Moreover, claimant had three additional business days prior to the scheduled trial date to read the exhibits and inform both respondent and the Court of his objections. Rather, claimant chose to spring them on the Court and respondent at the commencement of trial. This is the very sort of surprise the deadlines in the Scheduling Order are designed to prevent.

¶4 Further, during discussion of the claimant's objections, the Court learned that the claimant had not furnished medical records of Dr. Dean C. Sukin, whose opinion claimant intends to rely upon at trial. The first information that the respondent had concerning Dr. Sukin was when it received a copy of an opinion written in response to a letter from claimant's counsel. The letter, dated June 22, 1999, did not contain any information about Dr. Sukin's treatment of claimant, and was furnished to respondent in early July. Respondent's counsel on July 14, 1999, requested claimant's counsel to provide Dr. Sukin's records pertaining to claimant. Claimant's counsel ignored the request and instead, on July 22, 1999, filed a Petition for Hearing, then when asked for the records in discovery furnished a written release rather than the records. Claimant's counsel informed the Court that he did not obtain Dr. Sukin's medical records for treatment even though claimant was treated on three occasions in 1998 and two in 1999. Moreover, claimant's attorney contends that Dr. Sukin is claimant's treating physician. Yet the first time the respondent was made aware of Dr. Sukin was in early July when claimant's attorney furnished Dr. Sukin's letter.

¶5 Claimant's attorney argued that the medical records were not necessary since Dr. Sukin had put his opinion in writing. The Court would point out that the opinion letter of the sort written here may not constitute a medical record kept in the ordinary course of business and may not be admissible if objected to. More importantly, a review of Dr. Sukin's medical records shows that they are highly relevant to evaluating his opinion since they contain his examination and treatment notes and also record that on June 10, 1999, just days before claimant's counsel requested the doctor's opinion, the claimant showed up without an appointment at the doctor's office and told the doctor's office personnel that "he was told by his attorney to come in and see Dr. Sukin no matter when his back hurts since they can never pinpoint exactly when it hurts." (Ex. 3 at 4.) He was actually seen by the doctor on June 11, 1999, and by June 15, 1999, the doctor had received a letter from claimant's attorney requesting an opinion.

¶6 In his Petition for Hearing claimant's counsel certified:

Petitioner has exchanged **all available medical records** relating to the injury with the defendant and will continue to do so. [Emphasis added.]

The records were available to claimant's counsel and could have easily been obtained by him when he requested the opinion and when he met with the doctor; yet even in the face of the written request of July 14, 1999, he declined to do so.

¶7 Claimant and his counsel should have obtained and furnished respondent with the records and done so prior to filing the Petition for Hearing, especially since they intended to rely upon Dr. Sukin's opinion and that opinion did not disclose his examinations and treatment of claimant. Claimant's counsel's representation in the Petition for Hearing that he had furnished all available medical records was misleading at best. The objection to the exhibits was untimely.

¶8 On his part, respondent's counsel failed to seek extensions of time when on September 1, 1999, he finally secured Dr. Sukin's records. Respondent disclosed the new exhibits and witness information a month after the disclosure deadline and a mere ten days before trial. The potential for prejudicing claimant's ability to respond to the new information and prepare for trial is obvious.

¶9 Litigation in this Court is not a game of hide the ball. The rules and orders of the Court require full and fair, early disclosure of information and evidence relevant to the case. Counsel who disregard deadlines and disclosure requirements do so at their peril.

¶10 Under the circumstances the most appropriate remedy was, and is, to vacate the trial and allow both sides to adequately prepare their cases with full disclosure of each other's evidence. This matter will be reset for the next Billings term of Court unless the parties agree to an earlier date which is also convenient with the Court. A new scheduling order with new deadlines will be issued.

SO ORDERED.

DATED in Helena, Montana, this 21st day of October, 1999.

(SEAL)

\S\ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Leo S. Ward