IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 44

WCC No. 2007-1795

THE ST. PAUL TRAVELERS COMPANIES, INC.

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORP.

Respondent

and

JOHN DAVID MILLER

Claimant/Intervenor.

ORDER GRANTING MOTION TO COMPEL AND AWARDING ATTORNEY FEES AND COSTS

Summary: Petitioner moved this Court to compel Respondent to answer certain requests for production and an interrogatory to which Respondent had either objected to or provided answers which Petitioner argued were incomplete. Petitioner further requested sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs.

Held: Respondent's refusal to answer certain of Petitioner's discovery requests on the basis that the information sought was irrelevant does not satisfy the requirements of Mont. R. Civ.P. 26 because these requests could reasonably lead to the discovery of admissible evidence. The Court agrees with Petitioner that certain of Respondent's responses were incomplete or nonresponsive. Petitioner is entitled to reasonable attorney fees and costs pursuant to ARM 24.5.326.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure: Rule 26. Where Respondent refused Petitioner's requests for

discovery principally relying on Mont. R. Evid. 402 and the definition of relevant evidence, the Court found Respondent's reliance misplaced. Pursuant to Mont. R. Civ. P. 26(b)(1), the test for what is discoverable is evidence which is relevant *or* reasonably calculated to lead to the discovery of admissible evidence.

Discovery: Claims File. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Discovery: Compelling. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Discovery: Objections to Discovery. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Discovery: Sanctions. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Unreasonable Conduct by Insurer. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Attorney Fees: Cases Awarded. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Attorney Fees: Reasonableness of Insurer. Where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director, the Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable and awarded attorney fees and costs.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.326. The Court awarded sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs where Respondent objected to or provided incomplete responses to Petitioner's requests for production and interrogatory regarding a complete claims file, including, but not limited to all claims correspondence, claims adjusting notes, and communications with and between Respondent's medical director. The Court found Respondent's assertion that the requests were irrelevant and not calculated to lead to the discovery of admissible evidence to be unreasonable.

¶ 1 Regarding the case of Claimant John David Miller, Petitioner The St. Paul Travelers Companies, Inc., has moved to compel Respondent Liberty Northwest Insurance Corp. to

fully and immediately respond to certain of Petitioner's discovery requests.[1] The specific discovery requests and Respondent's responses[2] are as follows:

> REQUEST FOR PRODUCTION NO. 1: Please produce for inspection and copying your complete claim file for your Claim No. WC687-151977, including but not limited to all claims correspondence and claims adjusting notes. The scope of this request includes all records in your possession related to David Miller's March 16, 2003 work injury at issue.
>
> RESPONSE: Respondent objects to this request as irrelevant and not calculated to lead to the discovery of admissible evidence.
>
> INTERROGATORY NO. 2: With respect to the document attached hereto as Exhibit A, please identify by generation date, document type, author, and general content, each document that was "not being provided" by Liberty Northwest to Leslae Dalpiaz as referenced in Exhibit A.
>
> ANSWER: Respondent objects to this interrogatory as irrelevant and not calculated to lead to the discovery of admissible evidence.
>
> REQUEST FOR PRODUCTION NO. 2: Please produce for inspection and copying each and every document that was "not being provided" and was withheld by Liberty Northwest, as referenced in Exhibit A.
>
> RESPONSE: Respondent objects to this request as irrelevant and not calculated to lead to the discovery of admissible evidence.
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> . . . .
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> REQUEST FOR PRODUCTION NO. 3: Please produce for inspection and copying any and all records, documents, internal Liberty Northwest communications, or external communications with and between Dr. Gary Rischetelli [sic] regarding David Miller. This request includes, but is not limited to written communications, computer generated communications such as emails and notes of telephone conversations.

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[1] Petitioner's Motion to Compel Discovery Responses, for Sanctions and Brief in Support ("Motion to Compel"), Docket Item No. 17.

[2] In Respondent's response to Petitioner's Motion to Compel, Respondent further moved for a protective order to quash the deposition of claims adjuster Chris Stobb and the Subpoena *Duces Tecum* (Motion for Protective Order and Supporting Brief and Reply Brief in Opposition to Motion to Compel and for Sanctions [Response Brief], Docket Item No. 19). Subsequent events rendered Respondent's motion for a protective order moot and the Court considers this matter resolved.

RESPONSE: See the report of Dr. Rischetelli [sic] and answer to Interrogatory No. 3. Liberty objects to the rest of this request as irrelevant and not calculated to lead to the discovery of admissible evidence.

