

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 9

WCC No. 2021-5440

LESLIE BOWMAN

Petitioner

vs.

HARTFORD ACCIDENT & INDEMNITY CO.

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION TO COMPEL
AND DENYING RESPONDENT'S MOTION TO QUASH

Summary: Petitioner, who sustained an occupational disease in the course of her employment as a workers' compensation claims adjuster, moves to compel Respondent, a Plan II insurer, to produce her former employer's file on her claim. Petitioner asserts that the employer is actively involved in adjusting her claim from an office in Kentucky, in violation of Montana law, which requires that Montana claims be adjusted from an office in Montana. Respondent opposes Petitioner's Motion to Compel and has moved to quash the Subpoena Duces Tecum that Petitioner has served upon her former employer. Respondent argues that Petitioner's former employer has not been actively involved in adjusting her claim; instead, Respondent contends that the employer's role has been that of a payment clerk. Respondent also asks this Court to quash the subpoena to the extent it would require the employer to produce communications protected by the attorney-client and work-product privileges.

Held: Petitioner is entitled to her former employer's entire file because several documents from Respondent's claim file suggest that the employer is actively involved in adjusting Petitioner's claim and supervising and directing the Montana adjusters. Petitioner has the right to conduct discovery into the employer's role in the adjusting of her claim. Moreover, if the Montana adjusters disclosed communications from Respondent's attorney to the employer, then the attorney-client and work-product privileges have been waived under established Montana law.

¶ 1 Petitioner Leslie Bowman — who sustained an occupational disease in the course of her employment as a workers’ compensation adjuster for Sedgwick Claims Management Service, Inc. (Sedgwick) — moves to compel Respondent Hartford Accident & Indemnity Co. (Hartford) to produce all documents in Sedgwick’s possession.

¶ 2 Hartford opposes Bowman’s Motion to Compel and has moved to quash the Subpoena Duces Tecum that Bowman has served upon Sedgwick.

¶ 3 For the following reasons, this Court grants Bowman’s Motion to Compel and denies Hartford’s Motion to Quash.

FACTS AND PROCEDURAL HISTORY

¶ 4 Bowman sustained an occupational disease in the course of her employment as a workers’ compensation claims adjuster for Sedgwick.

¶ 5 Hartford insured Sedgwick pursuant to Plan II of the Workers’ Compensation Act (WCA).¹ Hartford has accepted liability for Bowman’s occupational disease.

¶ 6 Hartford retained Intermountain Claims of Montana (Intermountain Claims), a third-party administrator, to adjust Bowman’s claim. Shannon Tompkins and Sandy Scholl, who work as adjusters for Intermountain Claims at its office in Missoula, have been the adjusters assigned to Bowman’s claim.

¶ 7 Tompkins’ and Scholl’s “point of contact” with Sedgwick has been Danielle Renshaw, who works for Sedgwick as “Team Lead” in Kentucky. Although Hartford is Sedgwick’s insurer, Sedgwick has been paying Bowman’s benefits.

¶ 8 In her Petition for Hearing, Bowman contends that she is entitled to additional temporary total disability, temporary partial disability, and medical benefits. She also contends that she is entitled to a penalty for unreasonable delays and denials. Bowman also contends that she is entitled to a penalty because Renshaw is adjusting her claim, in violation of § 39-71-107(2), MCA, which provides, in relevant part, “All workers’ compensation and occupational disease claims filed pursuant to the Workers’ Compensation Act must be examined by a claims examiner in Montana.”

¶ 9 Bowman has served a request for production on Hartford, asking it to produce its entire claim file.

¹ Montana law requires an employer to provide workers’ compensation coverage under one of three plans. Under Plan I, the employer self-insures. See § 39-71-2101 *et seq.*, MCA. Under Plan II, the employer purchases coverage from an authorized insurance company. See § 39-71-2201 *et seq.*, MCA. The Plan II insurer is directly and primarily liable to the employee for workers’ compensation benefits. § 39-71-2203(3), MCA. Under Plan III, the employer purchases coverage from the Montana State Fund. See § 39-71-2311 *et seq.*, MCA.

¶ 10 Hartford produced part of the claim file from Intermountain Claims, objecting to producing portions of some documents on the grounds of attorney-client and work-product privilege.

¶ 11 Some of the documents Hartford produced from the claim file suggest that Renshaw is involved in the adjusting of Bowman's claim, and that she is supervising and directing the Montana adjusters. For example, on May 27, 2020, Tompkins spoke to Renshaw while opening the claim file. According to Tompkins' claim note, Renshaw stated that she "oversees the TPA." As another example, on October 2, 2020, Renshaw sent an email to Scholl stating, "Let me know if [Bowman] responds to you & we can then see if she's interested in a full/final settlement." One week later, Renshaw sent an email to Scholl stating:

I wanted to follow up to see if [you] had any success in reaching the employee for possible settlement. If not, please be sure we've sent a letter to the employee advising of the overpayment below. In discussing with Sedgwick the employee should not have received both benefits so we want to make her aware of this & that we can settle in an attempt to resolve. We want to see if we can recoup this.

