IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 3

WCC No. 2019-4673

LESLIE D. CONN

Petitioner

vs.

AMTRUST INS. CO. OF KANSAS

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION TO COMPEL

Summary: Petitioner asserts that Respondent's attorney waived the work-product privilege by disclosing his work product to the vocational rehabilitation provider that Respondent hired to prepare a JA in the regular course of Petitioner's claim. Respondent asserts that its attorney did not waive the work-product privilege on the grounds that the rehabilitation provider is Respondent's retained expert.

Held: Respondent's attorney waived the work-product privilege by voluntarily disclosing his work product to the rehabilitation provider. A rehabilitation provider hired by Respondent to prepare a JA in the regular course of a claim is not Respondent's retained expert under Montana law; rather, the rehabilitation provider is a non-retained, hybrid witness. Because Respondent could not have had a reasonable expectation that its attorney's communications to the rehabilitation provider would be kept confidential, Respondent's attorney waived the work-product privilege.

¶ 1 Petitioner Leslie D. Conn moves to compel Respondent AmTrust Ins. Co. of Kansas (AmTrust) to produce the complete files of Travis Stortz, MS, CRC, CCM, LCPC, a vocational rehabilitation provider who AmTrust hired to prepare a job analysis (JA). Conn asserts that she has the right to everything in Stortz's file, including communications from AmTrust's attorney on the grounds that AmTrust's attorney waived the work-product privilege by voluntary disclosure. Relying on a 2007 case from a federal district court,

Conn argues that an attorney's voluntary disclosure of his work product to an expert waives the work-product privilege.

¶ 2 AmTrust asserts that, with one exception, it has provided all of Stortz's file. The exception is an email AmTrust's attorney sent to Stortz on September 6, 2019, which AmTrust asserts is privileged as its attorney's work product. AmTrust asserts that it did not designate Stortz as Conn's vocational provider under the Workers' Compensation Act (WCA). Rather, AmTrust asserts that it retained Stortz as its expert witness. Relying upon recent case law from the Ninth Circuit Court of Appeals, AmTrust argues that an attorney does not waive the work-product privilege by disclosing his thoughts and opinions to a retained expert.

FACTS

¶ 3 On May 22, 2015, Conn suffered an industrial injury to her left shoulder.

¶ 4 AmTrust insured Conn's employer.

¶ 5 Intermountain Claims served as AmTrust's third-party administrator.

¶ 6 In the fall of 2015, AmTrust hired Beth Regan, MRC, CRC, of Vocational Management Services, Inc. (VMS) to prepare a time-of-injury job analysis (JA) and an alternative JA. Regan frequently communicated with Intermountain Claims via email, including sending documents as attachments. In her Progress Report dated October 23, 2015, which Regan sent to Intermountain Claims, Regan wrote that the rehabilitation goal was to, "Assist in the client's return to the work force, as soon as medically released to do so, earning wages equal to or higher than those secured in his [sic] time of injury position." Regan's case notes reveal that she spoke to Conn several times on the telephone and met with her. Regan consistently referred to Conn as her "client."[1] After completing a time-of-injury JA and an alternate JA, Regan closed her file.

¶ 7 Conn could not return to her time-of-injury job. However, she returned to a modified position with her employer.

¶ 8 In March 2018, Intermountain Claims hired Stortz – also of VMS – to prepare a JA for a modified position with Conn's time-of-injury employer.

¶ 9 In late March 2018, Stortz met with Conn's employer. On April 2, 2018, Stortz sent an email to Conn's supervisor, stating:

[1] At the time, the Code of Professional Ethics for Rehabilitation Counselors defined "clients" "as individuals with, or directly affected by a disability, functional limitation(s), or medical condition and who receive services from rehabilitation counselors." Commission on Rehabilitation Counselor Certification, *Code of Professional Ethics for Rehabilitation Counselors* (2009), p. 3.

