

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 3

WCC No. 9411-7185

ROBERT B. MUTCHIE

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent

ORDER COMPELLING DISCOVERY

Summary: Petitioner sought production of employer's personnel file, personnel manual, and telephone records; adjuster's notes and memos; and surveillance information.

Held: Personnel manual was produced and issues involving telephone records will be covered in deposition. With regard to personnel file, employer is concerned the claimant is making a fishing expedition to support a potential wrongful discharge lawsuit. Where claimant contends he seeks references to prior back problems, the file will be reviewed by the employer's attorney for identification of materials relating to back problems, then produced in its entirety for *in camera* review by the Court.

Materials in the adjuster's file referencing attorney advice or specific mental impressions are protected under the attorney-client privilege or work-product rule. However, because this dispute concerns the treatment and handling of petitioner's claim, and a specific issue exists as to selection of a physician, much of the adjuster's file must be produced. Where the Montana Supreme Court has distinguished between claims files of attorneys and those of insurers, *Cantrell v. Henderson*, 221 Mont. 201 (1985), the work-product rule does not automatically apply to an insurer's file. Information prepared in the regular course of a claims adjuster's work is typically not protected.

Pursuant to the Court's ability to control the sequence of discovery, information regarding surveillance of claimant need not be produced until after respondent has had the opportunity to depose claimant. See, *Yager v. Montana Schools Group Insurance*, 1994 MTWCC 24.

Topics:

Discovery: Claims File. Materials in the adjuster's file referencing attorney advice or specific mental impressions are protected under the attorney client privilege or work product rule. However, because this dispute concerns the treatment and handling of petitioner's claim, and a specific issue exists as to selection of a physician, most of the adjuster's file must be produced. Where the Montana Supreme Court has distinguished between claims files of attorneys and those of insurers, *Cantrell v. Henderson*, 221 Mont. 201 (1985), the work-product rule does not automatically apply to an insurer's file. Information prepared in the regular course of a claims adjuster's work is typically not protected.

Discovery: In Camera Inspection. Personnel manual was produced and issues involving telephone records will be covered in deposition. With regard to personnel file, with the employer concerned the claimant is making a fishing expedition to support a potential wrongful discharge lawsuit, and claimant contending he seeks references to prior back problems, the file will be reviewed by the employer's attorney for identification of materials relating to back problems, then produced in its entirety for *in camera* review by the Court.

Discovery: Employment Records. Personnel manual was produced and issues involving telephone records will be covered in deposition. With regard to personnel file, with the employer concerned the claimant is making a fishing expedition to support a potential wrongful discharge lawsuit, and claimant contending he seeks references to prior back problems, the file will be reviewed by the employer's attorney for identification of materials relating to back problems, then produced in its entirety for *in camera* review by the Court.

Discovery: Privileges: Work Product. Materials in the adjuster's file referencing attorney advice or specific mental impressions are protected under the attorney client privilege or work product rule. However, because this dispute concerns the treatment and handling of petitioner's claim, and a specific issue exists as to selection of a physician, much of the adjuster's file must be produced. Where the Montana Supreme Court has distinguished between claims files of attorneys and those of insurers, *Cantrell v. Henderson*, 221 Mont. 201 (1985), the work-product rule does not automatically apply to an insurer's file. Information prepared in the regular course of a claims adjuster's work is typically not protected.

Discovery: Surveillance. Pursuant to the Court's ability to control the sequence of discovery, information regarding surveillance of claimant need not be produced until after respondent has had the opportunity to depose claimant. See, *Yager v. Montana Schools Group Insurance*, 1994 MTWCC 24.

Petitioner in this matter seeks an order compelling discovery. His attorney, as well as respondent's attorney, provided the Court with certain discovery documents and letters outlining their respective positions. Because of the short time frames involved in this case, they also agreed to a conference call with the Court for the purpose of resolving their dispute. That call was held January 19, 1995. Participating were claimant's counsel, Mr. Stephen C. Pohl, and respondent's counsel, Mr. Joe C. Maynard. Additionally, Mr. Tom Hattersley, who represents the employer, participated in the discussion of the petitioner's request for employee files and employer telephone records.

The Court ruled on each of the matters presented by the parties. This Order will briefly memorialize those rulings.