Overpayment: \$5,430.76

Scholl replied, "Will keep you posted." As another example, several documents demonstrate that only Renshaw had access to the computer system with the payment ledgers for Bowman's claim. As a final example, in the system Sedgwick uses to manage prescription medications, Renshaw is listed as the "Claims Examiner."

¶ 12 Based upon these documents, Bowman demanded that Hartford produce all documents in Sedgwick's possession regarding her claim, including Renshaw's complete file.

¶ 13 On April 30, 2021, Bowman served a Subpoena Duces Tecum upon Sedgwick, asking it to produce, "Sedgwick's entire file and all documentation relating to Leslie Bowman's employment, her occupational disease claim of May 12, 2020, her workers' compensation claim regarding this occupational disease, and any and all communications and correspondence either written or in electronic or in whatever form with Hartford Accident & Indemnity, Co., Intermountain Claims, Sandy Scholl, and Bill Bronson regarding Leslie Bowman."

¶ 14 Sedgwick forwarded the Subpoena Duces Tecum to Scholl, who forwarded it to Hartford's attorney.

¶ 15 On May 5, 2021, Bowman moved to compel Hartford to produce all documents in Sedgwick's possession, asserting that Renshaw is actively involved in adjusting her claim. Bowman also asserts that if Scholl sent any of Hartford's attorney's communications to Sedgwick, then she waived the attorney-client and work product

privileges under *American Zurich Ins. Co. v. Montana Thirteenth Judicial District Court (American Zurich)*.²

¶ 16 Hartford opposes Bowman's Motion to Compel and has moved to quash the Subpoena Duces Tecum that Bowman served upon Sedgwick. Hartford acknowledges that Renshaw has a file with her notes and Scholl's status reports, which Renshaw refers to as a "dummy file." However, Hartford argues that Bowman is not entitled to Renshaw's file on the grounds that it is not part of Bowman's claim file. Hartford asserts that Renshaw has not been actively involved in adjusting Bowman's claim and that she does not supervise nor direct the Montana adjusters. Hartford maintains that Renshaw's role is merely that of a payment clerk. Hartford has filed the Affidavit of Danielle Renshaw in which Renshaw attests that she does not make any adjusting decisions, that she does not supervise Scholl, and that her role is only to follow Scholl's instructions regarding benefit payments. Hartford has also filed the Affidavit of Sandy Scholl in which Scholl attests that she alone manages Bowman's claim and determines Bowman's entitlement to benefits and that Renshaw's role is only to make benefit payments. Scholl also attests that she alone has the authority to decide whether to settle Bowman's claim. Hartford also maintains that it has already provided all of the documents in Sedgwick's file to Bowman, with the exception of the portions of documents that contain information protected by the attorney-client or work-product privilege. Hartford also argues that this Court should quash the Subpoena Duces Tecum to the extent it seeks information protected by the attorney-client or work-product privilege.

LAW AND ANALYSIS

¶ 17 This Court follows M.R.Civ.P. 26(b)(1), which provides in relevant part:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

¶ 18 For five reasons, Bowman is entitled to all of the documents in Sedgwick's possession regarding Bowman's claim, including Renshaw's entire "dummy file."

¶ 19 *First*, Bowman has the right to receive a copy of the claim file under § 39-71-107(3), MCA, which provides, in relevant part, that "the documents related to each claim filed with the insurer under the Workers' Compensation Act . . . must be maintained in a manner that allows the documents to be retrieved from that office and copied at the request of the

² 2012 MT 61, 364 Mont. 299, 280 P.3d 240.

claimant or the department.”³ Tompkins’ claim note and Renshaw’s emails suggest that Renshaw has not been merely a payment clerk but has been actively involved in adjusting Bowman’s claim, and that she has been supervising and directing the Montana adjusters. If Renshaw has been actively involved in adjusting Bowman’s claim, then Bowman has the right to Renshaw’s file because it is part of the claim file. Bowman’s request for Renshaw’s file is reasonably calculated to lead to the discovery of evidence of Renshaw’s role in making decisions on her claim and of evidence of the decisions made on her claim.