. . . .

REQUEST FOR PRODUCTION NO. 4: Please produce for inspection and copying any and all documents in your possession related to or evidencing the decision making process leading to the denial of medical benefits for David Miller's L5-S1 disc level.

RESPONSE: See the report of Dr. Rischetelli [sic] and answer to Interrogatory No. 3.[3]

¶ 2 Respondent responded to Petitioner's discovery requests on March 14, 2007. Petitioner pressed for responses and to depose claims adjuster Chris Stobb (Stobb). This prompted a letter, dated March 20, 2007, in which Respondent stated that it would not rely on Dr. Gary Rischitelli's causation opinion to dispute liability.[4] Respondent then moved to quash Stobb's deposition and the Subpoena *Duces Tecum* Petitioner had served on it for Respondent's claims file.[5]

¶ 3 In its opposition to Petitioner's Motion to Compel, Respondent principally relies upon Mont. R. Evid. 402, defining "relevant evidence."[6] Respondent's reliance upon Mont. R. Evid. 402 is misplaced. Relevancy alone is not the test for discoverability. Rather, the test for what is discoverable is evidence which is relevant *or* reasonably calculated to lead to the discovery of admissible evidence.[7] Petitioner argues, convincingly, that its requests for production and interrogatory at issue are well within the parameters of discoverable information.

¶ 4 With respect to Petitioner's Requests for Production Nos. 1 and 2, and Interrogatory No. 2, Petitioner argues:

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[3] Respondent's Responses to Petitioner's First Discovery Requests, Ex. F to Motion to Compel.

[4] Letter from Larry W. Jones to G. Andrew Adamek, Ex. G to Motion to Compel.

[5] Response Brief.

[6] Response Brief at 3.

[7] Mont. R. Civ. P. 26(b)(1).

> [These] are standard discovery requests in workers' compensation litigation and are specifically calculated to obtain all medical records, adjusting notes, adjuster communications, and other documentation in the possession of Respondent that relate to Chris Stobb's understanding and reaction to Dr. Sousa's[8] opinion, her seeking and relying upon Dr. Rischitelli's opinion, her understanding and reaction to Dr. Woods'[9] opinion and more recently, her understanding of Claimant's deposition testimony. This information is both relevant and reasonably calculated to lead to the discovery of documents and information which may explain why Liberty Northwest has maintained denial of liability for this claim and has forced Petitioner to establish Respondent's liability through litigation to obtain reimbursement of benefits paid by Petitioner to or on behalf of Claimant.[10]

¶ 5 Respondent argues that Stobb's understanding and reaction to Drs. Sousa's and Rischitelli's opinions are irrelevant because Dr. Woods is Claimant's treating physician and "[t]his Court follows the treating physician rule."[11] Respondent overlooks the standard of discoverability, which is not merely whether something is relevant, but whether it is reasonably calculated to lead to the discovery of admissible evidence. Even assuming, *arguendo*, that Stobb's understanding and reaction to the doctors' opinions are irrelevant, this information may well lead to the discovery of admissible evidence. For example, Stobbs' notes regarding causation could conceivably be construed as an admission by a party-opponent which would be admissible pursuant to Mont. R. Evid 801(d)(2). The information that is sought by Petitioner via Requests for Production Nos. 1 and 2 and Interrogatory No. 2 is discoverable and should have been produced.

¶ 6 At oral argument, Respondent's counsel argued that to obviate the time and expense of maintaining a privilege log, it is Respondent's "policy" not to include the claims adjuster's notes in the file that is provided to opposing counsel unless opposing counsel specifically requests the notes. Respondent's counsel asserted that if a claimant requests a copy of his file, pursuant to Respondent's policy, privileged information and the claims adjuster's notes are excluded from the production. The claims adjuster's notes are only provided if, after receiving the file, the claimant then specifically requests the notes. While I recognize the expediency of Respondent's policy, § 39-71-107(3), MCA, provides that insurers must maintain the documents related to each claims file in a manner which allows

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[8] Dr. Michael Sousa conducted an IME of Claimant at Respondent's request.

[9] Dr. Michael W. Woods is Claimant's treating physician.

[10] Motion to Compel at 6.

