

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 14

WCC No. 2021-5544

IRENE MEYER

Petitioner

vs.

CHURCH MUTUAL INSURANCE CO.

Respondent/Insurer.

**ORDER GRANTING PETITIONER'S MOTION TO STRIKE SURVEILLANCE VIDEOS
OF PETITIONER AND TO STRIKE ANY AND ALL TESTIMONY OF THOMAS
MCCLURE, MD, REGARDING THE SURVEILLANCE VIDEOS**

Summary: Petitioner moves to exclude surveillance videos from evidence and to strike the portions of a physician's testimony regarding the videos because Respondent did not truthfully answer discovery asking about surveillance until after the physician's deposition. Respondent concedes that sanctions are appropriate but asserts that the appropriate sanction is to reopen the physician's deposition at its expense.

Held: This Court granted Petitioner's motion in full. The sanctions that Petitioner seeks are appropriate and proper to remedy the prejudice to her, to punish Respondent for its discovery abuses, and to deter other litigants from engaging in the same or similar discovery abuses. The sanctions are also commensurate to the sanctions this Court has assessed in similar circumstances.

¶ 1 Petitioner Irene Meyer moves to strike three surveillance videos and to exclude the portions of the deposition testimony of Thomas McClure, MD, in which Dr. McClure was shown portions of the videos and questioned about what he saw. Meyer argues that these sanctions are appropriate because Respondent Church Mutual Insurance Co. (Church Mutual) did not truthfully answer and respond to discovery requests regarding surveillance and did not supplement its discovery before Dr. McClure's deposition. Meyer

asserts that she was unfairly surprised and prejudiced by Church Mutual's discovery abuses.

¶ 2 Church Mutual concedes that sanctions are warranted. However, it asserts that the appropriate sanction is for this Court to order the reopening of Dr. McClure's deposition at its expense.

¶ 3 For the following reasons, this Court grants Meyer's motion in full.

FACTS

¶ 4 On May 13 and 14, 2021, Church Mutual had Meyer under video surveillance.

¶ 5 On June 2, 2021, Meyer served Church Mutual with Petitioner's First Discovery Requests to Respondent, which included discovery requests regarding surveillance.

¶ 6 On June 16, 2021, Church Mutual again had Meyer under video surveillance.

¶ 7 On June 29, 2021, Church Mutual responded to Meyer's discovery requests. However, Church Mutual did not inform Meyer that it had performed surveillance on three occasions; instead, Church Mutual refused to answer and unilaterally decided to withhold the surveillance videos. Its answer and response were as follows:

INTERROGATORY NO. 2: Please state whether you have had the Petitioner, Irene Meyer, under surveillance.

ANSWER: Respondent objects to responding to this request pursuant to *Mutchie v. Old Republic Ins. Co.*, 1995 MTWCC 7185 [sic]. If surveillance has been performed, and if Respondent intends to utilize any surveillance or present any witness to testify regarding any such surveillance, Respondent will answer this request.

REQUEST FOR PRODUCTION NO. 2: If your answer to Interrogatory No. 2 is in the affirmative, please produce a copy of the surveillance video and transcript.

RESPONSE: Please see objection to Interrogatory 2, above.

¶ 8 On July 13, 2021, the parties deposed Meyer and Thomas McClure, MD, with a two-and-a-half-hour break between the depositions.

¶ 9 Toward the end of Dr. McClure's deposition, Church Mutual's lawyer stated he wanted Dr. McClure to watch approximately 10 minutes of the surveillance videos and then answer questions as to what he saw.

¶ 10 Meyer’s attorney objected, asserting surprise and prejudice given Church Mutual’s answer to Interrogatory No. 2.

¶ 11 On July 15, 2021, Church Mutual served Respondent’s First Supplemental Answers and Responses to Petitioner’s First Discovery Requests. Church Mutual truthfully answered Interrogatory No. 2 by stating that it had conducted surveillance. In response to Request for Production No. 2, Church Mutual produced the surveillance videos.

¶ 12 In the following days, Church Mutual acknowledged that it should have produced the surveillance videos to Meyer before Dr. McClure’s deposition. It offered to reopen Dr. McClure’s deposition at its expense.

LAW AND ANALYSIS

¶ 13 Relying upon M.R.Civ.P. 37(c)(1),¹ Meyer asks this Court to sanction Church Mutual for its failure to truthfully answer Interrogatory No. 2, for its unilateral refusal to produce the surveillance videos in response to Request for Production No. 2, and for its failure to supplement its answer and response before the deposition of Dr. McClure. She argues that the appropriate sanctions are to exclude the videos from evidence and to strike the parts of Dr. McClure’s deposition in which he was questioned about what he saw on the portions of the surveillance videos that Church Mutual showed to him.

¶ 14 Church Mutual concedes that it should have provided the surveillance videos to Meyer before Dr. McClure’s deposition and that sanctions are warranted. However, it asserts that its failure to supplement its answer to Interrogatory No. 2 and to produce the videos under Request for Production No. 2 before Dr. McClure’s deposition was just a mistake and argues that the sanctions should not be the exclusion of the videos or of the

¹ This rule states:

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information requested in accordance with these rules or fails to disclose information regarding opinions of a witness as required by Rule 26(b)(4), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order the payment of the reasonable expenses, including attorney fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

While this Court does not have a specific rule on supplementing discovery, this rule applies in this Court under ARM 24.5.352, which states, “If no express provision is made in these rules regarding a matter of procedure, the court is guided, where appropriate, by considerations and procedures set forth in the Montana Rules of Civil Procedure.” Indeed, this Court has ruled that parties have a duty to “promptly” supplement their discovery answers and responses when they discover that their initial answers and responses are incomplete. See, e.g., *Householder v. Republic Indem. Co. of Cal.*, 2001 MTWCC 18, ¶ 17 n.4.

portions of Dr. McClure's testimony regarding the excerpts of the videos that he saw. Instead, Church Mutual asserts that "any current prejudice can be cured by reopening Dr. McClure's deposition, since the videos in their entirety have been provided to Petitioner."

