

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 76

WCC No. 9906-8261

DIANE M. TAVES

Petitioner

vs.

AIU INSURANCE COMPANY

Respondent/Insurer for

BETTER BUSINESS SYSTEMS (CENTRAL PAINT & GLASS)

Employer.

ORDER ON DISCOVERY DISPUTE

Summary: Discovery dispute in case where sole issue is whether claimant should be referred to medical center in Denver for treatment of pulmonary condition which insurer accepted as occupational disease. Insurer sought to compel resumption of claimant's deposition, which it terminated without calling the Court, after claimant's counsel advised her not to respond to questions about details of her personal, educational, employment and medical history and suggested calling the WCC for immediate resolution of the issue. Insurer also sought to compel responses to interrogatories about health conditions other than the pulmonary condition, and to compel production of one doctor's file. Sanctions were requested.

Held: WCC refused to order resumption of deposition, finding the questions posed by insurance counsel not reasonably calculated to lead to admissible evidence given the single issue raised and accepted liability status of the case. The Court also noted that respondent's counsel chose to terminate the deposition without calling the Court despite the existence of ARM 24.5.316(8) and despite that counsel's prior experience with immediate telephonic conferences with the WCC judge on discovery disputes. Claimant was ordered to provide basic medical information about other medical conditions from which she now suffers or has suffered since the onset of her pulmonary condition and about medications she has taken since that onset, as other medical conditions and medications, per a doctor's testimony, could impact evaluation and treatment of the respiratory condition. Where doctor's file at issue had already been produced during

deposition, motion to compel production of that file was moot, though Court ordered that file sealed as to all persons other than parties, their representatives, and reviewing Court. Request for sanctions denied where claimant's position on discovery was substantially justified.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court

Rules: ARM 24.5.316. Where insurance counsel moved to compel claimant to appear at a resumed deposition, WCC considered the fact that said counsel had rejected the suggestion of claimant's counsel to contact the WCC during deposition for resolution of the dispute, rather than to terminate the deposition. The deposition was not ordered resumed where the questions giving rise to the dispute were not reasonably calculated to lead to admissible evidence and insurance counsel unilaterally chose to terminate the deposition rather than seek an immediate ruling.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court

Rules: ARM 24.5.322. Where insurance counsel moved to compel claimant to appear at a resumed deposition, WCC considered the fact that said counsel had rejected the suggestion of claimant's counsel to contact the WCC during deposition for resolution of the dispute, rather than to terminate the deposition. The deposition was not ordered resumed where the questions giving rise to the dispute were not reasonably calculated to lead to admissible evidence and insurance counsel unilaterally chose to terminate the deposition rather than seek an immediate ruling.

Discovery: Compelling Discovery. Where insurance counsel moved to compel claimant to appear at a resumed deposition, WCC considered the fact that said counsel had rejected the suggestion of claimant's counsel to contact the WCC during deposition for resolution of the dispute, rather than to terminate the deposition. The deposition was not ordered resumed where the questions giving rise to the dispute were not reasonably calculated to lead to admissible evidence and insurance counsel unilaterally chose to terminate the deposition rather than seek an immediate ruling.

Discovery: Compelling Discovery. Where doctor's file subject to motion to compel was produced at deposition, objection to production moot, though Court did order file sealed and available only to parties, their representatives, and a reviewing Court.

Discovery: Depositions: Generally. Where insurance counsel moved to compel claimant to appear at a resumed deposition, WCC considered the fact that said counsel had rejected the suggestion of claimant's counsel to contact the WCC during deposition for resolution of the dispute, rather than to terminate the

deposition. The deposition was not ordered resumed where the questions giving rise to the dispute were not reasonably calculated to lead to admissible evidence and insurance counsel unilaterally chose to terminate the deposition rather than seek an immediate ruling.

Discovery: Interrogatories. Where sole issue was whether claimant should be referred to medical center in Denver for treatment of pulmonary condition which insurer accepted as occupational disease, claimant objected to interrogatories asking for information about other medical conditions or medications taken for other conditions. Claimant was ordered to provide basic medical information about other medical conditions from which she now suffers or has suffered since the onset of her pulmonary condition and about medications she has taken since that onset, as those other medical conditions and medications, per a doctor's testimony, could impact evaluation and treatment of the respiratory condition.