Employer Records

Petitioner sought production of the employer's personnel manual, telephone records which might show calls by the employer to Dr. John Diggs, a physician who has treated the petitioner, and petitioner's entire personnel file. During the conference Mr. Pohl indicated that the petitioner has a copy of the personnel manual, alleviating the need for production. It also became apparent that depositions to be taken next week may make production of telephone records unnecessary. That left the request for the personnel file.

The respondent's and employer's concern with the claimant's request for the personnel file arises from threats that claimant has made regarding a wrongful discharge suit. They view the request as a fishing expedition for evidence to be used in other lawsuits. Mr. Pohl, however, stated that he wishes to review the personnel file to determine if it reflects prior back complaints by claimant. The respondent has treated the petitioner's current back condition as an occupational disease rather than an industrial accident. Any history of back complaints may be relevant to that dispute.

Mr. Hattersley advised the Court that the employer has sent him the personnel file; that he will review the file and identify for the Court and the parties those entries which relate to back pain; and will then furnish the entire file for an *in camera* inspection by the Court to determine what portions, if any, should be provided petitioner. That arrangement is deemed satisfactory and shall be followed.

Adjuster's Notes and Memos

Respondent provided petitioner with copies of the notes and memos made by its claims adjuster. However, portions of those notes were redacted. Mr. Maynard argued that the redacted portions are protected by the work-product rule. Having reviewed the redacted entries, the Court determined that most of them were not made in contemplation of litigation or that petitioner has made a requisite showing of substantial need for the information. Rule 26 (b)(3), Mont.R.Civ.P.

The alleged industrial accident at issue in this case occurred on April 28, 1994. Although the employer suspected that there might be future litigation over the matter, attorney involvement on behalf of the insurer did not occur until August of 1994. The entries in question were made prior to that time. Many involved the adjuster's contacts with the employer and management of the case.

The Montana Supreme Court has distinguished between claims files of attorneys and those of insurers. **Cantrell v. Henderson**, 221 Mont. 201, 718 P.2d 318 (1985). The work-product rule does not automatically apply to an insurer's claim file. **Tigart v. Thompson**, 237 Mont. 468, 474-5, 774 P.2d 401 (1989). Information prepared in the regular course of a claims adjuster's work is typically not protected.

This case involves a dispute over the treatment and handling of the petitioner's claim. That dispute arose from the very beginning, as illustrated by the controversy over whether Dr. Digg's was selected by petitioner as his physician. Petitioner has requested that he be permitted treatment by some other physician but his requests have been denied. Some of the information contained in the adjuster's notes and memos may be relevant to petitioner's claim that the employer or insurer selected Dr. Diggs and denied him appropriate medical treatment. The insurer apparently relies on Dr. Digg's opinions in arguing that claimant suffers from an occupational disease and did not suffer an industrial injury.

Having reviewed the individual notes and memos, the Court has ordered that unredacted notes for the following dates be produced:

4/29/94
5/11/94 time record for note
5/23/94
5/26/94 time record for note
6/28/94
7/11/94

It has further ordered that unredacted memos for the following dates be produced:

4/29/94 (both memos)
5/3/94
6/1/94 with the exception of the first redacted sentence.

Respondent agreed to furnish, without order of the Court, handwritten notes of the adjuster which apparently reflect her interview of the petitioner and memos dated May 11, 1994 and August 1, 1994.

The Court **denied** petitioner's request for the redacted portion of a 6/28/94 memo since it specifically discusses attorney advice. The first redacted sentence of the 6/1/94 memo is also **protected** since it contains specific mental impressions.

Witness Statements

Petitioner also requested an order compelling production of all witness statements in the possession of respondent. Mr. Maynard represented that there are not any. The motion was therefore **denied**.

Surveillance Information

Finally, the petitioner moved to compel respondent to provide him with surveillance information. The respondent has refused to do so until it can take the petitioner's deposition.

In ***Steven K. Yager v. Montana Schools Group Insurance, WCC No. 9308-6872 (March 14, 1994 Order on Motion to Compel)***, this Court indicated that it may control the sequence of discovery by requiring production of surveillance information only after the opposing party has been permitted an opportunity to depose the requesting party. The petitioner's deposition is scheduled for next week. The respondent shall answer the petitioner's interrogatories concerning surveillance within five days after the deposition.

Dated in Helena, Montana, this 20th day of January, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Stephen C. Pohl
Mr. Joe C. Maynard