¶ 15 This Court agrees with Meyer that Church Mutual violated the rules of discovery in three respects. *First*, Church Mutual did not truthfully answer Meyer's Interrogatory No. 2 on June 29, 2021. When Church Mutual answered Interrogatory No. 2, it had no option other than to say that it had conducted surveillance of Meyer on May 13 and 14, 2021, and again on June 16, 2021, as that was the truth.²

¶ 16 *Second*, Church Mutual made an objection to Interrogatory No. 2 and to Request for Production No. 2 that is baseless. In *Mutchie v. Old Republic Ins. Co.*,³ the case on which Church Mutual relied in making its objection, this Court did **not** rule that an insurer can refuse to answer discovery requests about whether it had conducted surveillance nor rule that an insurer can unilaterally decide to withhold the surveillance videos. Rather, this Court explained that it "**may** control the sequence of discovery by requiring production of surveillance information only after the [insurer] has been permitted an opportunity to depose the [claimant]."⁴ Again, Church Mutual's only option to answer Interrogatory No. 2 was to truthfully answer that it had conducted surveillance. If Church Mutual thought it had grounds to withhold the videos or other information regarding the surveillance until after it had deposed Meyer, it should have moved this Court for an order allowing it to delay production of the videos in response to Request for Production No. 2 until after it had an opportunity to depose her.

¶ 17 *Third*, Church Mutual did not supplement its initial answer to Interrogatory No. 2, nor its response to Request for Production No. 2, before the deposition of Dr. McClure. This Court has explained, "The policy behind discovery and the disclosure of expert witness testimony is to prevent surprise and to promote the effective cross-examination of expert witnesses."⁵ The record in this case establishes that Meyer's attorney was surprised when Church Mutual's attorney stated he was going to show excerpts of the surveillance videos to Dr. McClure because, based on Church Mutual's answer to Interrogatory No. 2, Meyer's attorney did not know the videos existed. The record also establishes prejudice, as Meyer's attorney could not have effectively questioned Dr. McClure because he had not seen the videos before Dr. McClure's deposition. This Court trusts Church Mutual's attorney's explanation that the failure to produce the videos

² See ARM 24.5.323(3) ("If the party [on which interrogatories have been served] is the insurer or other entity which is not a natural person, then the party's attorney or other representative of the party may sign the answers and such answers need not be verified. Whether or not verified, the signature of the person signing the answers constitutes a certification that the answers are complete and truthful to the best of the signor's knowledge.").

³ 1995 MTWCC 3.

⁴ *Mutchie* at 5 (citing *Yager v. Mont. Sch. Grp. Ins. Auth.*, WCC No. 9308-6872 (Order on Mot. to Compel) (Mar. 14, 1994)) (emphasis added).

⁵ *Taylor v. Mont. State Fund*, 2012 MTWCC 17, ¶ 68 (citation omitted).

before the deposition of Dr. McClure was just an honest mistake and that another factor may have played a role. However, the failure to produce the videos before the deposition of Dr. McClure remains part of a pattern of impermissible discovery tactics.

¶ 18 The Montana Supreme Court has explained that Montana’s discovery rules “embod[y] a strong preference for liberal imposition of sanctions as necessary and proper to remedy, punish, and deter non-compliance with discovery rules and orders.”⁶ Here, this Court has determined that excluding the surveillance videos from the evidence and striking Dr. McClure’s testimony regarding the videos are the appropriate and proper sanctions to remedy the prejudice to Meyer, to punish Church Mutual for its discovery abuses, and to deter other litigants in cases before this Court from engaging in the same or similar discovery abuses. As Meyer points out, these sanctions are commensurate to the sanctions this Court has assessed in a case with similar circumstances.⁷ This Court has also determined that merely reopening Dr. McClure’s deposition at Church Mutual’s expense would be far too lenient and, instead of deterring others from engaging in the same or similar discovery abuses, would open the door to the same or similar discovery abuses, as most litigants would deem such sanction to be only a slap on the wrist and worth the cost to gain an advantage. Finally, this Court has determined that Dr. McClure should not have to undergo another deposition because of Church Mutual’s discovery abuses.

¶ 19 Accordingly, this Court now enters the following:

ORDER

¶ 20 Meyer’s Motion to Strike Surveillance Videos of Petitioner and to Strike Any and All Testimony of Thomas McClure, MD, Regarding the Surveillance Videos is **granted**.

DATED this 25th day of August, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Garry D. Seaman
Geoffrey R. Keller
Submitted: August 10, 2021

⁶ *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 20, 392 Mont. 458, 426 P.3d 541 (citations omitted). See also *Cox v. Magers*, 2018 MT 21, ¶ 25, 390 Mont. 224, 411 P.3d 1271 (stating, “Time after time, this Court has held that discovery abuse will not ‘be dealt with leniently and that the transgressors of discovery abuses should be punished rather than encouraged repeatedly to cooperate.’” (citations omitted)).

⁷ *Simons v. State Comp. Mut. Ins. Fund*, 262 Mont. 438, 443, 865 P.2d 1118, 1121 (1994) (affirming this Court’s decision to exclude a surveillance video and the portions of a physician’s testimony which related to the video because the video had not been listed as an exhibit in the Pretrial Order, as required by ARM 24.5.318(5)(g)).