Discovery: Sanctions. Sanctions not awarded where claimant's positions during several pronged discovery disputes were substantially justified, even though claimant ordered to provide some information she had previously refused to provide. Even those objections ultimately overruled by Court were reasoned and tailored to the issues in the specific case.

¶1 Respondent, AIU Insurance Company (AIU), moves to compel claimant to answer deposition questions regarding her personal, educational, employment, and medical history predating her occupational disease claim. It further seeks an Order directing claimant to provide additional medical information and records in response to Interrogatories Nos. 2, 4, 5, and 6 and Request For Production No. 2. (Respondent's Motion to Compel Discovery and Request for Sanctions.)

Factual Background

¶2 Claimant has a chronic pulmonary condition that began in November, 1997. She filed a claim for compensation on November 10, 1997. AIU accepted the claim under the Occupational Disease Act and has paid benefits.

¶3 In her Petition for Trial the claimant requests the Court to order AIU to approve and pay for further medical evaluation and treatment at the National Jewish Medical and Research Center in Denver, Colorado. That is the **only** issue raised in the petition.

¶4 In its Response to Petition, AIU alleges that the issue is not ripe for judicial review. AIU alleged: "It has been the position of the Insurer ever since the National Jewish Hospital was recommended by Claimant's internist, Dr. Brice Addison, to obtain a second opinion by a pulmonary specialist before deciding upon the appropriateness of that referral." (Response to Petition, ¶ 1(c).) AIU further alleged that claimant had not cooperated with scheduled independent medical examinations, and had unreasonably limited the medical information

available to the insurer, thereby preventing it from obtaining a second opinion. (*Id.* ¶ 1 (e)-(k).)

¶5 On August 23, 1999, claimant was examined by Dr. David Anderson pursuant to an Order Directing Medical Examination issued by the Department of Labor & Industry (Department). Dr. Anderson, a pulmonologist on the Department's panel of occupational disease physicians, reviewed the complete file of claimant's treating physician (Dr. Addison), as well as pulmonary function studies, x-rays, and x-ray reports. (Anderson Dep. at 5-7.) He also took a history from claimant and conducted a complete physical examination, including a test to assess air flows. (*Id.* at 11.) Dr. Anderson diagnosed

moderate to severe persistent bronchial asthma. Number 1 pulmonary diagnosis. Other diagnoses were Type 1 diabetes mellitus with diabetic retinopathy, treated. Depression, treated. And vascular headaches.

(*Id.* at 16.) He attributed claimant's pulmonary condition 100 percent to her employment. (*Id.* at 26.)

¶6 Dr. Anderson was asked about the need for further evaluation or treatment at National Jewish Hospital. He responded that while referral to the hospital might be appropriate at some time in the future such referral was not currently appropriate. (*Id.* at 27-29.)

¶7 Dr. Anderson made recommendations for specific changes in medications and dosage; his recommendations were adopted by claimant's treating physician. (*Id.* at 23, 41-43.) He testified that with the recommended treatment "[u]sually one sees improvement within about six weeks and certainly within six months I would expect to see an improvement." (*Id.* at 35-36.) He said that if this "doesn't work, then I believe it is appropriate for her to go to National Jewish." (*Id.* at 38.)

Claimant's Deposition Testimony

¶8 On September 8, 1999, claimant was deposed by AIU's attorney, Mr. Donald R. Herndon. During the deposition, Mr. Herndon questioned claimant about her education and employment history as a nurse. Claimant answered his initial questions but her attorney, Mr. Richard J. Martin, objected when Mr. Herndon continued to pursue those areas. Initially, he objected when Mr. Herndon asked, "Who was your principal supervisor at Emanuel [Hospital] in Portland?" (Appendix A to Respondent's Memorandum in Support of Motion to Compel Discovery and for Sanctions (rule ARM 24.5.326) at 7.) When Mr. Herndon asked about claimant's next nursing assignment, Mr. Martin interposed the following objection:

Object. You are going to complete background information. It is not at all relevant to what is going on here. The issue is whether she has to go to National Jewish Hospital. What her work history is and who her supervisors were is a waste of time.

