

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

**WCC No. 2001-0300**

---

**CASSANDRA SCHMILL**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Respondent/Insurer**

**and**

**MONTANA STATE FUND**

**Intervenor.**

---

**FILED**

**JUL 10 2007**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

---

**ORDER ADOPTING ORDER OF SPECIAL MASTER**

¶ 1 Issues in the above-entitled matter were duly briefed before Special Master Jay Dufrechou, who considered the evidence and prepared and submitted his Order for consideration by the Court. These issues are fully set forth in the Special Master's Order.

¶ 2 Thereupon, the Court considered the record in the above-captioned matter, considered the Order of the Special Master, and does hereby make and enter the following Order.

¶ 3 IT IS ORDERED the "Findings and Conclusions by Special Master on Petitioner's Motion to Compel Responses to Discovery Requests to Lumberman's Underwriting Alliance" are adopted as follows:

¶ 3a Lumberman's Underwriting Alliance must answer the questions posed in Petitioner's "discovery letter." The answers must be mailed to Petitioner within 20 days after the date of this Order Adopting Order of Special Master and Entering Judgment.

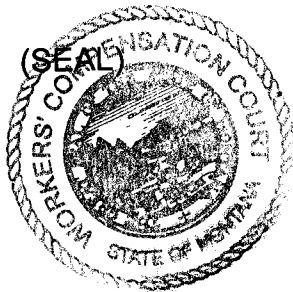
¶ 3b Petitioner's request for sanctions is denied.

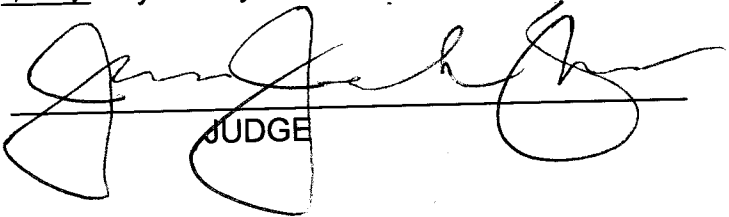
DOCKET ITEM NO. 379

¶ 3c After receipt from Respondent of the information requested in the "discovery letter," Petitioner shall have 15 days to initiate any further discovery or investigation. If such further discovery or investigation is deemed necessary by Petitioner, the parties should contact the Special Master for discussion of dates for response by Respondent and for handling of any additional issues presented regarding this matter.

¶ 4 Any party to this dispute may have twenty days in which to request reconsideration from this Order.

DATED in Helena, Montana, this 10th day of July, 2007.



  
JUDGE

c: *Counsel of Record via Website*  
Jay P. Dufrechou

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

---

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

---

FINDINGS AND CONCLUSIONS BY SPECIAL MASTER ON PETITIONER'S  
MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS TO  
LUMBERMAN'S UNDERWRITING ALLIANCE

I. Background

¶ 1 On November 30, 2006, an affidavit was filed in the Workers' Compensation Court (WCC) by Marianna Valer, who identified herself as a Legal Analyst for Lumberman's Underwriting Alliance (LUA). The Affidavit made use of the form created by the WCC for insurers to request dismissal from the *Schmill* common fund proceedings. The affidavit indicated that LUA "has no claimants meeting the Court's criteria in this matter as set forth in the summons."<sup>1</sup>

¶ 2 In signing the affidavit, Ms. Valer affirmed that she understood that the Workers' Compensation Court may allow a period of up to 90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery **and investigation** for the limited purpose of proving or disproving the foregoing statement(s)

---

<sup>1</sup> Affidavit of Marianna Valer, CP – Certified Paralegal, filed November 30, 2006, p. 2.

made by me on behalf of Lumberman's Underwriting Alliance.<sup>2</sup>  
(emphasis added).

¶ 3 On March 22, 2007, LUA filed a Motion to Dismiss on the ground that Petitioner had 90 days from November 30, 2006 (the date the above-referenced affidavit was filed) to submit formal discovery requests directed toward proving or disproving the statement made by Ms. Valer in the affidavit. Because no discovery requests had been submitted, LUA requested dismissal.

