

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 47

WCC No. 2008- 2056

LUCILE KILGORE

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION TO ALLOW A POST-TRIAL DEPOSITION OF ROBERT MAROZZO AND DENYING INTRODUCTION OF RESPONDENT'S PROPOSED EXHIBIT 24.

Summary: Respondent moves this Court to allow a post-trial deposition of Robert Marozzo, a former W.R. Grace management official, for the purpose of rebutting or impeaching Petitioner's allegedly inconsistent testimony regarding her W.R. Grace termination date. Respondent also moves the Court for admission of proposed Exhibit 24, a copy of a W.R. Grace "Pay Roll Change Notice" which indicates that Petitioner was discharged from W.R. Grace effective March 23, 1987. Respondent argues that proposed Exhibit 24 should also be admitted as either rebuttal and/or impeachment evidence.

Held: Petitioner testified at her deposition and at trial that her termination from W.R. Grace occurred in September 1987. However, although she testified at her deposition that her termination was precipitated by missed work days as a result of being snowed in while visiting family in Washington, she recalled at trial that her missed work days actually resulted from a neck injury she sustained due to a July 1987 car accident. Respondent asserts that Petitioner's inconsistent testimony opens the door for Marozzo's testimony and the admission of proposed Exhibit 24. At the time of the pretrial conference the parties stipulated that the 1987 statutes applied to Petitioner's claim. After the pretrial conference, Respondent sought to amend the Pretrial Order and sought to dispute the applicable statutory year in contravention of ARM 24.5.318(4). Respondent also sought to introduce proposed Exhibit 24 in support of its argument. Regardless of whether Respondent attempts to couch its evidence as rebuttal or impeachment evidence, Respondent is seeking to introduce untimely disclosed evidence in order to fundamentally alter the issues

that were agreed to at the pretrial conference and that were incorporated into the Pretrial Order. In light of the statutory year stipulation, there is simply nothing for Respondent to either impeach or rebut.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.318. At the time of the pretrial conference, the parties stipulated that the 1987 statutes applied to Petitioner's claim, finalized the language in the final Pretrial Order, and agreed on the determinative issues for the Court's consideration. After the conference, Respondent sought to amend the Pretrial Order and introduce a previously undisclosed exhibit. The Court found no good cause for Respondent's untimely disclosure of the evidence nor for the requested amendment to the Pretrial Order.

Procedure: Pretrial Order. At the time of the pretrial conference, the parties stipulated that the 1987 statutes applied to Petitioner's claim, finalized the language in the final Pretrial Order, and agreed on the determinative issues for the Court's consideration. After the conference, Respondent sought to amend the Pretrial Order and introduce a previously undisclosed exhibit. The Court found no good cause for Respondent's untimely disclosure of the evidence nor for the requested amendment to the Pretrial Order.

Procedure: Issues. At the time of the pretrial conference, the parties stipulated that the 1987 statutes applied to Petitioner's claim, finalized the language in the final Pretrial Order, and agreed on the determinative issues for the Court's consideration. After the conference, Respondent sought to amend the Pretrial Order and introduce a previously undisclosed exhibit. The Court found no good cause for Respondent's untimely disclosure of the evidence nor for the requested amendment to the Pretrial Order.

Procedure: Issues. Where Respondent moved to introduce a proposed exhibit and sought a post-trial deposition for impeachment and/or rebuttal purposes, the Court concluded that Respondent sought to introduce untimely disclosed evidence in order to fundamentally alter the issues that were incorporated into the Pretrial Order as agreed to at the pretrial conference. If the Court allowed the admission of such evidence under the guise of impeachment or rebuttal evidence, it would effectively negate the fundamental purpose of a Pretrial Order which is to simplify issues, prevent surprise, and allow the parties to prepare for trial based on the Pretrial Order.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.318. Where Respondent moved to introduce a proposed exhibit and sought a post-trial deposition for impeachment and/or rebuttal purposes, the Court concluded that Respondent sought to introduce untimely disclosed evidence in order to fundamentally alter the issues that were incorporated into the Pretrial Order as agreed to at the pretrial conference. If the Court allowed the admission of such evidence under the guise of impeachment or rebuttal evidence, it would effectively negate the fundamental purpose of a Pretrial Order which is to simplify issues, prevent surprise, and allow the parties to prepare for trial based on the Pretrial Order.

Procedure: Pretrial Order. Where Respondent moved to introduce a proposed exhibit and sought a post-trial deposition for impeachment and/or rebuttal purposes, the Court concluded that Respondent sought to introduce untimely disclosed evidence in order to fundamentally alter the issues that were incorporated into the Pretrial Order as agreed to at the pretrial conference. If the Court allowed the admission of such evidence under the guise of impeachment or rebuttal evidence, it would effectively negate the fundamental purpose of a Pretrial Order which is to simplify issues, prevent surprise, and allow the parties to prepare for trial based on the Pretrial Order.