> Hi Dick,
> Was nice to meet you last week and appreciate your time with regard to Ms. Conn's claim. As discussed please look over the attached job analysis. Please make changes (or let me know and I will make the changes) as necessary for accuracy. Once ok by you, please have Ms. Conn review and offer changes as well. Once deemed accurate please sign under Employer Authorization Signature on the last page and have Ms. Conn sign under Employee Authorization Signature. Then please email or fax . . . back to me and I will get it over to [the claims examiner], etc. Please also email or call . . . with any thoughts, questions, or concerns.

¶ 10 On April 6, 2018, Stortz sent a Progress Report to Intermountain Claims. Stortz stated that the purpose of the referral was, "for Time of Injury Job Analysis development and further services upon request." Stortz stated that the rehabilitation goal was to, "Assist in the client's return to the workforce as soon as medically released to do so earning wages equal to or higher than those secured in her time of injury position."[2] Stortz had prepared a JA and sent it to Conn. Thus, Stortz stated, "At this time I await the reviewed time of injury job analysis from Ms. Conn and the time of injury employer. Once completed[,] I will forward it on to you."

¶ 11 On April 18, 2018, Stortz emailed Conn's supervisor with questions about the changes the supervisor and Conn had made to the JA. Stortz notified Conn's supervisor that if either he or Conn had questions or concerns, they could call him.

¶ 12 Later that day, Stortz spoke with Conn. His note from the conversation states:

> Staffed file with client. Client was confused as she thought the JA was to represent her TOI job versus her current modified job, etc. Made additional changes to JA. Client to see physician the beginning of May will then have FCE to determine her final abilities and limitations. Will get JA done and to physician.

¶ 13 On April 19, 2018, Stortz received the JA, which Conn and her supervisor had signed. Stortz then sent the JA to Justin Jacobsen, MD, who was one of Conn's treating physicians, with a letter stating:

> I am a vocational rehabilitation consultant working with Ms. Leslie Conn in an effort to assist with her current employment with her time of injury employer. Towards this end, I have been requested by Mr. Jay Ward of Intermountain Claims, to send the attached Customer Service

[2] At this time, the Code of Professional Ethics for Rehabilitation Counselors (Code of Ethics) defined "clients" as "individuals with or directly affected by a disability, who receive services from rehabilitation counselors." Commission on Rehabilitation Counselor Certification, *Code of Ethics* (2017), p. 2, *available at* https://www.crccertification.com/filebin/pdf/ethics/CodeOfEthics_01-01-2017.pdf.

> Representative job analysis for your medical opinion as to the above worker's ability to perform the position described from a physical standpoint.
>
> Please review the analysis and indicate, in the space provided on the final page of the job analysis, your approval or disapproval of the analysis based upon the injured worker's physical abilities and limitations. A space is also provided for any comments, recommendations, or modification suggestions you might have relative to the worker's physical ability to perform these duties.

¶ 14 On May 8, 2018, Stortz left a voicemail with Dr. Jacobsen's office asking for "status on JA."

¶ 15 On June 27, 2018, the adjuster at Intermountain Claims sent Stortz an email stating: "I need the JA on the time of injury job duties ASAP. 07/10/18 FCE is set." Stortz replied as follows:

> Sounds good – thanks Jay. Just talked to Ms. Conn on the phone. I sent the TOI JA over on 5/17 but had not heard back. Just [re-sent] it and I think they will send [it] right back. Once done – do you just want me to send it to you or on to the FCE?

¶ 16 On July 31, 2018, Stortz contacted Intermountain Claims. Stortz's note from the conversation states:

> Staffed file with carrier – ok to close file as client is going to continue on in her modified position with her TOI employer.

¶ 17 On October 8, 2018, Stortz sent Intermountain Claims a Closure Report, again stating that he was retained to prepare a time-of-injury JA and to assist Conn in returning to the workforce.

¶ 18 Thereafter, Conn's employment with her time-of-injury employer ended.

¶ 19 On June 6, 2019, Conn filed a Petition for Hearing, wherein she alleges:

> The respondent insurer contends that Conn is at MMI, and that the employer offered modified work. Conn contends that the time of injury employer forced her to exceed her claim related physical restrictions, so she was no longer able to continue working for the time of injury employer. Conn submits that she is entitled to resulting indemnity benefits, and that she is entitled to ongoing medical treatment benefits.

