

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2015 MTWCC 3**

**WCC No. 2014-3383**

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**HAZEL ATCHLEY**

**Petitioner**

**vs.**

**LOUISIANA PACIFIC CORP.**

**Respondent/Insurer.**

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ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SANCTIONS, MOTION TO LIMIT AND MOTION TO STRIKE REGARDING "11 MILE RADIUS" EXHIBIT

**Summary:** Respondent moves for sanctions and to limit testimony and the use of an exhibit that was not disclosed until months after the Court granted Respondent's motion to compel discovery of all evidence supporting Petitioner's allegations. Petitioner responds that Respondent cannot prove prejudice by the late disclosure of the exhibit and that the motion is moot as Petitioner does not intend to offer the document into evidence.

**Held:** Respondent was put on notice after this Court granted its motion to compel that timber harvested in the so-called "11-mile radius" zone was a potential source of the alleged asbestos contamination at its mill and therefore, any prejudice caused by the late disclosure of the "11-mile radius" exhibit was not as great as Respondent alleges. Nevertheless, sanctions are warranted for Petitioner's failure to timely produce the disputed document. The Court will grant a motion to extend the deadlines in the scheduling order to provide Respondent time to "analyze and investigate" the disputed exhibit, which may include reopening the deposition of Petitioner's expert; to supplement its exhibit list; and to file other pretrial motions it feels are needed because of the late disclosure of the disputed exhibit. If the deposition is reopened, Petitioner shall bear all expenses of the deposition, including any reasonable costs incurred by Respondent. Should Respondent file any motions or reopen the deposition, this Court will vacate the current trial setting. The postponement of trial and the increased costs to Petitioner will serve as the appropriate sanctions for failing to timely produce the disputed document.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.326.** Where Petitioner failed to produce one document out of hundreds of pages of exhibits, and Respondent was put on notice prior to deposing Petitioner's expert that the expert relied on a USFS document in concluding that Respondent's mill processed contaminated lumber, dismissal of the case or limiting Petitioner's proof that Respondent's mill processed contaminated lumber was too severe a sanction.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.326.** Appropriate sanctions were warranted where Petitioner failed to produce a key document in response to Respondent's request for production and after the Court ordered her to produce it, including: (1) the Court granting Respondent's motion to extend the scheduling deadlines to allow it reasonable time to investigate the withheld document; (2) the Court allowing Respondent to supplement its exhibit list; (3) the Court considering and ruling on any pretrial motions regarding the withheld document; (4) the Court permitting the reconvening of Petitioner's expert's deposition in order to question him regarding the withheld document; (5) the Court requiring Petitioner to pay all expenses and Respondent's reasonable costs incurred in reconvening the expert's deposition; and (6) the Court vacating the current trial setting.

**Discovery: Sanctions.** Where Petitioner failed to produce one document out of hundreds of pages of exhibits, and Respondent was put on notice prior to deposing Petitioner's expert that the expert relied on a USFS document in concluding that Respondent's mill processed contaminated lumber, dismissal of the case or limiting Petitioner's proof that Respondent's mill processed contaminated lumber was too severe a sanction.

**Discovery: Sanctions.** Appropriate sanctions were warranted where Petitioner failed to produce a key document in response to Respondent's request for production and after the Court ordered her to produce it, including: (1) the Court granting Respondent's motion to extend the scheduling deadlines to allow it reasonable time to investigate the withheld document; (2) the Court allowing Respondent to supplement its exhibit list; (3) the Court considering and ruling on any pretrial motions regarding the

withheld document; (4) the Court permitting the reconvening of Petitioner's expert's deposition in order to question him regarding the withheld document; (5) the Court requiring Petitioner to pay all expenses and Respondent's reasonable costs incurred in reconvening the expert's deposition; and (6) the Court vacating the current trial setting.

**Discovery: Experts.** Where Respondent was put on notice prior to deposing Petitioner's expert that the expert relied on a USFS document that indicated that Respondent's mill processed contaminated lumber, appropriate sanctions were warranted where Petitioner failed to produce the USFS document in response to Respondent's request for production and after the Court ordered her to produce it, including: (1) the Court granting Respondent's motion to extend the scheduling deadlines to allow it reasonable time to investigate the withheld document; (2) the Court allowing Respondent to supplement its exhibit list; (3) the Court considering and ruling on any pretrial motions regarding the withheld document; (4) the Court permitting the reconvening of Petitioner's expert's deposition in order to question him regarding the withheld document; (5) the Court requiring Petitioner to pay all expenses and Respondent's reasonable costs incurred in reconvening the expert's deposition; and (6) the Court vacating the current trial setting.