¶ 20 *Second*, even if Renshaw’s role has been limited to that of a payment clerk, Bowman’s discovery request for Sedgwick’s file is reasonably calculated to lead to the discovery of admissible evidence, including the reasons why the Montana adjusters made decisions as to Bowman’s entitlement to benefits, the dates on which the Montana adjusters instructed Renshaw to make payments, and the dates on which Sedgwick paid the benefits. As an employer, Sedgwick’s role is similar to that of a witness and it has a duty to produce the documents in its possession regarding Bowman’s job duties, injury, and claim under ARM 24.5.301(4), which states that “an employer shall fulfill its duty to cooperate and assist its insurer, including any duty to assist in responding to discovery.”⁴

¶ 21 *Third*, Bowman’s request for Sedgwick’s file is reasonably calculated to lead to the discovery of admissible evidence for Bowman’s penalty claim. This Court has ruled that, under § 39-71-2203, MCA, it is “patently unreasonable” for a Plan II insurer to delegate its responsibilities to adjust a claim to the employer.⁵ Here again, some documents from Intermountain Claims’ file suggest that Renshaw’s role has been greater than that of a payment clerk. On this record, Bowman has the right to conduct discovery into the extent of Renshaw’s role in adjusting her claim. Moreover, the discrepancies between the documents that suggest that Renshaw has been actively involved in adjusting Bowman’s claim and Renshaw’s and Scholl’s affidavits call into question whether Renshaw and Scholl were truthful in their affidavits, which could affect this Court’s finding of whether they are credible witnesses.⁶

¶ 22 *Fourth*, there is no merit to Hartford’s claim that this Court should quash the Subpoena Duces Tecum to the extent that it seeks information protected by the attorney-client and work-product privileges. In *American Zurich*, the Montana Supreme Court addressed waiver of the attorney-client and work-product privileges in the context of a

³ See also *Stewart v. MACo Workers’ Comp. Trust*, 2008 MTWCC 22, ¶ 11 (stating, “Section 39-71-107(3), MCA, mandates that a claim file must be maintained in a manner that makes it accessible to the claimant.”); *Porter v. Liberty Nw. Ins. Corp.*, 2007 MTWCC 42, ¶ 53 (stating, “I would caution insurers that there is also a point at which, if a claimant is forced to file a petition in this Court simply to receive a copy of his claims file, this fact would certainly be among the issues taken into consideration in determining whether an insurer acted reasonably in its adjustment of the claim.”).

⁴ See *Am Zurich*, ¶ 15.

⁵ *Hernandez v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 2003 MTWCC 5, ¶ 1.

⁶ See § 26-1-302(7), (9), MCA (providing that the presumption that a witness is speaking the truth can be overcome by, *inter alia*, “inconsistent statements of the witness” and “other evidence contradicting the witness’s testimony”).

workers' compensation claim against a Plan II insurer.⁷ The court explained that, under Plan II of the WCA, "the employer's role in workers' compensation cases is limited" and that "[t]he Plan II insurer is directly and primarily liable to the employee, and must pay directly to the employee any compensation for which the employer is liable."⁸ The court also explained, "the insurer's duty to compensate the employee cannot be delegated to the employer, nor can the employer veto or influence any settlement between the insurer and the employee."⁹ Because the employer is not a co-litigant and bears no liability for a workers' compensation claim, the court held that the workers' compensation adjuster waived the attorney-client privilege by voluntarily disclosing the insurer's attorney's opinion letter to the employer.¹⁰ Likewise, because an employer's "status as a disinterested third party, and its preclusion by law from participating in the adjustment of the compensation claim, could not support a reasonable expectation that [the insurer's] work product would be kept confidential," the court held that the voluntary disclosure waived the work-product privilege.¹¹ Thus, if Tompkins or Scholl disclosed Hartford's attorney's communications to Sedgwick, then they waived the attorney-client and work-product privileges. Sedgwick must therefore produce all documents in its possession, including the entirety of Renshaw's "dummy file."

¶ 23 *Fifth*, there is no merit to Hartford's arguments that it should not have to produce Sedgwick's file because Bowman already has the documents or because she can make her case that Renshaw has been adjusting her claim based on the evidence that she already has. Hartford's assertion that Bowman already has all of the documents in Sedgwick's possession is baseless, as there is no evidence indicating that Hartford actually knows what is in Sedgwick's files and Renshaw acknowledges that her "dummy file" contains her notes, which have not been produced to Bowman. And, a party has a duty to fully and completely answer and respond to discovery requests.¹² For obvious reasons, a party cannot refuse to fully respond to discovery by unilaterally declaring that the opposing party already has enough evidence to make her case.

¶ 24 Accordingly, this Court now enters the following:

ORDER

¶ 25 Bowman's Motion to Compel is **granted**. Hartford shall produce all documents in Sedgwick's possession on or before **Friday, June 4, 2021**.

⁷ *Am. Zurich*, 2012 MT 61.

⁸ *Am Zurich*, ¶ 12 (citing § 39-71-2203(3), MCA).

⁹ *Am. Zurich*, ¶ 13 (citing *Hernandez*, ¶ 1).

¹⁰ *Am. Zurich*, ¶¶ 8-22.

¹¹ *Am. Zurich*, ¶¶ 28-29 (internal citation omitted).

¹² See ARM 24.5.326(1) (providing that this Court may sanction a party for making "incomplete responses to discovery").

¶ 26 Hartford's Motion to Quash Subpoena Duces Tecum is **denied**.

DATED this 27th day of May, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Sydney E. McKenna and Justin Starin
William O. Bronson

Submitted: May 21, 2021