¶ 20 On June 27, 2019, AmTrust filed its Response to Petition for Hearing. AmTrust asserts that Conn is not entitled to any temporary total disability (TTD) benefits nor

permanent partial disability (PPD) benefits because Dr. Jacobsen approved the JA for the modified position in which she was working:

> Petitioner was medically approved to return to work in her time-of-injury position with modification, and to an alternate position with her time-of-injury employer by her treating surgeon, Dr. Jacobsen. Petitioner returned to work for her time-of-injury employer without an actual wage loss. Petitioner continued in that position until she quit, advising her employer she quit due to a heart condition.

¶ 21 On July 29, 2019, Stortz spoke with AmTrust's attorney. Stortz's note of that conversation states, "File consult with attorney – need to determine if client can continue to work in permanent alternative job with employer."

¶ 22 During discovery, Conn sent Request for Production No. 4 to AmTrust, asking it to produce "a copy of the Certified Rehabilitation Counselor's entire file." Although AmTrust had received emails, Progress Reports, and Closure reports from Regan and Stortz, AmTrust falsely responded, "Respondent has no responsive documents to this Request."[3]

¶ 23 In its supplemental answers to Conn's request for production, AmTrust produced documents from VMS's files. AmTrust asserts that it has now produced the complete files of VMS with one exception, that being an email AmTrust's attorney sent to Stortz on September 6, 2019. AmTrust claims that this email is protected by the attorney work-product privilege. This Court has reviewed the email *in camera* under ARM 24.5.324(6)(c) and agrees that it contains attorney opinion work product.

¶ 24 Conn moved to compel AmTrust to produce the email from its attorney to Stortz. Conn contends that AmTrust's attorney's voluntary disclosure of his work product to Stortz waived the work-product privilege. Conn maintains that Stortz was her vocational rehabilitation provider, and not AmTrust's retained expert. AmTrust opposes the motion, asserting that Stortz is its retained expert.

¶ 25 Because neither party filed sufficient evidence from which this Court could determine whether Stortz was AmTrust's retained expert, this Court ordered the parties to file supplemental evidence in support of their respective positions.

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[3] AmTrust takes great issue and offense with Conn's characterization of this answer as "preposterous." AmTrust asserts that it did nothing wrong, emphasizing that, "without prompting from Conn," it produced the files from the vocational providers, with the exception of the email currently at issue, in its third and fourth supplemental responses, which it provided months after its initial response. However, a party is expected to completely and truthfully answer discovery. The Montana Supreme Court recently explained, "Failure or refusal to fully and fairly answer proper discovery requests 'essentially prevents the case from progressing' and warrants appropriate sanction . . . ." *Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, ¶ 72, 392 Mont. 139, 424 P.3d 571 (citation omitted). After AmTrust supplemented its response, Conn demanded that AmTrust verify that its responses were complete. AmTrust was indignant, asserting that it had no duty to do so. However, since AmTrust gave an obviously false response when it first responded to Request for Production No. 4, Conn's request was reasonable. Thus, this Court will require AmTrust to verify, under oath, that its responses to Request for Production No. 4 are complete.

¶ 26 On December 13, 2019, Conn filed examples of Progress Reports and notes in which Stortz referred to Conn as his "client" and Stortz's letter to Dr. Jacobsen, in which Stortz stated he was a vocational rehabilitation consultant working with Conn.