**Evidence: Exclusion: Failure to Provide Discovery.** Appropriate sanctions were warranted where Petitioner failed to produce a key document in response to Respondent's request for production and after the Court ordered her to produce it, including: (1) the Court granting Respondent's motion to extend the scheduling deadlines to allow it reasonable time to investigate the withheld document; (2) the Court allowing Respondent to supplement its exhibit list; (3) the Court considering and ruling on any pretrial motions regarding the withheld document; (4) the Court permitting the reconvening of Petitioner's expert's deposition in order to question him regarding the withheld document; (5) the Court requiring Petitioner to pay all expenses and Respondent's reasonable costs incurred in reconvening the expert's deposition; and (6) the Court vacating the current trial setting.

**Sanctions.** Where Petitioner failed to produce one document out of hundreds of pages of exhibits and where Respondent was put on notice prior to deposing Petitioner's expert that the expert relied on a particular

document, dismissal of the case or limiting Petitioner's proof was too severe a sanction.

**Sanctions.** Appropriate sanctions were warranted where Petitioner failed to produce a key document in response to Respondent's request for production and after the Court ordered her to produce it, including: (1) the Court granting Respondent's motion to extend the scheduling deadlines to allow it reasonable time to investigate the withheld document; (2) the Court allowing Respondent to supplement its exhibit list; (3) the Court considering and ruling on any pretrial motions regarding the withheld document; (4) the Court permitting the reconvening of Petitioner's expert's deposition in order to question him regarding the withheld document; (5) the Court requiring Petitioner to pay all expenses and Respondent's reasonable costs incurred in reconvening the expert's deposition; and (6) the Court vacating the current trial setting.

¶ 1 Respondent Louisiana Pacific Corp. (LP) moves to sanction Petitioner Hazel Atchley and her attorneys for failing to timely disclose the so-called "11-mile radius" exhibit.<sup>1</sup> The 11-mile radius exhibit is a spreadsheet from the United States Forest Service showing timber harvest data since 1950 within an approximate 11-mile radius of the W.R. Grace mine in Libby, Montana.<sup>2</sup> LP correctly notes that this Court ordered Atchley to produce all documents in support of the opinions of Terry Spear, PhD, when it granted LP's motion to compel.<sup>3</sup> Dr. Spear, an industrial hygienist, relied in part on the 11-mile radius exhibit in forming his opinions in this case.<sup>4</sup> The fact that Atchley had not produced the 11-mile radius exhibit became apparent during Dr. Spear's deposition on January 30, 2015. However, Dr. Spear did not have the document with him.<sup>5</sup> LP argues that the appropriate sanction is dismissal.<sup>6</sup> In the alternative, LP seeks to prevent Atchley from having any witnesses testify that the "LP property was significantly

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<sup>1</sup> Respondent's Motion for Sanctions, Motion to Limit and Motion to Strike Regarding "11 Mile Radius" Exhibit (Respondent's Motion) and brief in support (Respondent's Brief), Docket Item Nos. 60 and 61.

<sup>2</sup> See Respondent's Brief, Ex. B; Spear Dep., 132:24 – 133:11.

<sup>3</sup> See Minute Book Hearing No. 4564, Docket Item No. 26; Order on Discovery Motions, Vacating and Resetting Trial, ¶ 2.f., Docket Item No. 29; see also [Respondent's] Motion to Compel and Memorandum in Support at 7-8 & Ex. 6, Docket Item No. 10.

<sup>4</sup> See Spear Dep. 72:18 – 87:20.

<sup>5</sup> *Id.* at 87:8-10.

<sup>6</sup> Respondent's Brief at 9; Respondent's Reply Brief in Support of its Motion for Sanctions, Motion to Limit and Motion to Strike Regarding "11 Mile Radius" Exhibit (Respondent's Reply Brief) at 9-10, Docket Item No. 85.

contaminated with asbestos from timber harvested in the 11 mile area of Libby” and to have the document excluded from the exhibits in this case.<sup>7</sup>

