

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 24

WCC No. 9308-6872

STEVEN K. YAGER

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE/
ALEXIS RISK MANAGEMENT SERVICE

Respondents/Insurers for

LIVINGSTON SCHOOL DISTRICT NOS. 4 AND 1

Employer.

ORDER ON MOTION TO COMPEL

Presently under consideration is the claimant's motion to compel discovery. The motion seeks production of two written investigative reports. The first report was apparently prepared on December 18, 1992 by Mike Warren, a private investigator working for Pete Dunbar, who is also a private investigator. The second is Mr. Dunbar's January 18, 1993 report to the insurer, which had requested the investigation.

Mr. Warren conducted surveillance of claimant and made a video tape. The video tape has been produced by the insurer without objection. However, the insurer objects to production of the two reports on work-product grounds. It argues that it has no obligation to produce the reports in advance of trial because it does not plan to introduce the reports as a trial exhibit, thus distinguishing its situation from that in ***Simons v. State Compensation Mutual Ins. Fund***, 50 St.Rptr. 1628 (December 16, 1993) (holding that a surveillance tape must be listed as an exhibit in the pretrial order if a party intends to use it as substantive evidence). However, the insurer has listed Mr. Warren as a witness on its behalf and has tendered him for deposition. That deposition was taken recently and Warren's handwritten notes regarding surveillance were provided to claimant's attorney. Nonetheless, the claimant continues to demand the more formal written reports, while the insurer maintains its steadfast resistance to that demand.

The insurer has requested oral argument. However, after reviewing the briefs and undertaking its own legal research, the Court deems argument unnecessary. It notes that

neither party cited any precedent specifically addressing the production of an investigative report where the investigator will be a witness at trial.

This Court's recent amended discovery order in **Adels v. Cigna Ins. Co.**, WCC No. 9307-6831 discusses Supreme Court decisions holding that documents in the claim file of an insurer are not entitled to automatic protection under the work-product doctrine: claim file documents produced in the ordinary course of the insurer's business, rather than in anticipation of litigation are *not* protected. **Id.**, Order Amending Prior Order Denying Motion to Compel (march 10, 1994). However, insurers do not ordinarily employ private investigators to surveil claimants unless litigation is expected. The protection afforded by the work-product doctrine extends not only to attorneys but to others acting as agents and representatives of attorneys, including private investigators, **United States v. Nobles**, 422 U.S. 225, 238-9 (1975). The reports are therefore protected.

The protection is not absolute. Ordinary work product is discoverable upon a showing that "the party seeking discovery has substantial need of the material in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." **Palmer v. Farmers Ins.**, 50 St.Rptr. 1210, 1220 (October 18, 1993) (quoting Rule 26(b)(3), Mont.R.Civ.P.) Mental impressions, conclusions, opinions and legal theories are discoverable only upon a showing that they are "*directly at issue* and the need for the material is **compelling**." **Id.** (*italics in the original; bolding added*).

In **United States v. Nobles**, *supra*, the United States Supreme Court held that the work product protection otherwise afforded reports of a private investigator is waived where the party elects to present the investigator as a witness. 422 U.S. at 239. The protection is waived "with respect to matters covered in his testimony." 422 U.S. at 239-40. Only those portions of the report that relate to testimony are discoverable. **Id.**

The Court may control the timing of discovery by requiring production only after the party seeking discovery of work product is deposed. **Cabral v. Arruda**, 556 A.2d 47,50 (R.I. 1989).

As applied to this case, **Nobles** requires the insurer to produce those portions of Mr. Warren's written investigative report which concern any matter on which he may testify at trial. Excepted from disclosure are any impressions, conclusions, and opinions he may have committed to writing. Since the insurer may wish to redact non-discoverable parts of the report, it shall submit to the Court Mr. Warren's complete report, a redacted copy of the report, and the reasons for the redactions. The Court will then appoint its hearing examiner to conduct an **in camera** inspection of the redacted portions to determine whether any of them should be produced.

If the claimant has already been deposed, the insurer shall at the same time furnish the redacted copy to claimant's attorney. If the claimant has not already been deposed, the

insurer may defer production until it has taken his deposition, provided the deposition is taken within 30 days.

Mr. Dunbar apparently has not been listed as a witness. Unless his report includes statements made by Mr. Warren which are otherwise discoverable, Mr. Dunbar's report need not be disclosed. The insurer shall submit the Dunbar report for an **in camera** inspection by the Court's hearing examiner, who shall determine what, if any, parts of it are discoverable.

ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

- 1) The insurer shall produce those portions of Mr. Warren's written investigative report that concern any matter which Mr. Warren may testify at trial. Excepted from disclosure are Mr. Warren's impressions, conclusions and opinions.
- 2) Within ten (10) days of this Order, the insurer shall submit to the Court Mr. Warren's complete report, a redacted copy of the report, and the reasons for the redactions. The Court's hearing examiner will conduct an **in camera** inspection to determine whether any of the redacted portions should be produced.
- 3) If the claimant has already been deposed, the insurer shall furnish the redacted copy of Mr. Warren's report to claimant's attorney within ten (10) days of this Order.
- 4) If the claimant has not been deposed, the insurer may defer production until it has taken his deposition, provided that the deposition is taken within 30 days.
- 5) Within ten (10) days of this Order, the insurer shall provide the Court with a copy of Mr. Dunbar's report. The Court's hearing examiner shall then determine which parts, if any, of the report are discoverable.

DATED in Helena, Montana, this 14th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Tom L. Lewis

Mr. David J. Slovak (Courtesy Copy)

Mr. Oliver H. Goe