

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 22

WCC No. 2020-5103

BRADY HOGAN

Petitioner

vs.

FEDERATED MUTUAL INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR PROTECTIVE ORDER

Summary: Petitioner seeks a protective order prohibiting Respondent from obtaining his mental health records in discovery, asserting that they have no relevance to the issue of whether Respondent may subrogate.

Held: Petitioner's mental health records are discoverable because they are relevant to the factual issue of his "entire loss" from his injury, relevant to the factual issue of the amount of workers' compensation benefits he will receive, and because Respondent is entitled to them to cross examine the expert witnesses Petitioner has disclosed to testify to his mental injuries and the costs to treat those injuries.

¶ 1 In his Petition for Hearing, Petitioner Brady Hogan alleges that Respondent Federated Mutual Insurance Company (Federated Mutual) may not subrogate on his third-party tort recovery because he will not be made whole. Federated Mutual has served discovery requests upon Hogan asking him to identify the mental health providers he has seen since his injury, to produce their records, and to identify any medications the mental health providers have prescribed. Hogan now moves for a protective order preventing Federated Mutual from obtaining his mental health records.

¶ 2 When ruling on discoverability, this Court follows the standards in M.R.Civ.P. 26(b)(1). That rule 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.

¶ 3 The Montana Supreme Court has explained, “The rules of civil procedure are premised upon a policy of liberal and broad discovery.”¹ Likewise, this Court has explained that “discovery is very broad” and “there is a difference between discoverability and admissibility.”²

¶ 4 To decide whether Federated Mutual has a right of subrogation under § 39-71-414, MCA, this Court is to apply the Montana Supreme Court's formula for determining whether a claimant has been made whole. As first set forth in *Zacher v. American Ins. Co.*:

We hold that where a workers' compensation claimant recovers against a third party, an insurer has no subrogation rights until a claimant has been made whole for his entire loss and any costs of recovery, including attorney fees. In determining whether a claimant has been made whole, the amounts received and to be received under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss³

The Montana Supreme Court has explained, “The question of whether an injured claimant has been made whole is a question of fact, dependent on the level of his or her physical recovery and the extent of his or her compensation through benefits paid and/or damages recouped.”⁴

¶ 5 Hogan asserts that his mental health records are not discoverable under *Lewis v. Montana Eighth Judicial District Court*, in which the Montana Supreme Court held that, in a tort claim, a prayer for general emotional distress damages is not, in and of itself, a

¹ *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d 642 (citation omitted).

² *Overholt v. Liberty Nw. Ins.*, 2013 MTWCC 5, ¶¶ 5, 6.

³ 243 Mont. 226, 231, 794 P.2d 335, 338 (1990). See also *State Comp. Ins. Fund v. McMillan*, 2001 MT 168, ¶ 12, 306 Mont. 155, 31 P.3d 347 (citation omitted).

⁴ *Ness v. Anaconda Minerals Co., a Div. of Atl. Richfield Co.*, 279 Mont. 472, 481, 929 P.2d 205, 211 (1996).

sufficient basis for a mental examination under M.R.Civ.P. 35.⁵ Hogan maintains that he sought only general emotional distress damages in his tort claim and thus argues that the amounts he received in his tort claim were only for general emotional distress damages. Thus, Hogan asserts that his mental health records are irrelevant in this case and not discoverable.

¶ 6 Federated Mutual argues that Hogan's mental health records are discoverable for three reasons. First, Federated Mutual argues that Hogan's mental health records are relevant to determine the nature and extent of his mental injuries, which is necessary for this Court to find Hogan's entire loss. Federated Mutual asserts that Hogan sought more than general emotional distress damages in his tort claim, pointing to Hogan's Second Amended Complaint, in which Hogan alleged that the tortfeasor's negligence caused "mental injury," including "significant" "emotional suffering" and "anguish and depression." Second, Federated Mutual argues that Hogan's mental health records are relevant to determine the amount of workers' compensation benefits Hogan will receive in the future because physical-mental injuries are compensable under the Workers' Compensation Act. Third, Federated Mutual argues that Hogan's mental health records are discoverable because Hogan's medical experts have relied upon them in forming their opinions that Hogan suffered mental injuries, that he has needed treatment for those injuries in the past, that he will require treatment for those injuries in the future, and that Hogan's life care expert has included treatments for Hogan's mental injuries in her calculation of his future medical costs. Federated Mutual argues that it is entitled to Hogan's mental health records for cross examination.

¶ 7 Here, Federated Mutual is correct that Hogan's mental health records are discoverable for three independent reasons.