¶ 27 On December 16, 2019, Amtrust filed the Affidavit of Travis Stortz, CRC. Stortz does not aver that he was working for AmTrust as a retained expert. But, he denies that he was Conn's vocational provider. Stortz maintains that his "sole function was to prepare JAs at the request of AmTrust." Stortz avers that he was not retained to serve as Conn's "rehabilitation provider" to provide "vocational services" under the WCA because he does not consider himself to be providing "vocational services" unless he develops a rehabilitation plan for a "client." Stortz claims he consistently used the word "client" in his Progress Reports as a "generic term" and was not "representing that [he] was functioning as a 'rehabilitation provider' for a client . . . ." Stortz claims his statement to Dr. Jacobsen that he was a "vocational rehabilitation consultant working with Ms. Leslie Conn in an effort to assist with her current employment with her time of injury employer" was just the "template letter" he uses to send JAs to a treating physician. Stortz avers that he did not intend to convey to Dr. Jacobsen that he was Conn's rehabilitation provider. Stortz avers that he did not copy Conn with his letters or emails. Stortz acknowledges that he spoke directly to Conn, but claims that he did not represent himself as a " 'rehabilitation provider,' or [use] words to that effect."

LAW AND ANALYSIS

¶ 28 The work-product privilege protects materials prepared in anticipation of litigation from discovery by the adverse party, giving "a qualified immunity to materials prepared 'in anticipation of litigation,' and nearly absolute immunity to the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party to the litigation.' "[4] The Montana Supreme Court has explained, "the work product doctrine serves the adversarial process directly 'by enabling attorneys to prepare cases without fear that their work product will be used against their clients.' "[5]

[4] *Burnside Lund v. St. Paul Fire & Marine Ins. Co*., 2002 MTWCC 13, ¶ 8 (emphasis omitted) (quoting *State of Mont. ex. rel., Burlington N. R.R. Co. v. Mont. Eighth Jud. Dist. Ct.*, 239 Mont. 207, 217, 779 P.2d 885, 892 (1989)). *See also* M.R.Civ.P. 26(b)(3).

[5] *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶ 24, 364 Mont. 299, 280 P.3d 240. *See also Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947) (stating, in case which first recognized the work-product privilege, "In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case . . . as the 'Work product of the lawyer.' ").

¶ 29 The work-product privilege can be waived.[6] However, the Montana Supreme Court has explained that, unlike the attorney-client privilege, "voluntary disclosure does not necessarily waive confidentiality of attorney work product."[7] Rather, the work-product privilege is waived by voluntary disclosure only when the disclosure would potentially allow the attorney's client's adversary to obtain the information:

> The purpose underlying the work product doctrine requires us to distinguish between disclosures to adversaries and disclosures to non-adversaries. Disclosure only waives work product protection if it is inconsistent with the maintenance of secrecy from the disclosing party's adversary.[8]

¶ 30 In *American Zurich Ins. Co. v. Montana Thirteenth Judicial District Court (American Zurich)*, the Montana Supreme Court addressed waiver of the work-product privilege in the context of a workers' compensation claim. American Zurich insured Roscoe Steel & Culvert Co. (Roscoe) at the time Phillip Peters suffered an industrial injury.[9] During Peter's workers' compensation claim, American Zurich's claims examiner sent a copy of American Zurich's attorney's opinion and evaluation letter to Roscoe.[10] After Peters and American Zurich settled his workers' compensation claim, Peters brought a bad faith case against American Zurich.[11] Peters served Roscoe with a Subpoena Duces Tecum, requesting Roscoe's entire file, including any correspondence from American Zurich's attorney.[12] Roscoe moved to quash, asserting that American Zurich's attorney's letter was protected by the attorney-client privilege and the work-product privilege.[13]

¶ 31 The court ruled that American Zurich waived the attorney-client privilege and work-product privilege by voluntarily disclosing its attorney's letter.[14] While voluntary disclosure does not automatically waive the work-product privilege, the court explained that disclosure to a non-adversary which is a potential "conduit" to the adversary waives the work-product privilege unless the disclosing party has a "reasonable basis for believing the recipient would keep the disclosed material confidential."[15] The court explained that a reasonable expectation of confidentiality may derive from: (1) common litigation interests between the disclosing party and the recipient; (2) a confidentiality agreement

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[6] *Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 118, 861 P.2d 895, 912 (1993).

[7] *Am. Zurich*, ¶ 24 (citation omitted).

[8] *Am. Zurich*, ¶ 26 (citations omitted) (internal quotation marks omitted).

[9] *Am. Zurich*, ¶ 2.

