

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 23

WCC No. 2012-3054

**KAREN MONROE, Individually and as Personal Representative
of the Estate of Dwane Monroe**

Petitioner

vs.

MACO WORKERS COMP TRUST

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION TO ALLOW ADDITIONAL EVIDENCE

Summary: Respondent moved to reopen the record post-trial to allow the submission of additional evidence pertaining to Petitioner's prior occupational disease claim, arguing that Petitioner and her counsel wrongfully withheld information about the claim during discovery. Petitioner responds that she provided information regarding the claim during discovery, that Respondent failed to move to compel disclosure of more information about the claim prior to trial, and the fact Respondent phoned post-trial the Montana Department of Labor and Industry Employment Relations Division to learn details of the settlement of the earlier claim is proof it could have done so at any time prior to trial.

Held: Petitioner specifically identified the previous occupational disease claim in discovery and even produced the claim form to Respondent. Although Petitioner objected to providing additional information regarding any claim settlements, which Respondent contends was without a legitimate basis, the manner of determining the legitimacy of Petitioner's objection would have been in a motion to compel. This Court has previously held that when an opposing party objects to written discovery, the party propounding discovery must move to compel. A party cannot sit on his or her hands and then seek to exclude evidence because it was not identified in response to discovery. Similarly, Respondent's failure to move to compel additional information regarding Petitioner's settlement does not provide a basis to reopen a case after the close of evidence. Respondent's motion to reopen the record and add additional evidence is denied.

Topics:

Discovery: Compelling Discovery. A motion to allow additional evidence filed post-trial is essentially a motion to reopen the record. It will not be granted where Respondent was aware through Petitioner's discovery responses that Petitioner had other OD claims for asbestos-related disease and Respondent failed to either inquire about the claims with the Employment Relations Division or to respond to Petitioner's objections with a motion to compel. A party's failure to act to gather information does not provide a basis to reopen a case after the close of evidence.

Procedure: Post-Trial Proceedings: Re-opening the Record. A motion to allow additional evidence filed post-trial is essentially a motion to reopen the record. It will not be granted where Respondent was aware through Petitioner's discovery responses that Petitioner had other OD claims for asbestos-related disease and Respondent failed to either inquire about the claims with the Employment Relations Division or to respond to Petitioner's objections with a motion to compel. A party's failure to act to gather information does not provide a basis to reopen a case after the close of evidence.

¶ 1 A one-day trial was held in this matter on March 20, 2013, in Kalispell, Montana. Following trial, the Court held a telephonic conference with counsel on March 29, 2013,¹ at which time I advised the parties that I was requiring supplemental briefing on the limited issue of which standard to apply in this case regarding the last injurious exposure rule – the “potentially causal” standard that the Montana Supreme Court applied in *In Re: Claim of Mitchell*,² or the standard which was applied in the *Caekaert*³ and *Lanes*⁴ cases, and which the Supreme Court held in *In Re: Claim of Mitchell* was still applicable in certain situations.⁵ I also specified that I was not reopening the record, that no new evidence was to be submitted, and that the briefing was to be confined to this limited legal issue.

¹ Minute Book Hearing No. 4462, Docket Item No. 30.

² *Liberty Northwest Ins. Corp. v. Montana State Fund*, 2009 MT 386, 353 Mont. 299, 219 P.3d 1267 (*In Re: Claim of Mitchell*).

³ *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994).

⁴ *Lanes v. Montana State Fund*, 2008 MT 306, 346 Mont. 10, 192 P.3d 1145.

⁵ *In Re: Claim of Mitchell*, ¶ 24.

¶ 2 On April 19, 2013, Respondent MACO Workers Comp Trust (MACO) filed Respondent's Motion to Allow Additional Evidence, alleging that, "[a]fter reviewing Petitioner's Brief Re Last Injurious Exposure, Respondent's counsel made an inquiry to the Employment Relations Division of the Department of Labor and Industry" (ERD) to determine whether there was a denial on record by W.R. Grace regarding the 2001 occupational disease claim. (Grace claim)⁶ ERD informed MACO's counsel that Petitioner Karen Monroe received a "significant financial amount" on the Grace claim.⁷

¶ 3 MACO alleges that during discovery, information regarding the settlement of the Grace claim was intentionally withheld from MACO and that MACO "was misled [sic] by [Monroe] and her counsel into believing that no benefits had been paid in relation [to] the W. R. Grace claim."⁸

¶ 4 Monroe responded to MACO's motion by arguing that she provided a copy of the claim form on the Grace claim to MACO's attorney,⁹ but objected to providing information regarding amounts received on that and other claims "on the grounds of confidentiality and not likely to lead to the discovery of admissible evidence."¹⁰ Regarding Monroe's answers to questions about the Grace claim during her deposition, she responds that she did not intentionally mislead MACO about the monies she received, but only had a bad memory about what she received, when she received it, and who she received it from.¹¹ Finally, without waiving her objection to disclosing the amount of the Grace settlement, Monroe attached a copy of the settlement documents to her response to MACO's motion, showing that the claim was settled on a disputed liability basis.¹² Therefore, Monroe maintains, no "benefits" were ever paid on the Grace claim.

¶ 5 Because of the seriousness of the allegations made by MACO against Monroe and her attorney, on May 21, 2013, the Court held oral argument on both MACO's motion to reopen the record and allow additional evidence, and on what standard to

⁶ Respondent's Motion to Allow Additional Evidence (Respondent's Motion) at 2, Docket Item No. 35.

⁷ *Id.*

⁸ *Id.*

⁹ Ex. 19 at 18.

