

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 7

WCC No. 9710-7854

JACK J. O'BRIEN,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

PINE HILLS SCHOOL,

Employer.

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

Summary: Claimant demands sanctions under section 39-71-2914, MCA (1991), against the attorney filing a response on behalf of State Fund which asserted the insurer's claim for "equitable subrogation" in claimant's third-party recovery in a malpractice case. Claimant noticed the deposition of Carl Swanson, President of State Compensation Insurance Fund. State Fund moved to quash the deposition.

Held: Protective order granted prohibiting deposition. Sanctions under section 39-71-2914, MCA (1991) are available against an attorney signing a pleadings which is not "warranted by existing law or a good faith argument for extension, modification or reversal of existing law." The issue raised is whether State Fund's position, put forth by its counsel, was beyond the pale of legitimate advocacy. Mr. Swanson is not, to the Court's knowledge, an attorney, certainly did not sign the pleading in question, and is beyond the ambit of sanctions.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2914, MCA (1991). Claimant demanded sanctions under section 39-71-2914, MCA (1991), against the attorney filing a response on behalf of State Fund which asserted the insurer's claim for "equitable subrogation" in claimant's third-party recovery in a malpractice case. Claimant noticed the deposition of Carl Swanson, President of State Compensation Insurance Fund. Protective order granted prohibiting deposition. Sanctions under section 39-71-2914, MCA (1991) are

available against an attorney signing a pleadings which is not "warranted by existing law or a good faith argument for extension, modification or reversal of existing law." The issue raised is whether State Fund's position, put forth by its counsel, was beyond the pale of legitimate advocacy. Mr. Swanson is not, to the Court's knowledge, an attorney, certainly did not sign the pleading in question, and is beyond the ambit of sanctions.

Discovery: Protective Orders. Claimant demanded sanctions under section 39-71-2914, MCA (1991), against the attorney filing a response on behalf of State Fund which asserted the insurer's claim for "equitable subrogation" in claimant's third-party recovery in a malpractice case. Claimant noticed the deposition of Carl Swanson, President of State Compensation Insurance Fund. Protective order granted prohibiting deposition. Sanctions under section 39-71-2914, MCA (1991) are available against an attorney signing a pleadings which is not "warranted by existing law or a good faith argument for extension, modification or reversal of existing law." The issue raised is whether State Fund's position, put forth by its counsel, was beyond the pale of legitimate advocacy. Mr. Swanson is not, to the Court's knowledge, an attorney, certainly did not sign the pleading in question, and is beyond the ambit of sanctions.

¶1 The petitioner/claimant (claimant) in this matter has noticed the deposition of Carl Swanson, President of the State Compensation Insurance Fund (State Fund). The State Fund moved to quash the deposition, which was then postponed to allow the claimant to respond in writing to the motion before the Court issued its ruling. That response has now been filed and the matter is ready for decision.

¶2 This case was commenced by claimant after the State Fund asserted a subrogation interest in settlement proceeds obtained by claimant in a medical malpractice action. Documents attached to petitioner's brief in opposition to state fund's motion for protective order (petitioner's brief) show that the State Fund asserted it was entitled to the entire settlement amount remaining after attorney fees and costs were subtracted but would settle for half of that amount. The petitioner requested this Court to find that the State Fund has no right to any portion of the settlement.

¶3 In its written response to the petition the State Fund reiterated its position that it had a subrogation interest in the settlement. Thereafter the State Fund expressly "waived" its alleged right and moved to dismiss the petition in its entirety, including the prayer for attorney fees. In a companion order issued today, the Court has granted the State Fund partial summary judgment, holding that the merits of the petition are now moot. (Order Granting Partial Summary Judgment.) However, in that Order I determined that the State Fund is not entitled to dismissal of claimant's request for sanctions, which may include an award of attorney fees.

¶4 Claimant has cited deposition testimony indicating that the State Fund's decision to pursue a subrogation interest in the settlement proceeds was not based on any cognizable legal authority. He suggests that the decision was motivated by the desire to maximize State Fund's profits and justify large bonuses and salaries for State Fund. One of the subjects he apparently wishes to pursue in any deposition is Mr. Swanson's "personal knowledge of the State Fund's policies regarding raises and bonuses based upon performance goals of the State Fund." (Petitioner's Brief at 6.)

¶5 Sanctions are governed by section 39-71-2914, MCA, which provides:

39-71-2914. Signing of petitions, pleadings, motions, and other papers -- requirements -- sanctions. (1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.

(2) A party who is not represented by an attorney shall sign his petition, pleading, motion, or other paper and state his address.

(3) The signature of an attorney or party constitutes a certificate by him that:

(a) he has read the petition, pleading, motion, or other paper;

(b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;

(c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and

(d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

In his brief opposing the motion for summary judgment, claimant relies on subsection (3)(c), which states that a lawyer's signature on a pleading, which would include the response filed in this case, is a certification that the pleading "is warranted by existing law or by a good faith argument for extension, modification or reversal of existing law."

¶6 The issue raised with regard to sanctions is whether the subrogation interest asserted by the State Fund in its response is beyond the pale of legitimate legal argument. Mr. Swanson

is not, to the Court's knowledge, an attorney, certainly did not sign the pleading in question, and is beyond the ambit of the sanctions. The attorney signing the response, on the other hand, is responsible for the response and must take full responsibility for it.

¶7 Whether the subrogation claim asserted by the State Fund is or is not beyond the pale of legal advocacy is an issue for the Court to determine, and it is the only issue the Court will entertain. This is not a damage action for bad faith. The best of motives will not save the State Fund from sanctions if the claim is outside the pale of legitimate legal advocacy. The worst of motives will not support sanctions if the claim is within the pale.

¶8 ACCORDINGLY, the motion for protective order is **granted**.

¶9 IT IS FURTHER ORDERED that **no** further discovery shall be conducted.

DATED in Helena, Montana, this 10th day of February, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Gene R. Jarussi
Mr. Charles G. Adams
Submitted: February 6, 1998