(*Id.* at 8.)

¶9 Mr. Herndon persisted, questioning claimant about successive jobs as a registered nurse. Mr. Martin instructed claimant not to answer and stated: "Her work history is not relevant. I will instruct her not to answer any more questions about her work history." (*Id.* at 10.) Mr. Herndon then terminated the deposition:

MR. HERNDON: That concludes then. We aren't going to close this deposition. We are going to recess it pending motions. Because we do need her background, we do need to know what her exposures have been to various kinds of things. It is a discovery deposition, and the background of people who are making claims based upon their mental and physical condition is extremely relevant and important and not subject to carte blanche direction to a client by an attorney not to answer, totally obviating the discovery rights of the respondent in this matter.

MR. MARTIN: We will state for the record that this is a proceeding about whether or not Diane Taves should be referred to National Jewish Hospital, it is a case of accepted liability, there is no issue about what caused her occupational disease. Counsel obviously has chosen not to ask relevant questions, and in light of the distress of my client, the physical distress she is in during this deposition, and the long course it is obviously headed, I have instructed her not to answer any non-relevant questions.

(*Id.* at 10-11.)

¶10 Mr. Martin suggested, prior to Mr. Herndon's termination, that counsel call the Court for guidance or ruling on the dispute:

MR. MARTIN: Maybe call the court right now.

MR. HERNDON: No. The court requires you file a motion and that you show them what is at issue and you don't call courts about this. I am not doing that.

MR. MARTIN: You can. It is in the rule. Judge McCarter wants us to do that. Call him right now.

MR. HERNDON: I have been chewed out by too many judges. Judge McCarter will need to see the record to understand what is relevant. There is no way he could handle this in a phone call in my opinion.

(Respondent's Memorandum in Support of Motion to Compel Discovery and for Sanctions, Ex. A, at 9-10.)

¶11 Rule 24.5.316 expressly provides that motions regarding discovery may be presented informally by telephone conference call, with the possibility of an immediate oral ruling by the Court.⁽¹⁾ Mr. Herndon has previously participated in at least one telephone conference call with the Court over a discovery dispute. That dispute was resolved through immediate

ruling and later confirmed by a written order. See *Wall v. National Union Fire Insurance Company*, WCC No. 9701-7682 (11/22/97).

¶12 AIU now asks the Court to order that the claimant's deposition be reconvened and that she be compelled to testify about her personal, educational, employment, and medical history predating her occupational disease claim. The request is **denied**. The information sought is not reasonably calculated to lead to admissible evidence. See Rule 26(b)(1), Mont.R.Civ.P.⁽²⁾ AIU has accepted liability and the only issue raised by the petition concerns Dr. Addison's referral of claimant to National Jewish Hospital. AIU now has the benefit of an IME by Dr. Anderson, who testified prior to claimant's deposition, that a referral to National Jewish Hospital may be appropriate if claimant does not respond to his treatment recommendations. (Anderson Dep. at 28-29, 35-36, 38.) Dr. Anderson's evaluation and testimony raise no issues about the existence of claimant's pulmonary condition or about its relationship to her work. Nothing in his testimony or evaluation indicates that the sort of detailed employment information sought by Mr. Herndon had any potential relevance to his opinions, and AIU has presented no other medical testimony to indicate its potential relevance.

¶13 Mr. Herndon unilaterally terminated the deposition in this case without contacting the Court and I decline to order it resumed. Rule 24.5.322(6) governs suspension of a deposition, providing as follows:

(6) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the taking of the deposition shall be suspended for the time necessary for the objecting party to move the court for an order. The court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. The provisions of ARM 24.5.326 apply to the award of expenses incurred in relation to the motion.