¹⁰ Petitioner's Response to Respondent's Motion to Allow Additional Evidence (Petitioner's Response) at 2, Docket Item No. 38.

¹¹ *Id.*

¹² Petitioner's Response, Ex. 2.

apply in terms of the last injurious exposure rule.¹³ After hearing oral argument, I advised that I would issue a separate order on Respondent's motion to reopen the record. If I granted that motion, I would convene a conference to discuss how the matter would proceed. If I denied the motion, I would deem the matter submitted and issue findings and conclusions on the submitted record.

DISCUSSION

¶ 6 MACO's motion to allow additional evidence is essentially a motion to reopen the record after the close of evidence and supplement the record with evidence MACO maintains is relevant to the issue of which standard should apply under the last injurious exposure rule.

¶ 7 In *Stavenjord v. Montana State Fund*, the Montana Supreme Court noted the long-standing principle regarding the reopening of the record:

Whether to reopen a case for the introduction of further evidence after the case has been submitted to the court is within the discretion of the trial court. Its ruling, upon the request to reopen, will not be disturbed by this Court unless there has been a clear abuse of discretion.¹⁴

¶ 8 In *Stavenjord*, the Supreme Court affirmed this Court's refusal to reopen the record, reasoning that there was no indication the evidence Montana State Fund sought to offer following trial was unavailable to it prior to trial. Montana State Fund also failed to demonstrate the materiality of the evidence it sought to offer.¹⁵

¶ 9 MACO argues there was something in Monroe's post-trial brief that caused it to question ERD regarding the Grace claim. However, MACO knew of the Grace claim prior to trial through Monroe's discovery responses, yet failed to follow-up with ERD until after the close of evidence. MACO was free to subpoena ERD's records, or to follow-up Monroe's objections to its discovery requests with a motion to compel discovery. MACO maintains that, during her deposition, Monroe and her counsel misled MACO into believing that no monies were paid on the Grace claim.

¶ 10 In both written discovery and during her deposition, Monroe testified that both she and her husband had received settlements from various entities for Dwane

¹³ Minute Book Hearing No. 4474, Docket Item No. 41.

¹⁴ 2003 MT 67, ¶ 15, 314 Mont 466, 67 P.3d 229, citing *Cole v. Helena Light & Ry. Co.*, 49 Mont. 443, 143 P. 974 (1914).

¹⁵ *Id.*, ¶¶ 21, 22.

Monroe's asbestos exposure and subsequent death. Although Monroe was unable to testify specifically as to the amounts received, when they were received, and from whom they were received, this is hardly surprising since Dwane Monroe's estate had filed twelve separate claims against different entities, including W.R. Grace. Monroe did recall that one of the payments was from the Johns-Manville Trust, and testified that she had received an additional settlement from another entity.¹⁶ When asked if she could recall which entity was involved in the additional payments, Monroe testified: "I don't – I'm sorry. I don't remember the names of different places. It was too confusing to me. I'm sorry."¹⁷ When asked at her deposition whether she knew if either she or her husband had received any benefits from W.R. Grace, Monroe testified: "None that I know of."¹⁸

¶ 11 Based on the history of this case as it pertains to the discovery of the Grace claim, I cannot conclude that there was any concerted effort on Monroe's part to conceal information from MACO. Five weeks before her deposition, Monroe responded to MACO's written discovery by specifically identifying her claim with Grace in response to MACO's interrogatories, and producing the Grace claim form in response to MACO's requests for production. Although Monroe objected to disclosing the specific amount of any settlements, MACO had several avenues available to it in ascertaining whether the Grace claim was settled and, if so, for how much. MACO could have moved to compel the information from Monroe, called ERD for the information, or – as MACO acknowledged during oral argument – the settlement information was published and available in *Montana Law Week*. At her deposition, Monroe testified that she had received settlements from multiple entities and apologized for her inability to recall specifics regarding the entities from whom she received those settlements. When considered in the context of the information that **was** provided to MACO regarding the Grace claim, it is far more plausible that Monroe's inability to recall receiving a specific settlement from Grace was just that – an inability to recall – rather than an effort to mislead.

¶ 12 MACO correctly notes that this Court takes a dim view of gamesmanship in the discovery process and expects attorneys to make full and fair disclosure and to cooperate with each other.¹⁹ If Monroe had indeed hidden the Grace claim from MACO, this case may well be on a different footing. However, Monroe specifically identified the Grace claim in response to discovery, provided the claim form to MACO, and objected

¹⁶ Monroe Dep. 15:15-18.

¹⁷ Monroe Dep. 15:19-23.

¹⁸ Monroe Dep. 16:20-22.

¹⁹ Respondent's Motion at 2 (*citing, Mavity v. Champion Int'l*, 1995 MTWCC 27).

to providing information regarding any claim settlements. Although MACO contends Monroe's objection was baseless, the manner for determining the merits of that argument would have been in a motion to compel. In *Ganje v. Liberty Mut. Fire Ins. Co.*,²⁰ this Court noted that when an opposing party objects to written discovery, the party propounding discovery must move to compel discovery. A party cannot sit on his or her hands and then seek to exclude evidence because it was not identified in response to discovery. Similarly, MACO's failure to move to compel or at least inquire of ERD regarding Monroe's W.R. Grace settlement does not provide a basis to reopen a case after the close of evidence.

ORDER

¶ 13 For the foregoing reasons, Respondent's Motion to Allow Additional Evidence is **DENIED**.

¶ 14 As this matter is now deemed submitted, separate findings and conclusions shall be issued on the submitted record.

DATED in Helena, Montana, this 26th day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder
Norman H. Grosfield
Submitted: May 21, 2013

²⁰ 2002 MTWCC 52.