¶ 8 *First*, Hogan's mental health records are discoverable because they are relevant to the factual issue of his entire loss. To make a finding of Hogan's entire loss, this Court will need to make findings as to the severity and duration of his mental injuries and the reasonable costs to treat his mental injuries. Hogan's mental health records are relevant to these issues of fact. Moreover, this Court is not convinced that Hogan sought only "general" emotional distress damages in his tort claim. Hogan suffered a major and life-changing injury and specifically alleged that his injury has caused "significant" emotional suffering and depression. To the extent *Lewis* is applicable to a request to produce mental health records, which is less invasive than a M.R.Civ.P. 35 mental examination, the Montana Supreme Court indicated that a mental examination is warranted, *inter alia*, when there is "an allegation of a specific mental or psychiatric injury or disorder" or "a claim of unusually severe emotional distress."⁶ Although Hogan asserts that the defendant in his tort claim did not obtain his mental health records, it could have obtained

⁵ 2012 MT 200, ¶¶ 8-10, 366 Mont. 217, 286 P.3d 577.

⁶ *Lewis*, ¶ 8 (citation omitted).

them, given his allegations of “significant” emotional distress and depression. Thus, it follows that Hogan’s mental health records are discoverable in this case.

¶ 9 *Second*, Hogan’s mental health records are relevant to the issue of the amount of workers’ compensation benefits to be received in the future. A workers’ compensation insurer is liable for physical-mental injuries, i.e., injuries with a physical stimulus and a mental consequence.⁷ Although Hogan asserts that this case does not concern “entitlement to benefits,” to make a finding as to the amount of workers’ compensation benefits to be received, this Court will need to make findings as to whether Hogan’s mental injuries are physical-mental injuries and, if so, the amount of benefits to which he will be entitled as a result of those injuries. Hogan’s mental health records are relevant to these issues of fact. It matters not that Hogan is not currently asking Federated Mutual to pay for his mental health therapy because there is nothing precluding him from seeking benefits for a physical-mental injury in the future.

¶ 10 *Third*, Hogan’s mental health records are discoverable because Hogan has disclosed expert witnesses to testify to his mental injuries and the costs to treat those injuries. M.R.Evid. 705 provides that experts can be required to disclose the underlying facts or data on which they base their opinions. The Montana Supreme Court has explained:

Rule 705 allows the cross-examiner to “determine the underlying facts on which the expert bases [her] opinion and expose the weaknesses if any of the underlying facts for the consideration of the jury.” We have repeatedly stated the right to cross-examine an opposing expert regarding the basis of that expert’s opinion is “the shield to guard against unwarranted opinions,” and is “essential” to the “discovery of truth.”⁸

The Commission Comments to M.R.Evid. 705 state, “The cross-examiner should be aware of the underlying facts or data of the opinion through discovery” And, in *Lewis*, the Montana Supreme Court indicated that a defendant could obtain a M.R.Civ.P. 35 mental examination when the injured party “intends to offer expert testimony in support of [a] claim for emotional distress damages.”⁹

¶ 11 Under this law, there is no merit to Hogan’s argument that Federated Mutual should be required to question his experts without seeing his mental health records

⁷ *T.G. v. Mont. Sch. Grp. Ins. Auth.*, 2018 MTWCC 1, ¶ 34. See also *Yarborough v. Mont. Mun. Ins. Auth.*, 282 Mont. 475, 938 P.2d 679 (1997) (holding that the claimant’s increased anxiety and depression, and PTSD, were not compensable injuries because they were caused by the traumatic events at the scene and not his minor physical injuries; i.e., claimant’s increased anxiety and depression, and PTSD, were mental-mental injuries).

⁸ *Reese v. Stanton*, 2015 MT 293, ¶ 21, 381 Mont. 241, 358 P.3d 208 (quoting *Jim’s Excavating Serv. v. HKM Assocs.*, 265 Mont. 494, 510, 878 P.2d 248, 257 (1994) and *Clark v. Bell*, 2009 MT 390, ¶ 22, 353 Mont. 331, 220 P.3d 650).

⁹ *Lewis*, ¶ 8 (citation omitted).

beforehand, or at any point. Federated Mutual is entitled to Hogan's mental health records in discovery to prepare for and to cross examine Hogan's experts, including his treating physicians, because he intends to offer expert testimony in support of his claim that he suffered mental injuries and emotional distress.

¶ 12 This Court has considered all of Hogan's other arguments, including those in his Reply Brief in Support of Motion for Protective Order, and is not persuaded that any of them preclude Federated Mutual from obtaining his mental health records in discovery in this case.

¶ 13 Accordingly, Hogan's Motion for Protective Order is **denied**. Hogan shall fully answer and respond to Interrogatory Nos. 4 and 5 and Request for Production No. 7 on or before **Tuesday, January 5, 2021**.

DATED this 22nd day of December, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Leo S. Ward

Submitted: October 13, 2020