¶ 4 Petitioner responded that LUA was required through the common fund Summons to serve a copy of a response to the Summons on Petitioner. Characterizing the above-referenced affidavit as a response to the Summons, Petitioner argued that the Motion to Dismiss was premature and should be denied because Petitioner had not been served with the Affidavit. LUA replied that the Affidavit was not a response to the Summons. LUA argued that the Affidavit itself triggered the 90 day discovery period, without requiring service of the Affidavit on Petitioner other than through the Court's posting of the Affidavit on the WCC website.

¶ 5 On April 11, 2007, the WCC entered an Order Granting Petitioner Extension of Time to Conduct Discovery. The WCC noted that there was no requirement that an Affidavit such as that completed by Ms. Valer be served directly on Petitioner's counsel. The WCC also noted that it had followed a practice of reminding attorneys through email to check the Court's website for new filings, but had discontinued that practice following notification from several attorneys that the emails were not effective.

¶ 6 The WCC noted:

It is not entirely clear to the Court whether Petitioner's objection to Respondent's motion is premised on a lack of notice due to lack of service of LUA's affidavit. Nevertheless, in order to mitigate any potential prejudice, the Court grants Petitioner until June 20, 2007, to conduct discovery in this matter for the limited purpose of proving or disproving the statements made in the affidavit filed by Ms. Valer.<sup>3</sup>

## II. Discussion

¶ 7 With this background, we approach the issue presented, which involves Petitioner's Motion to Compel discovery responses by LUA. On April 13, 2007, Petitioner sent a "discovery letter" to LUA's counsel, seeking answers to three questions:

---

<sup>2</sup> *Id.*

<sup>3</sup> *Order Granting Petitioner Extension of Time to Conduct Discovery*, ¶ 6.

1. Please describe the procedure used to determine the insurer has no claimants meeting the Court's criteria as set forth in the Summons.
2. Please indicate the total number of occupational disease claims that the insurer had in Montana occurring on or after July 1, 1987.
3. Please indicate how many of the claims identified in response to question no. 2 involve the payment of temporary total disability benefits.<sup>4</sup>

¶ 8 Petitioner represents that she

has used this form of informal discovery with every insurer who has filed an affidavit selecting the third option in response to the *Schmill* Summons. Each time the Petitioner has sent a letter to an insurer similar to the one sent to LUA, the insurer has responded to the correspondence. LUA, on the other hand, did not respond to the correspondence and so the Petitioner sent a follow-up letter dated June 4, 2007, requesting a response. [citation omitted.] LUA responded that it will only respond to the Petitioner's questions if they are contained in a pleading, as opposed to correspondence.<sup>5</sup>

¶ 9 Petitioner also notes her concern that Respondent may have been seeking tactical advantage through delay in responding to her original "discovery letter," followed by insistence on formal interrogatories. Petitioner argues:

What is especially troubling about this last refusal is that it was not made at the time the discovery was sent in April, but only after Petitioner's counsel solicited a response in June. It is clear that had Petitioner's counsel not followed up on the discovery, LUA's counsel would simply have waited until the time limit for discovery had expired and then used that as a reason not to respond.<sup>6</sup>

¶ 10 In opposition to the Motion to Compel, LUA argues that it should not be required to respond to a "discovery letter" because no such form of discovery exists under the WCC's rules of procedure. LUA argues that written interrogatories, in pleading form, are required. Absent such written

---

<sup>4</sup> Petitioner's Motion to Compel Response to Discovery Requests from Lumberman's Underwriting Alliance, pp. 1-2.

<sup>5</sup> Petitioner's Motion to Compel Response to Discovery Requests from Lumberman's Underwriting Alliance, p. 2.

<sup>6</sup> *Id.*

interrogatories, LUA contends that it should be not required to answer the questions posed by Petitioner.