[11] Response Brief at 3.

the documents to be retrieved and copied at the request of the claimant or the department. This Court recently noted that, prior to the filing of a petition in this Court, the Court lacks jurisdiction to enforce § 39-71-107(3), MCA.[12] Furthermore, I recognize that this statute specifically addresses the request of a claims file by the worker or the department whereas, in this case, the claims file was requested in discovery by another insurer. So while this statute does not address Respondent's obligation to produce the nonprivileged information to Petitioner in this case, it certainly speaks to the discoverability of such information.

¶ 7 Petitioner's Request for Production No. 3 seeks the production of all records documenting internal and external communications involving Dr. Rischitelli regarding Claimant. Request for Production No. 4 seeks the production of all documentation related to Respondent's decision-making process leading to the denial of Claimant's medical benefits. In response to both requests, Respondent directed Petitioner to Dr. Rischitelli's report and Respondent's Answer to Interrogatory No. 3.[13] Additionally, Respondent objected to the balance of Request for Production No. 3 as irrelevant and not calculated to lead to the discovery of admissible evidence.

¶ 8 Again, Respondent's responses are incomplete and its objection lacks foundation. Dr. Rischitelli is Respondent's Medical Director. His "report" consists of a one-page letter to Stobb dated April 10, 2006.[14] Petitioner's request unambiguously encompassed more than this single report. As such, Respondent's responses to these requests were nonresponsive. With respect to Respondent's objection, although Respondent asserted that Petitioner's Requests for Production were irrelevant and not calculated to lead to the discovery of admissible evidence, I fail to conceive how the communications of Respondent's Medical Director, upon whose opinion Respondent relied in denying benefits to Claimant, could not at a minimum be construed as reasonably calculated to lead to the discovery of admissible evidence.

¶ 9 When pressed for a more complete response, Respondent advised Petitioner that it did not intend to rely upon the opinion of Dr. Rischitelli regarding causation. However, Respondent answered Petitioner's discovery requests on March 14, 2007, but did not withdraw its reliance upon Dr. Rischitelli's opinion until March 20, 2007, after Petitioner pressed for more complete responses. Therefore, even assuming, *arguendo*, that Respondent could properly resist this discovery by simply withdrawing its reliance on Dr.

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[12] *Porter v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 42.

[13] Respondent's Answer to Interrogatory No. 3 refers Petitioner to Stobb's denial letter and Dr. Rischitelli's medical report.

[14] Letter from Dr. Rischitelli to Christine Stobb dated April 10, 2006, Ex. C to Motion to Compel.

Rischitelli's opinion, Respondent had no grounds to withhold the information requested by Petitioner at the time Respondent answered Petitioner's discovery requests.

¶ 10 In addition to its motion to compel Respondent to answer its discovery requests, Petitioner further requests sanctions in the form of its attorney fees and costs which resulted from this discovery dispute, including the fees and costs incurred in bringing this motion, pursuant to ARM 24.5.326. Petitioner's request is well taken.

¶ 11 ARM 24.5.326 provides that the Court may impose sanctions as it deems appropriate, including attorney fees and reasonable expenses, to the prevailing party in a discovery dispute. The rule further provides that sanctions ***shall*** be imposed against the nonprevailing party unless the party's position with regard to the motion to compel is substantially justified or other circumstances make sanctions unjust. For the reasons set forth above, I have determined that Respondent did not have justifiable grounds when it objected or provided incomplete responses to Petitioner's discovery requests which are the subject of its motion. Therefore I am awarding Petitioner its reasonable attorney fees and costs which resulted from this discovery dispute, including the fees and costs incurred in bringing its Motion to Compel.[15]

ORDER AND JUDGMENT

¶ 12 Petitioner's Motion to Compel is GRANTED.

¶ 13 Pursuant to ARM 24.5.326, Respondent shall pay the reasonable fees and costs incurred by Petitioner resulting from this discovery dispute, including the fees and costs associated with Petitioner's filing of its Motion to Compel.

[15] Pursuant to my oral ruling of April 13, 2007, Petitioner submitted Petitioner's Statement of Assessed Fees and Costs totaling $2,227, along with the supporting affidavit of Petitioner's counsel. Respondent's counsel advised the Court that Respondent had no objection to the number of hours or the hourly rate set forth in Petitioner's statement. However, Respondent reserved the right to appeal this Court's Order awarding fees and costs. (*See* Docket Item Nos. 26, 27, and 28, respectively.)

DATED in Helena, Montana, this 26th day of October, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: G. Andrew Adamek
Larry W. Jones
Leslae J.E. Dalpiaz
Submitted: May 3, 2007