¶ 1 Respondent Transportation Insurance Company moves this Court to allow a post-trial deposition of Robert Marozzo, a former W.R. Grace management official. Respondent argues that it should be allowed to depose Marozzo to rebut or impeach what Respondent characterizes as Petitioner's inconsistent testimony regarding her W.R. Grace termination date. Respondent also moves the Court for post-trial admission of Respondent's proposed Exhibit 24, a copy of a W.R. Grace "Pay Roll Change Notice" which indicates that Petitioner was discharged from W.R. Grace effective March 23, 1987. Respondent argues that proposed Exhibit 24 should be admitted as either rebuttal and/or impeachment evidence.

¶ 2 Petitioner testified at her deposition and at trial that she was terminated from W.R. Grace in September 1987.¹ However, although she testified at her deposition that her termination was precipitated by missed work days as a result of being snowed in while visiting family in Washington, she recalled at trial that her missed work days prior to her termination actually resulted from a neck injury she sustained in a July 1987 car accident.² Respondent asserts that Petitioner's inconsistent testimony opens the door for Marozzo's

¹ Trial Test.

² Petitioner's Dep. 30:2-18; Trial Test.

testimony that Petitioner's W.R. Grace termination date was, in fact, March, 23, 1987, as well as the admission of proposed Exhibit 24.

¶ 3 The significance of Petitioner's termination date is whether the 1985 or 1987 statutes apply to Petitioner's claim. At an August 4, 2008, pretrial conference, the parties stipulated that the 1987 statutes applied.³ At the time of the conference, the parties finalized the language of the final Pretrial Order and agreed on the determinative issues for the Court's consideration. Which statutory year applied to Petitioner's claim was not listed as an issue for the Court's determination. After the pretrial conference, and days before trial, Respondent sought to amend the Pretrial Order and, for the first time, sought to dispute the applicable statutory year in contravention of ARM 24.5.318(4).⁴ Respondent then attempted to introduce previously undisclosed proposed Exhibit 24 in support of that argument.

¶ 4 ARM 24.5.318(6) provides as follows:

Upon approval by the court the pretrial order shall supersede all other pleadings and shall govern the trial proceedings. Amendments to the pretrial order shall be allowed by either stipulation of the parties or leave of court for good cause shown.

¶ 5 After conferring with counsel as to the reasons for the untimely disclosure of proposed Exhibit 24 and Respondent's request to amend the Pretrial Order, I determined that no good cause existed for Respondent's untimely disclosure of the evidence nor for the requested amendment to the Pretrial Order.⁵ The applicable statutory year, therefore, was not an issue for the Court's consideration at trial. Nevertheless, Respondent attempted to introduce evidence whose sole purpose was to interject the issue of which statutory year applied to Petitioner's claim. Regardless of whether Respondent attempts to couch its evidence as rebuttal or impeachment evidence, the patently obvious fact is that Respondent seeks to introduce untimely disclosed evidence in order to fundamentally alter the issues that were incorporated into the Pretrial Order as agreed to at the pretrial conference. "The purpose of pretrial orders is to simplify issues, prevent surprise and allow counsel to prepare their cases for trial based on the pretrial order."⁶ If I were to allow the

³ Pretrial Conference Memorandum. Docket Item No. 32.

⁴ ARM 24.5.318(4) states, in pertinent part that, "Disputes as to the content of the final pretrial order shall be presented and resolved at the pretrial conference."

⁵ Minute Book Hearing No. 3967. Docket Item No. 43.

⁶ *Travelers Indemnity Co. v. Andersen*, 1999 MT 201, ¶ 34, 295 Mont. 438, 446, 983 P.2d 999, 1004.

admission of such evidence under the guise of impeachment or rebuttal evidence, I would effectively negate the fundamental purpose of a pretrial order. I decline to do so.

¶ 6 More to the point, Petitioner and Respondent stipulated at the pretrial conference that the 1987 statutes applied. Petitioner's testimony at trial was consistent with that stipulation in that she testified that her termination from W.R. Grace occurred in September 1987. I am at a loss to understand how Respondent can seek to rebut an issue to which it had already stipulated. In light of this stipulation, there is simply nothing for Respondent to either impeach or rebut.

ORDER

¶ 7 Respondent's motion to allow the post-trial deposition of Robert Marozzo is **DENIED**.

¶ 8 Respondent's motion to introduce Respondent's proposed Exhibit 24 is **DENIED**.

DATED in Helena, Montana, this 27th day of October, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Jon L. Heberling
Todd A. Hammer
Bryce R. Floch
Submitted: September 15, 2008