[10] *Am. Zurich*, ¶ 3.

[11] *Am. Zurich*, ¶ 4.

[12] *Id.*

[13] *Id.*

[14] *Am. Zurich*, ¶¶ 22, 29.

[15] *Am. Zurich*, ¶ 27 (citing *U.S. v. Deloitte, LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010)).

between the disclosing party and the recipient; or (3) rules of professional conduct which require the recipient to keep the information confidential.[16]

¶ 32 Although the court explained that Roscoe was not "necessarily a conduit" to Peters, the court held that American Zurich waived the work-product privilege because Roscoe's overlapping relationship with American Zurich and Peters made "Zurich's expectations of confidentiality in Roscoe during the claims adjustment process unreasonable."[17] The court explained that because an employer is not allowed to make decisions in the adjusting of a claim, it was a disinterested third-party and that American Zurich had "no basis for either a confidentiality agreement or assurances of confidentiality."[18] The court explained: "we conclude that Roscoe's effective 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 Zurich's work product would be kept confidential. Zurich's disclosure of the letter therefore waives work product protection."[19]

¶ 33 Relying upon *American Zurich*, Conn argues that AmTrust's attorney waived the work-product privilege because AmTrust could not reasonably expect that Stortz would keep its attorney's email confidential. Conn asserts that a vocational rehabilitation provider designated by the insurer for vocational services in the regular course of a claim is not the insurer's retained expert. Conn points to the Code of Professional Ethics for Rehabilitation Counselors (Code of Ethics), which distinguishes between a vocational provider who is hired to provide services for a person with a disability, who is called a "client," and a vocational provider who is employed "to render an opinion for a forensic purpose." The Code of Ethics states, "When employed to render an opinion for a forensic purpose, rehabilitation counselors do not have clients. In a forensic setting, the evaluee is the person who is being evaluated."[20] Conn notes that Stortz consistently referred to her as a "client," which she asserts establishes that AmTrust did not hire Stortz as its retained expert. Conn points out that the Code of Ethics provides that a vocational provider's duty is primarily to his client. Thus, Conn argues that AmTrust's attorney waived the work-product privilege by voluntarily disclosing his thoughts to Stortz.

¶ 34 AmTrust argues that this case is distinguishable from *American Zurich.* AmTrust asserts that its attorney's voluntary disclosure of his work product to Stortz did not waive the work-product privilege on the grounds that Stortz is its retained expert. AmTrust did not cite any authority in support of its claim that Stortz is its retained expert but is correct

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[16] *Am. Zurich*, ¶ 27 (citing *Deloitte,* 610 F.3d at 141-42).

[17] *Am. Zurich*, ¶ 28.

[18] *Am. Zurich*, ¶¶ 13, 28.

[19] *Am. Zurich*, ¶ 29.

[20] Code of Ethics, p. 2.

that under current law, an attorney's disclosure of opinion work product to his client's retained expert does not waive the work-product privilege.[21]

¶ 35 In *Norris v. Fritz*, the Montana Supreme Court distinguished between a retained expert and a non-retained expert.[22] The Court explained that a retained expert is a person who obtains facts and formulates opinions "in anticipation of litigation or for trial."[23] The court explained that the disclosure requirements for a retained expert are strict because, a party's "only access" to an opposing party's "adversarial, retained expert's identity and opinions" is through "M.R.Civ.P. 26(b)(4) disclosures and pre-trial depositions,"[24] and because, "A retained expert's identity could remain unknown and his opinions unattainable until the expert disclosure deadline within a scheduling order."[25]

¶ 36 In contrast, the court explained that a non-retained expert is an "expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit."[26] The Court noted that a treating physician is an example of a non-retained, hybrid expert.[27] The court explained:

> [A] non-retained expert's role in the factual scenario makes his identity well known to both parties and his opinions are more readily available. A non-retained expert typically will be a hybrid witness. This witness possesses personal knowledge of factual events relevant to the case. He also possesses specialized training that allows him to formulate expert opinions regarding those factual events. His involvement usually stems from his profession thereby making his expertise obvious. His opinions largely are ascertainable, therefore, and useful to any party who seeks them.[28]

