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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 76

WCC No. 9505-7307

MARIAN MAAS

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY

Respondent/Insurer for

INTERSTATE BRANDS

Employer.

**ORDER DENYING IN PART PETITIONER'S MOTION
FOR PROTECTIVE ORDER**

Petitioner, Marian Maas, has petitioned the Court seeking a determination that she was injured in a March 15, 1995 industrial accident. According to her petition, Maas injured her cervical spine when she tripped and fell over a box. The respondent denies that any industrial accident occurred and alleges that claimant's neck condition was a preexisting one. Response to Petition ¶s 1 and 4.

In answer to an interrogatory requesting information concerning preexisting mental and physical defects, the claimant disclosed that she suffers from a preexisting mental condition. However, she objected to disclosure of further information on the ground that her condition is irrelevant to her claim for compensation, which is based on a physical injury. She followed up with a motion for a protective order. In conjunction with that motion she furnished the Court with copies of medical and psychological records relating to the treatment of her mental condition. (Exhibit 1.) The records were apparently furnished for in camera inspection since the claimant opposes their production and requests that they be sealed during the pendency of this case, then returned to her.

Records of treatment by a psychologist, as well any physician are normally privileged. §§ 26-1-807 and 26-1-805, MCA. However, the privilege may be waived by commencing a civil action or asserting a defense which places the party's mental or physical condition in issue. *Linton v. City of Great Falls*, 230 Mont. 122, 132, 749 P.2d 55, 62, (1988); *State ex rel. Mapes v. District Court of Eighth Judicial Dist. In and For County of Cascade*, 250 Mont. 524, 530, 822 P.2d 91, 94 (1991). The waiver is not without limits. It "does not apply to any treatment or condition not related to the action." *Linton*, 230 Mont. at 132, 749 P.2d at 62. It does not extend to matters that are wholly irrelevant or unrelated.

Mapes, 250 Mont. at 530, 822 P.2d at 94. But it does extend to medical information which is relevant to the existence and extent of damages, including "whether plaintiff's current medical or physical condition is the result of some other cause." *Id.* Thus, records which are relevant to whether or not claimant's neck condition is related to her alleged industrial accident and whether an industrial accident occurred at all are relevant and must be produced.

The petitioner's claim in this case is that an accident occurred and that she was injured. Respondent contends that the accident did not occur, hence the claim is a false one. Respondent makes the following partial offer of proof in its reply to petitioner's motion:

Respondent believes that the evidence it submits at trial will show that petitioner had a significant problem with absenteeism prior to her injury. The evidence will also indicate that petitioner had used up virtually all her sick leave prior to her claimed accident. On the day petitioner claims she was injured, co-workers who worked in close proximity to the petitioner did not see her fall. There was no mention of an accident to the company as was the past custom of the petitioner. The afternoon of her alleged injury, the petitioner went to her physical therapist, Mark Amendola, and did not report the injury.

Respondent's Brief in Opposition to Petitioner's Motion for Protective Order at 2. Respondent asserts that claimant's psychological treatment records may contain relevant information, for example concerning her preexisting medical condition or her report of an injury.

I have reviewed the records. These records pertain to treatment of a mental condition antedating claimant's injury by several years and are in large part irrelevant. However, in late 1994 and early 1995 there are a number of entries indicating that claimant was dissatisfied with her job and considering other employment, and that her mental condition was becoming all consuming and interfering with her ability to work. Then on February 27, 1995, there is the following entry:

She [claimant] says that it is all she can do to get herself to work and cook meals for her children occasionally. She doesn't have the energy to put on makeup or take a bath. She is concerned that she won't be able to go on like this. **She has begun to think about whether there is any way she can get on disability.**

(Ex. 1 at 85, emphasis added.) This statement, along with other information in the records concerning her difficulties with her employment, may be relevant to any determination concerning the occurrence of an accident and claimant's entitlement to compensation.

Also of possible relevance is mention in the records to "occipital nerve surgery" and to headaches, since they may relate to her constellation of cervical symptoms.

The Court must balance the respondent's need for relevant information contained in these records with claimant's right of confidentiality. *Mapes*, 250 Mont. at 530, 822 P.2d at 94. Claimant's attitude towards work and her general mental condition on March 5, 1995, are relevant as they may indicate a motive to falsify a claim. Her thoughts concerning "any way she can get on disability" is similarly relevant to assessing her credibility and whether an accident in fact occurred. On the other hand, the specifics concerning her underlying mental condition and treatment for that condition appear to add little which would be helpful in evaluating this case.

I have therefore determined that some but not all of the records should be turned over to counsel for respondent. In light of the limited disclosure ordered, redaction will be necessary.

Referring to the numbers of the records furnished to the Court (Exhibit 1), IT IS HEREBY ORDERED THAT petitioner furnish respondent's counsel with the following records or portions of records:

7 First 3 lines.

8 First complete paragraph.

20 Lines 1-2, 4-7. (Line 1 is the line with words "Date" and "Time" typed in and the handwritten words "Progress Note.")

24 Lines 1-2, 4-8.

26 Lines 1-2, 4-9.

28 Line 1-2, 4 (through word "work").

32 All

34 All

35 Lines 1-2, 4-5 up to words "1 AM."

36 Lines 1-2, 8.

55 Lines 1-16.

56 Date on line 2, lines 7-11 beginning with word "Says."

58 All

59 All

64 Lines 1-3.

65 Lines 1-7.

80 Lines 1-4 and first three words of line 5 of paragraph.

82 Second paragraph (all).

83 All

84 Sentences 1, 7 and 8.

85 All

87 All

88 Second sentence of paragraph.

91 Second and third sentences of paragraph.

92 First four sentences of paragraph..

105 First six sentences of paragraph.

113 First two sentences of paragraph.

115 Third sentence of paragraph.

118 All

127 Next to last sentence.

163 All

164 All

The pages, as redacted, should also contain the identifying heading, for example "Deaconess Medical Center PROGRESS RECORD", any line setting out patient name and date, and any identifying signature (typewritten and/or handwritten).

IT IS FURTHER ORDERED THAT with the exception of the redacted records which are produced pursuant to this Order, the records shall be sealed until further order of the Court.

DATED in Helena, Montana, this 22nd day of August, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Michael P. Heringer

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