As noted previously, the Court's rules provide for a telephone conference to resolve this sort of issue and Mr. Herndon has participated in such a conference on at least one previous occasion. Instead of requesting a conference so that a ruling might be obtained and the deposition continued at that time, he terminated the deposition. Moreover, given the lack of any apparent relationship between the questions Mr. Herndon insisted on asking and the issue in the case, I find his questions oppressive and grounds for terminating the deposition in any event.

Interrogatories

¶14 The interrogatories at issue, along with the initial responses, are as follows:

INTERROGATORY NO. 2: Identify all of your significant ongoing health problems that require continuous or periodic treatment of any kind and for each state the approximate date of onset.

ANSWER: The only health condition **for which I am claiming benefits in this action** requires ongoing treatment is my lung condition, which began in 1997. There are no other continuing health problems **for which I am claiming or receiving benefits in this proceeding**. Therefore, objection is made for producing documents of other medical conditions for which I may be receiving treatment.

INTERROGATORY NO. 4: List the names, addresses, and area of speciality of all medical doctors who have seen and examined you in the past ten (10) years, and identify the condition or conditions diagnosed and treated as to each.

ANSWER: See answer to Interrogatory Numbers 2 & 3. **I am not claiming benefits for any other medical condition for which other physicians may have treated me.**

INTERROGATORY NO. 5: List all prescription drugs/medications which you have taken during the last ten (10) years, and for each identify the name of the medical doctor who prescribed it and the medical condition intended to be treated.

ANSWER: See answer to Interrogatory Numbers 2, 3 & 4. See medical records of Dr. Addison already in Respondent's possession. In addition see attached medical records of Dr. Addison's nurse's notes dated 2/6/99, 2/7/99, Dr. Yturri note dated 4/1/99, note dated 5/31/99 of doctor TBA, Addison's notes dated 7/16/99.

Prescriptions for my lung condition are: Intal, Seravent, Azmacort, Ventolin, Vanceril, Albuteral with Xylocaine, Singular, Tussinex, Zovirax, Pheregan with Codeine, Methyl Prednisone, Solunedrol, Pulmocort, Serevent and Accolate.

INTERROGATORY NO. 6: Identify by name and address all hospitals where you have been admitted as an inpatient specifying the approximate inclusive dates, the treating physician and the medical reason or reasons for your admission.

ANSWER: Benefis Healthcare and Great Falls Clinic, February 99 through August 23, 1999. Also admitted by Dr. David Jordan to Benefis Health care 11/10/97 for 2 days with Dr. Addison for chronic Bronchitis and Asthma. These medical records are attached hereto, except for the 11/10/97 records, which are already in the possession of Respondent.

(Respondent's Memorandum in Support of Motion to Compel Discovery and Sanctions at 7-8, emphasis in original.)

¶15 As a general proposition, AIU is entitled to "health care information **which is relevant** to the subject matter" in this case. *Bowen v. Super Valu Stores, Inc.*, 229 Mont. 84, 94, 745 P.2d 330, 337 (1986)(emphasis added). Health care information is discover-able so long as the information "sought **appears reasonably calculated to lead to the discovery of admissible evidence . . .**" *Id.* (emphasis added). AIU is entitled to discovery with respect to "prior physical or mental conditions which may relate to the damages [benefits] being claimed in the current action, but is not entitled to unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." *State v. District Court*, 250 Mont. 524, 530, 822 P.2d 91, 94-95 (1991).

¶16 Claimant's position - that she will reveal only medical information directly relating to her pulmonary condition - is untenable under the foregoing discovery rules. AIU is entitled to discover medical information which is relevant to any medical determination to refer her to National Jewish Hospital. If she suffers from some other medical condition which affects the ability of her Montana treating physician to control her respiratory condition, then AIU is entitled to information concerning that condition so that it can analyze whether other treatment available in Montana is appropriate. Dr. Anderson, for example, testified that stress or anxiety has the potential for impacting respiratory problems. (Anderson Dep. at 33.) He also testified that in evaluating claimant's condition, he solicited and considered information about medications claimant has taken for other conditions since those medications may impact her respiratory problems. (*Id.* at 32.)