¶ 11 The Special Master finds and concludes that LUA must answer the questions posed by Petitioner in her “discovery letter.” Regardless of whether the “discovery letter” falls within the formalities of the WCC discovery rules, the letter was sufficient to trigger the responsibility of response in the context of common fund implementation proceedings. The implementation phase of common fund proceedings can be difficult enough without the elevation of form over substance. Respondent has identified absolutely no reason that it may be prejudiced or confused by Petitioner’s use of a “discovery letter” as opposed to formal service of interrogatories. The information sought in the discovery letter is clear, concise, and directed toward allowing Petitioner to satisfy herself that the affidavit filed by Ms. Valer, a paralegal with the title of legal analyst, residing in the State of Florida, was based on actual investigation and not a cursory attempt to generate dismissal from the common fund proceedings.

¶ 12 Moreover, the Special Master notes that Ms. Valer, in the Affidavit, indicated her understanding that Petitioner’s counsel may conduct “discovery and investigation” for the purpose of proving or disproving statements made in the affidavit. Even if the “discovery letter” were not considered discovery per se, it is investigation which Respondent chose to ignore. The decision to ignore a reasonable investigatory request should not give rise to tactical advantage to Respondent.

¶ 13 Outside the context of common fund implementation proceedings, the Special Master would be extremely hesitant to recommend loosening the formal rules of discovery as stated in the WCC rules. However, in the context of common fund implementation proceedings, the practice of the WCC, since *Murer v. Montana State Compensation Ins. Fund*, 257 Mont. 434 (1993), has been to encourage cooperation between the parties toward the goal of identifying and paying claimants entitled to benefits under the common fund.

¶ 14 Given the potentially complex nature of file location and review, and the myriad unforeseen issues that arise in the implementation of common fund rulings, a degree of informality allows implementation to proceed. Open discussion and give-and-take between parties allows identification of and payment to claimants within months or years as opposed to decades. If the Special Master were to countenance reliance on formalities serving no real purpose, we would be in danger of encouraging additional motions arising from technicalities. The common fund implementation proceedings would be in danger of bogging down for no good reason.

¶ 15 Petitioner’s counsel requests imposition of sanctions on Respondent in the form of attorney fees and costs associated with the filing of her motion. The Special Master finds and concludes that this request should be denied. While

the Special Master finds that the "discovery letter" utilized by Petitioner is sufficient to require response by LUA, the use of a "discovery letter" is not clearly within the rules of the WCC. Following these Findings and Conclusions, Petitioner is authorized to initiate discovery through letters that clearly state the information sought. Prior to these Findings and Conclusions, however, the Special Master finds that objection to a "discovery letter" as outside the parameters of the WCC rules was at least within the bounds of reasonable advocacy.

¶ 16 These Findings and Conclusions should not be read to suggest that rules and procedures do not have their place in common fund implementation proceedings. At present, the Special Master has only found that "discovery letters" are appropriate when seeking information in response to a "dismissal" affidavit. However, following these Findings and Conclusions, the parties are encouraged to focus on issues of substance and to share information to the extent appropriate. The Special Master will consider recommendation for sanctions in the future if advocacy exceeds the bounds appropriate in a common fund implementation proceeding.

### III. Findings and Conclusions

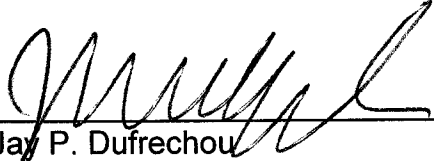
¶ 17 In accordance with the foregoing, the Special Master finds and concludes:

¶ 17a LUA must answer the questions posed in Petitioner's "discovery letter." The answers must be mailed to Petitioner within 20 days after the date the WCC enters an order implementing these Findings and Conclusions.

¶ 17b Petitioner's request for sanctions should be denied.

¶ 17c After receipt from Respondent of the information requested in the "discovery letter," Petitioner shall have 15 days to initiate any further discovery or investigation. If such further discovery or investigation is deemed necessary by Petitioner, the parties should contact the Special Master for discussion of dates for response by Respondent and for handling of any additional issues presented regarding this matter.

DATED in Helena, Montana, this 9th day of July, 2007.

  
\_\_\_\_\_  
Jay P. Dufrechou  
Special Master