Because the parties will know the person's identity and his opinions before litigation, the court held that the disclosure requirements for non-retained experts are relatively relaxed,

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[21] *See, e.g.*, *Republic of Ecuador v. Mackay*, 742 F.3d 860, 867-71 (9th Cir. 2014) (citations omitted) (noting that under the 2003 amendments to Fed.R.Civ.P. 26(a)(2), many courts held that " 'any material given by an attorney to an expert [wa]s discoverable,' including opinion work product" but explaining that the purpose of the 2010 amendment to Fed.R.Civ.P. 26(b)(4) was to change this law and to "protect opinion work product—i.e., attorney mental impressions, conclusions, or legal theories—from discovery.").

[22] 2012 MT 27, 364 Mont. 63, 270 P.3d 79. *See also Faulconbridge v. State*, 2006 MT 198, ¶ 43, 333 Mont. 186, 142 P.3d 777.

[23] *Norris*, ¶ 20 (citing M.R.Civ.P. 26(b)(4)).

[24] *Norris*, ¶ 21.

[25] *Norris*, ¶ 21 (citation omitted).

[26] *Norris*, ¶ 20 (citation omitted).

[27] *Norris*, ¶¶ 20, 22, 23.

[28] *Norris*, ¶ 22.

only requiring that the opposing party have adequate notice of the identity of the expert and sufficient information about his opinions to prevent unfair surprise.[29]

¶ 37 Applying these distinctions leads inexorably to the conclusion that a "rehabilitation provider"[30] designated to prepare a JA in the regular course of a workers' compensation claim is not the insurer's retained expert. Although rehabilitation providers are not providing "rehabilitation services"[31] unless they prepare a "rehabilitation plan"[32] for a "disabled worker,"[33] the WCA requires insurers to obtain at least one JA from a rehabilitation provider whenever an injured worker is unable to work because of an industrial injury and has a permanent, physical impairment because of the injury. Section 39-71-609(2), MCA, states:

> (2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:
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> (a) must have a physician's determination that the claimant has reached medical stability;
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> (b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;
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> (c) must have a physician's determination, ***based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider***, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;

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[29] *Norris*, ¶¶ 32-33.

[30] Section 39-71-1011(7), MCA (2013) defines "rehabilitation provider" as "a rehabilitation counselor certified by the commission on rehabilitation counselor certification." Although § 39-71-1011, MCA, provides that the definitions are to be "used in this part," the definition of "rehabilitation provider" applies throughout the Workers' Compensation Act pursuant to § 1-2-107, MCA, which states, "Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears."

[31] Section 39-71-1011(8), MCA (2013) defines "rehabilitation services" as "a program of evaluation, planning, and implementation of a rehabilitation plan to assist a disabled worker to return to work."

[32] Section 39-71-1011(6), MCA (2013) defines "rehabilitation plan" as "a written individualized plan that assists a disabled worker in acquiring skills or aptitudes to return to work through job placement, on-the-job training, education, training, or specialized job modification and that reasonably reduces the worker's actual wage loss."

[33] Section 39-71-1011(3), MCA (2013) defines "disabled worker" as "a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury."

(d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.[34]

This Court has relied upon this statute and ruled that in cases in which a claimant contends that she is permanently totally disabled, the insurer has the initial burden of proving that a physician has approved a JA.[35] Because rehabilitation providers preparing JAs in the regular course of a claim have a role in the claim, and their identities, area of expertise, and opinions are readily ascertainable before litigation, they are non-retained experts and hybrid witnesses.

