IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 49

WCC No. 2006-1515

BILLY FORE

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION TO COMPEL

Summary: Petitioner Billy Fore moves the Court to compel Respondent Transportation Insurance Company to produce approximately 800,000 pages of Environmental Protection Agency documentation contained on ten compact disks. Petitioner argues that Respondent is required to produce the documentation in discovery because Respondent asserted the "last injurious exposure" rule in its response to Petitioner's petition for benefits. Respondent responds that Petitioner's discovery request is improper because: (1) the information is not peculiarly within the possession of Respondent but is available to be obtained by other means; and (2) the information is a public record and obtainable under the Freedom of Information Act.

Held: Petitioner's motion to compel is granted. Pursuant to Rule 26(b)(1), Mont. R. Civ. P., Respondent is generally required to produce discovery that is relevant and not privileged. However, the Court shall limit discovery if it determines that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. In this case, Respondent has failed to show that Petitioner may obtain the compact disks from a source that is more convenient, less burdensome, or less expensive. Respondent may charge Petitioner a reasonable amount to recoup its cost in copying the compact disks.

¶ 1 Petitioner Billy Fore moves this Court, pursuant to ARM 24.5.326, to compel Respondent Transportation Insurance Company to produce approximately 800,000 pages of Environmental Protection Agency (EPA) documents contained on ten compact disks currently in Respondent's possession. Respondent responds that the discovery request is

improper because: (1) the information is not peculiarly in the possession of Respondent but is available to be obtained by other means; and (2) the information is public record and obtainable under the Freedom of Information Act.

¶ 2 Where no express provision is made in the Workers' Compensation Court rules regarding a matter of procedure, the Court will be guided by considerations and procedures set forth in the Montana Rules of Civil Procedure.[1] In this regard, I look to Rule 26(b)(1), Mont. R. Civ. P., which states, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> . . . .
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> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is . . . obtainable from some other source that is more convenient, less burdensome, or less expensive . . . .

¶ 3 I fail to appreciate how requiring Petitioner to request compact disks from the EPA when these same disks are already in Respondent's possession would be more convenient, less burdensome, or less expensive than obtaining the compact disks directly from Respondent. Petitioner, therefore, is entitled to the disks pursuant to Rule 26(b)(1), Mont. R. Civ. P.

¶ 4 In an October 23, 2008, conference call with the parties, Respondent expressed concerns about possible copyright violations by providing copies of the compact disks to Petitioner without the permission of the EPA. However, Respondent has not provided the Court with any legal authority supporting this position. If Respondent is able to show that providing copies of the compact disks is somehow a violation of copyright law, it may file a motion for reconsideration in this matter. Respondent also expressed concerns regarding

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[1] ARM 24.5.352.

the expense it incurred when it ordered the disks directly from the EPA. Respondent did not incur this expense at Petitioner's behest. However, in *Stewart v. MACo Workers' Compensation Trust,* I held that an insurer may charge a reasonable amount to recoup its cost in copying a claimant's file.[2] In *Stewart*, I found that a reasonable amount would be the same amount as is commonly charged by businesses which offer photocopy services to the public.[3] Likewise, in the present case, Respondent may charge Petitioner a reasonable amount to recoup its cost in copying the compact disks. Similar to my ruling in *Stewart,* I find a reasonable charge to be the same amount as is commonly charged by businesses which offer compact disk copying services to the public.

ORDER

¶ 5 Petitioner's motion to compel is **GRANTED**.

¶ 6 Respondent may charge Petitioner the same amount as is commonly charged by businesses offering compact disk copying services to the public which are located in the same community as the claim file is maintained.

DATED in Helena, Montana, this 21st day of November, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Jon L. Heberling
Todd A. Hammer
Submitted: April 10, 2006

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[2] *Stewart*, 2008 MTWCC 22, ¶ 11.

[3] *Id.*