¶17 I conclude that AIU is entitled to basic medical information concerning other medical conditions from which claimant currently suffers or has suffered since the onset of her respiratory condition and to information concerning medications she has taken since the onset of her respiratory condition. Therefore, she shall answer Interrogatory No. 2 in full. She shall further answer Interrogatory No. 5 with respect to all medications she was taking at or after the onset of her respiratory condition. She shall answer Interrogatories Nos. 4 and 5 with respect to all conditions from which she currently suffers or has suffered at any time since the onset of her respiratory condition, with respect to examination or treatment for stress, anxiety or other psychological condition, and with respect to any physician who prescribed any of the medications which she has taken since the date of the onset of her respiratory condition.

¶18 If AIU believes that further medical information may be relevant to the present dispute it may file a further motion. However, any such motion must be supported by specific medical opinions indicating the relevance of the information sought to the medical need to refer claimant to National Jewish Hospital.

¶19 Respondent has also moved to compel the further production of documents requested in its second request for production. The request and response were as follows:

REQUEST FOR PRODUCTION NO. 2: Produce for copying and inspection all medical reports, office notes, narrative reports, reports of consultants and other medical specialists, and written memoranda of every kind or description that contain information relevant to the diagnosis and treatment of your respiratory problems.

RESPONSE: See letter of 6/24/99 from Richard J. Martin to Valarie Bender. In addition, attached are records of Benefis Healthcare dated 4/28/99 to 4/30/99. Please see letter of 6/24/99 from Richard J. Martin to Valarie Bender with records attached.

(Respondent's Memorandum in Support of Motion to Compel Discovery and Sanctions, at 8.) The correspondence referenced in claimant's response indicated that copies of the medical file of Dr. Addison had been provided in redacted form. (Respondent's Memorandum in Support of Motion to Compel Discovery and for Sanctions, Ex. C). When respondent's motion was filed, claimant disputed that AIU was entitled to review Dr. Addison's complete, unredacted file.

¶20 As indicated by recent communications between the parties and Court staff, the dispute over Dr. Addison's file has been resolved in light of production of the complete file during the doctor's deposition. The parties have stipulated, and the Court has ordered, that the deposition of Dr. Addison, together with his attached file, shall be filed with the Court in a sealed envelope, available for inspection only by the parties, their representatives and representatives of this Court, and a reviewing Court on appeal.

Sanctions

¶21 AIU requests sanctions in conjunction with its motion to compel. The request is governed by Rule 24.5.326, which provides:

24.5.326 FAILURE TO MAKE DISCOVERY--SANCTIONS (1) If a party fails to respond to discovery pursuant to these rules, or makes evasive or incomplete responses to discovery, or objects to discovery, the party seeking discovery may move for an order compelling responses. With respect to a motion to compel discovery, the court may, at the request of a party or upon its own motion, impose such sanctions as it deems appropriate, including, but not limited to, awarding the prevailing party attorney fees and reasonable expenses incurred in obtaining the order or in opposing the motion. Sanctions shall be imposed against the non-prevailing party **unless the party's position with regard to the motion to compel was substantially justified or other circumstances make sanctions unjust.** If the party shall fail to make discovery following issuance of an order compelling

responses, the court may order such sanctions as it deems required and just under the circumstances. Prior to any imposition of sanctions, the court shall provide the party who may be sanctioned with the opportunity for a hearing. [Emphasis added.]

I find that the claimant's opposition to the requested discovery was substantially justified and that it would be unjust to impose sanctions. The request is **denied**.

¶22 SO ORDERED.

DATED in Helena, Montana, this 30th day of November, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin

Mr. Donald R. Herndon

Date Submitted: October 6, 1999

1. Rule 24.5.316(8) provides:

(8) Motions regarding discovery, procedure and similar pretrial issues may be presented informally by telephone conference call. The moving party shall arrange the call and for the participation of all parties. The court may designate a hearing examiner to preside and decide the motion. The court may make an oral ruling or direct that the motion be presented in writing and briefed. Any oral order shall thereafter be confirmed by written order.

2. Rule 26(b)(1) provides in relevant part:

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.