¶ 38 Here, Stortz was squarely in the non-retained expert, hybrid witness category when he prepared the JA and sent it to Dr. Jacobsen. AmTrust designated Stortz as the rehabilitation provider to prepare a JA as part of its investigation into whether Conn was entitled to additional benefits due to her permanent impairment. Stortz used his expertise to investigate Conn's modified position and prepare a JA.[36] Conn asserts that she could not continue working in her modified job and has demanded that AmTrust reinstate her TTD benefits. As set forth in its Response to Petition for Hearing, one reason AmTrust denied Conn's demand to reinstate her TTD benefits is that Dr. Jacobsen approved the JA for the modified job. Although Stortz asserts that he did not function as Conn's rehabilitation provider under the WCA because AmTrust did not designate him to prepare a rehabilitation plan, he had a role in Conn's claim and his identity, area of expertise, and opinions were known to both parties before litigation. Thus, he was not AmTrust's retained expert.

¶ 39 Moreover, Stortz does <u>not</u> assert that he was working as a retained expert and it is evident that he did not think he was working as AmTrust's retained expert when he prepared the JA. If Stortz thought he was AmTrust's retained expert, he would have

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[34] Emphasis added.

[35] *Kellegher v. MACO Workers' Comp. Trust*, 2015 MTWCC 16, ¶ 71 (citations omitted) (explaining that, "in determining whether an insurer may terminate temporary total disability benefits, § 39-71-609(2), MCA, provides that an insurer must first obtain a physician's approval of one or more jobs suitable for the claimant 'by age, education, work experience, and physical condition.' Thus, the insurer bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled by submitting sufficient evidence that there are approved jobs."); *Holmes v. Safeway Inc.*, 2012 MTWCC 8, ¶ 59 (citation omitted) (ruling that in cases where claimant seeks PTD benefits, "the insurer bears the initial burden to produce evidence showing that an injured worker is not permanently totally disabled by obtaining a physician's approval of one or more jobs suitable for the injured worker."); *Drivdahl v. Zurich Am. Ins. Co.*, 2012 MTWCC 43, ¶ 24 (ruling, "under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence showing that the injured worker is not permanently totally disabled."); *Weisgerber v. Am. Home Assurance Co.*, 2005 MTWCC 8, ¶ 32 (explaining that § 39-71-609(2), MCA, "puts the burden on the insurer to, in the first instance, obtain a physician's approval of one or more jobs suitable for the claimant. Thus, it bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled.").

[36] *See Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21, ¶ 40 (recognizing that the WCA requires that JAs be prepared by a certified vocational rehabilitation counselor, an expert, because "determining the essential functions of a job, which is not always performed in public view, and whether [the claimant] would be competitive for a particular position, is beyond common experience.").

followed the Code of Ethics' provisions for "forensic rehabilitation counselors." The Code of Ethics states, "Rehabilitation counselors working in a forensic setting, referred to in this section as forensic rehabilitation counselors, conduct reviews of records and/or evaluations and conduct research for the purpose of providing unbiased and objective expert opinions via case consultation or testimony."[37] The Code of Ethics states, "When employed to render an opinion for a forensic purpose, rehabilitation counselors do not have clients. In a forensic setting, the evaluee is the person who is being evaluated."[38]

¶ 40 Stortz's actions at the time he prepared the JA show the he was not working as a forensic rehabilitation counselor. For example, the Code of Ethics provides that when a rehabilitation counselor is working as a forensic rehabilitation counselor and is going to speak with the evaluee "in person or using any other form of communication," he is to inform the evaluee in writing of the purpose of the evaluation and obtain informed consent from the evaluee.[39] Stortz spoke to Conn on two occasions. Although Stortz avers that he did not tell Conn that he was her " 'rehabilitation provider' or [use] words to that effect," there is no evidence that he informed her that he was working as a forensic rehabilitation counselor nor any evidence that he obtained informed consent before speaking with her.

¶ 41 As another example, Stortz consistently referred to Conn as his "client" and his attempt to explain away his use of the word "client" is unavailing. The Code of Ethics conclusively shows that the word "client" is not a "generic" word when used by rehabilitation providers. If Stortz was working as a forensic rehabilitation counselor, he would have referred to Conn as the "evaluee." Moreover, Stortz unequivocally told Dr. Jacobsen that he was "a vocational rehabilitation consultant working with" Conn "to assist with her current employment with her time of injury employer." Stortz's claim that this is a template letter he uses to send JAs to treating physicians only proves that he does not consider himself to be a forensic rehabilitation counselor when he is preparing JAs in the regular course of a workers' compensation claim, as a rehabilitation provider "working with" a claimant to "assist" with her employment is clearly not working as the insurer's retained expert.