¶ 2 While acknowledging that she did not produce the 11-mile radius exhibit before Dr. Spear’s deposition as this Court ordered her to do, Atchley argues that no sanctions are warranted because LP was not prejudiced.<sup>8</sup> Atchley points out that in her Third Supplemental Responses to discovery, which were served upon LP on November 10, 2014, she stated that Dr. Spear relied in part on data showing that LP received timber that was harvested from within an 11-mile radius of the mine.<sup>9</sup> Atchley also states that she does not intend to introduce the 11-mile radius document as an exhibit, thereby making LP’s motion to strike it as an exhibit moot.<sup>10</sup>

¶ 3 While this Court does not condone a failure to timely provide documents during discovery, and agrees that Atchley should have produced the 11-mile radius exhibit far earlier in this case, the severe sanctions LP requests are not warranted. The situation in this case is far different than the cases on which LP relies, where the Montana Supreme Court upheld severe sanctions for discovery abuses.<sup>11</sup> This case involves the failure to produce one document in a case that has hundreds of pages of exhibits. LP’s prejudice is not as severe as it claims, as it was put on notice after its motion to compel was granted and prior to Dr. Spear’s deposition that Dr. Spear was relying in part on data at least arguably showing that LP received timber that was harvested within an 11-mile radius of the W.R. Grace mine. In response to the interrogatory asking Atchley to identify the source of contamination of the LP property, Atchley stated, in relevant part: “USFS data indicates that 9,200 acres of timber has been harvested within an 11 mile radius of the mine since 1950. During the years of 1985-2002, there were 272 stands of USFS timber harvested in the designated area encompassing 4,563 timbered acres. USFS data indicates that LPSM received logs from this area . . . .”<sup>12</sup> This Court disagrees with LP’s assertion that the word “indicates” made Atchley’s answer too vague for LP to know that she was stating that the timber delivered to LP was a potential source of contamination. Under these circumstances, this Court will not dismiss this case or limit Atchley’s proof as a sanction.

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<sup>7</sup> Respondent’s Brief at 9; Respondent’s Reply Brief at 10-12.

<sup>8</sup> Petitioner’s Response to Respondent’s Motion for Sanctions, Motion to Limit, and Motion to Strike Regarding “11 Mile Radius” Exhibit (Petitioner’s Response) at 6-8, Docket Item No. 69.

<sup>9</sup> *Id.* at 2-4, 7.

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> See, e.g., *McKenzie v. Scheeler*, 285 Mont. 500, 949 P.2d 1168 (1997) (affirming the dismissal of a case because of the plaintiff’s failure to fully answer discovery despite having nearly a year and a half to do so and despite the Court’s order to answer by a date certain).

<sup>12</sup> Petitioner’s Response at 3-4.

¶ 4 However, since Atchley did not produce the document in response to LP's request for production, and since she did not produce it after this Court ordered her to do so, sanctions are warranted.<sup>13</sup> Thus, if LP still needs more time to "analyze and investigate the information and obtain documents that either support or do not support the exhibit,"<sup>14</sup> this Court will grant a motion to extend the deadlines in the scheduling order<sup>15</sup> to allow LP a reasonable time to conduct its investigation and will allow it to supplement its exhibit list. Likewise, the Court will consider and rule upon any *Daubert*<sup>16</sup> or other pretrial motion based on the 11-mile radius exhibit, which LP believes is viable. LP shall file any such motions and supporting briefs on or before March 18, 2015. During Dr. Spear's deposition, Atchley agreed to produce the 11-mile radius exhibit and further agreed to allow LP to question Dr. Spear about it after it was produced.<sup>17</sup> The Court will allow Respondent to reconvene Dr. Spear's deposition, and should LP do so, Atchley shall pay all expenses of the deposition, including any reasonable costs that LP incurs. If LP decides to reopen the deposition, it shall notice the deposition on or before March 18, 2015. LP shall file an application for taxation of costs within 10 days after the deposition. If LP files any motions or reopens the deposition, this Court will vacate the current trial setting. The postponement of the trial and the increased costs to Atchley will serve as the appropriate sanctions for her failure to timely produce the 11-mile radius exhibit.

¶ 5 Respondent's Motion for Sanctions, Motion to Limit and Motion to Strike Regarding "11 Mile Radius" Exhibit is **granted in part and denied in part.**

DATED this 9<sup>th</sup> day of March, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder/Dustin Leftridge  
Todd A. Hammer

Submitted: February 20, 2015

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<sup>13</sup> See ARM 24.5.326.

<sup>14</sup> Respondent's Reply Brief at 4.

<sup>15</sup> Order Resetting Scheduling Order, Docket Item No. 30.

<sup>16</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

<sup>17</sup> Petitioner's Response at 6.