

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 2

WCC No. 2012-3014

ESTATE OF RICHARD HIRTH, by and through Ashley Harmon,
Personal Representative

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION *IN LIMINE*

Summary: Petitioner moved *in limine* to exclude the testimony of two of Respondent's expert witnesses, contending that Respondent's witness disclosures were inadequate.

Held: Petitioner has not followed this Court's procedure for resolving disputes regarding allegedly inadequate witness disclosures and therefore the Court will not consider Petitioner's motion.

Topics:

Procedure: Scheduling Order. The Scheduling Order clearly states that this Court will only consider limiting witness testimony based on inadequate disclosure if the Scheduling Order procedures have been followed. Where Petitioner failed to follow the procedure for inadequate witness summaries set forth in the Scheduling Order, and offered no explanation as to why it failed to do so, the Court refused to consider Petitioner's motion to limit the testimony of witnesses.

¶ 1 Petitioner Estate of Richard Hirth, by and through Ashley Harmon, Personal Representative (Hirth Estate), moves this Court *in limine* to prohibit Montana State Fund (State Fund) from calling Drs. Joel E. Cleary and Kenneth V. Carpenter as expert witnesses in this matter.¹ State Fund opposes Hirth Estate's motion.²

¹ Petitioner's Motion in Limine and Brief in Support Thereof (Opening Brief), Docket Item No. 19.

¶ 2 Hirth Estate argues that Drs. Cleary and Carpenter should be prohibited from testifying because it alleges State Fund failed to meet the witness disclosure requirements of M. R. Civ. P. 26(b)(4). Hirth Estate argues that M. R. Civ. P. 26(b)(4) applies in the present case pursuant to ARM 24.5.352(1),³ which states:

If no express provision is made in these rules regarding a matter of procedure, the court will be guided, where appropriate, by considerations and procedures set forth in the Mont. R. Civ. P.

¶ 3 In its opposition brief, State Fund points out that the disclosure criteria for this Court is set forth in the Scheduling Order.⁴ The pertinent language in the Scheduling Order states:

Inadequate witness summaries: Summaries of the expected testimony of witnesses, including expert witnesses, may incorporate by reference depositions, reports, or records of the witness. If a party considers an opposing party's summary inadequate to permit trial preparation or case evaluation, the party shall contact the opposing party no later than **January 4, 2013**, to request additional information. If the party remains dissatisfied with the information provided, the dissatisfied party may file a motion to compel further disclosure and shall promptly arrange a conference call with the Court to resolve the motion. Unless otherwise permitted by the Court, a motion to compel further disclosure shall be filed no later than **January 11, 2013**. Any motion to limit witness testimony based on inadequate disclosure will be considered by the Court **only if** these procedures have been followed.⁵

¶ 4 Hirth Estate states that its counsel contacted State Fund's counsel on January 4, 2013, and indicated that Hirth Estate believed State Fund's expert witness disclosure was inadequate.⁶ While Hirth Estate does not tell the Court what happened next, one can assume Hirth Estate remained dissatisfied with the information filed, as we are now here.

² Brief in Opposition to Petitioner's Motion in Limine to Exclude the Testimony of Drs. Cleary and Carpenter, Docket Item No. 21.

³ Opening Brief at 2.

⁴ Docket Item No. 2.

⁵ Scheduling Order at 2. (Emphasis in original.)

⁶ Opening Brief at 2.

¶ 5 However, Hirth Estate also does not explain to the Court why it ignored the rest of the procedure set forth in the Scheduling Order. Hirth Estate did not file a motion to compel further disclosure, nor did it promptly arrange a conference call with the Court to resolve the motion. Instead, it filed the motion *in limine* at issue.

¶ 6 As set forth in the Court's Scheduling Order and quoted above, "Any motion to limit witness testimony based on inadequate disclosure will be considered by the Court **only if** these procedures have been followed." The procedures have not been followed in the present case. Therefore, I will not consider Hirth Estate's motion to limit the testimony of these witnesses. Hirth Estate's motion *in limine* is therefore **denied**.

SO ORDERED.

DATED in Helena, Montana, this 23rd day of January, 2013.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Michael G. Barer
Thomas E. Martello
Submitted: January 17, 2013