¶ 42 Under *American Zurich*, AmTrust's attorney's voluntary disclosure of his work product to Stortz waived the work-product privilege.[40] Like a claimant's employer, a rehabilitation provider designated to prepare JAs in the normal course of a claim is a "disinterested" third party because the rehabilitation provider makes no decisions in the adjusting of the claim and has no common litigation interest with the insurer. Rather, the

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[37] Code of Ethics, p. 18.

[38] Code of Ethics, p. 2.

[39] Code of Ethics, Section F, ¶¶ F.1b, F.1d, at p. 18.

[40] The attorney-client privilege belongs to the client and cannot be waived by an attorney without the consent of the client. *Palmer*, 261 Mont. at 109, 861 P.2d at 906 (citing § 26-1-803, MCA; Rule 503, M.R.Evid.). However, the work product privilege belongs to the attorney and can be waived by the attorney. *Rhone–Poulenc Rorer Inc. v. The Home Indem. Co.*, 32 F.3d 851, 866 (3rd Cir. 1994) ("[T]he work product doctrine belongs to the professional, rather than the client.").

claims examiner makes the decisions[41] and the insurer is solely liable for benefits.[42] If the rehabilitation provider is hired to prepare JAs to satisfy the requirement in § 39-71-609(2)(c), MCA, the rehabilitation provider's role is limited to providing some of the information the claims examiner needs to adjust the claim. Moreover, like a claimant's employer, the rehabilitation provider has an overlapping relationship with the claimant and the insurer and is a potential "conduit" from the insurer to the claimant. In *American Zurich*, the court relied heavily upon *United States v. Deloitte LLP*, where the District of Columbia Circuit Court of Appeals held that disclosure of work product to an accountant did not waive the work-product privilege because the accountant was bound by rules of professional conduct that "include confidentiality requirements."[43] Here, the Code of Ethics does not require Stortz to keep information from AmTrust's attorney confidential. In fact, the Code of Ethics provides that vocational providers are to disclose information to their clients. Accordingly, AmTrust's attorney waived the work-product privilege, and AmTrust must produce the email that AmTrust's attorney sent to Stortz on September 6, 2019.

¶ 43 Conn also requests her attorney fees incurred in preparing and presenting her Motion to Compel. ARM 24.5.326 states, in relevant part, "The Court imposes sanctions 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." However, AmTrust's opposition was substantially justified because this case presented an issue of first impression. And, the circumstances of this case make sanctions unjust. Neither party cited *Norris* or any other authority in support of their arguments on the issue of whether Stortz was a retained expert. And, Conn relied on a case that is no longer good law.

¶ 44 Accordingly, this Court now enters the following:

ORDER

¶ 45 Conn's Motion to Compel is **granted**. AmTrust shall produce to Conn the email that Kelly M. Wills sent to Travis Stortz on Friday, September 6, 2019, at 2:06 p.m., on or before **Friday, March 6, 2020**, via a supplemental answer to Conn's Request for Production No. 4. The representative of AmTrust with the most knowledge of Conn's claim file shall verify, under oath, that AmTrust has produced all documents responsive to Request for Production No. 4.

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[41] *See* § 39-71-107(2), MCA (providing that workers' compensation claims are to "be examined by a claims examiner in Montana" and that "the claims examiner examining the claim is required to determine the entitlement to benefits, authorize payment of all benefits due, manage the claim, have authority to settle the claim, maintain an office located in Montana, and examine Montana claims from that office.").

[42] § 39-71-2203(3), MCA. *See also Am. Zurich*, ¶¶ 12, 13.

[43] *Am. Zurich*, ¶ 27 (citing *Deloitte*, 610 F.3d at 142).

DATED this 25th day of February, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Kelly M. Wills and Will Ballew

Submitted: December 16, 2019