IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 15

WCC No. 2020-4996

EDWARD RAINES

Petitioner

vs.

TECHNOLOGY INS. CO. INC.

Respondent/Insurer.

ORDER DENYING RESPONDENT'S AMENDED MOTION FOR PROTECTIVE ORDER

Summary: Respondent seeks a protective order, asserting that its attorney's e-mails to the independent insurance agency from which Petitioner procured workers' compensation insurance for his business are protected by the work-product privilege. In the alternative, Respondent asserts that it should not have to produce its attorney's e-mails until after Petitioner's deposition.

Held: Respondent's attorney waived the work-product privilege by voluntarily disclosing his work product to the independent insurance agency. Respondent's attorney did not have a reasonable basis to believe that the independent insurance agency would keep the disclosed material confidential because the independent insurance agency has an overlapping relationship with Petitioner and Respondent. Moreover, because the independent insurance agency does not make any decisions in the adjusting of Petitioner's claim and cannot be liable for Petitioner's benefits, it is a disinterested third-party and does not share a common litigation interest with Respondent. Respondent does not have good cause to delay production of its attorney's e-mails until after Petitioner's deposition.

¶ 1 Respondent Technology Ins. Co. Inc. (Technology) moves for a protective order for e-mails its attorney sent to Payne West Insurance (Payne West), the independent insurance agency from which Petitioner Edward Raines procured workers' compensation insurance for his business. Technology asserts that its attorney's e-mails are protected

by the work-product privilege. In the alternative, Technology asserts that it should not have to produce the e-mails until after it takes Raines' deposition.

¶ 2 Raines opposes Technology's motion on the grounds that Technology's attorney's e-mails are not work product and that Technology's attorney waived the work-product privilege by sending the e-mails to Payne West.

¶ 3 Technology filed its attorney's e-mails under seal, pursuant to ARM 24.5.324(6). This Court has reviewed the e-mails and agrees that they contain attorney work product. However, as set forth below, Technology's attorney waived the work-product privilege by voluntarily disclosing his work product to Payne West. Moreover, Technology has not set forth a legitimate reason to delay production of the e-mails until after Raines' deposition. Accordingly, this Court denies Technology's Amended Motion for Protective Order.

FACTS

¶ 4 Raines is the owner of VGR Lawn Maintenance, LLC (VGR).

¶ 5 He obtained a workers' compensation insurance policy for VGR from Technology through Payne West, an independent soliciting agent, meaning that it "does not have an exclusive relationship with one particular insurer."[1] Raines' contact at Payne West was Diana Deyo, CISR.

¶ 6 Pursuant to § 39-71-118(4), MCA (2017),[2] Raines made two elections under the policy. First, he elected to be included as a covered employee under the policy. Second, he elected the amount of wages for the purposes of calculating his premium and determination of his wages.

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[1] *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 37, 356 Mont. 417, 234 P.3d 79.

[2] § 39-71-118(4), MCA states:

> (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a member-managed limited liability company, the employer may elect to include as an employee within the provisions of this chapter any member of the partnership or limited liability partnership, the owner of the sole proprietorship, or any member of the limited liability company devoting full time to the partnership, limited liability partnership, proprietorship, or limited liability company business.
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> (b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the partners, sole proprietor, or members to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (4)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice has been given.
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> (c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.
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> (d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection (4)(d). For premium ratemaking and for the determination of the weekly wage for weekly compensation benefits, the electing employer may elect an amount of not less than $900 a month and not more than 1 1/2 times the state's average weekly wage.

¶ 7 On May 20, 2018, Raines suffered an industrial injury involving his left knee, which left him unable to work.

¶ 8 Technology accepted liability. Technology initiated temporary total disability (TTD) benefits based on Raines' reported wage of $3,000 per month, which resulted in a TTD rate of $451.47.

¶ 9 On September 4, 2018, Elias Harman — who was adjusting Raines' claim — contacted Deyo to determine the compensation level Raines had elected when he obtained the policy. Deyo replied that Raines had elected coverage for himself at the annual wage of $10,428.

¶ 10 Based on the information from Deyo, Technology adjusted Raines' TTD rate to $133.33 and reduced his biweekly TTD benefits by 50% to recoup the alleged overpayment in TTD benefits.

¶ 11 In the fall of 2019, Raines reached maximum medical improvement. He has a 1% whole person impairment rating. Two physicians determined that he could not return to his time-of-injury position.

¶ 12 On December 4, 2019, Raines' attorney wrote to Technology, asserting that it had underpaid his TTD benefits because it did not properly calculate his TTD rate. Raines asserted that his TTD rate should be calculated on his actual earnings. Raines demanded that Technology pay him the shortfall and that it pay him permanent partial disability (PPD) benefits.

¶ 13 Technology denied both demands, asserting that Raines had not been underpaid TTD benefits and that he did not have an actual wage loss.

¶ 14 On April 16, 2020, Raines filed a Petition for Hearing, asserting that he is entitled to TTD and PPD benefits.

¶ 15 On April 21, 2020, Raines served Technology with Petitioner's First Discovery Requests to Respondent/Insurer, which included Requests for Production Nos. 17 and 19, which requested that Technology produce all correspondence between Technology and Payne West and all documents "pertaining to Petitioner's level of compensation coverage."

¶ 16 On April 28, 2020, Technology's attorney's paralegal sent an e-mail to Mindy Carver, CPA, CPCU, CIC — who is Payne West's general counsel — asking Payne West to provide Technology's attorney with the documents to answer Raines' discovery requests.

¶ 17 On April 29, 2020, Carver responded, requesting that Technology's attorney serve Payne West with a subpoena. Carver explained her reason for requesting a subpoena as follows:

> With every insured/insurer matter, we are caught in the middle when presented with a request for information. The subpoena takes any discretion to respond out of our hands. We will start to collect this information in anticipation that a subpoena is coming.

¶ 18 On May 26, 2020, Technology answered and responded to Raines' discovery requests. However, Technology withheld several e-mails between its attorney and Deyo and Carver on the grounds that the e-mails are protected by the work-product privilege.

¶ 19 Technology contended that these e-mails were prepared in anticipation of litigation. Technology further contended that one of the e-mails reflects its attorney's mental impressions and legal theories.

¶ 20 On June 2, 2020, Raines requested that Technology produce the e-mails because they are either not privileged or because Technology's attorney waived his work-product privilege when he voluntarily disclosed his work product to Payne West.

¶ 21 On June 9, 2020, Technology filed its Amended Motion for a Protective Order and Brief in Support of Amended Motion.

¶ 22 Although Technology had scheduled Raines' deposition for June 10, 2020, it agreed not to take the deposition until the present discovery dispute is resolved.

LAW AND ANALYSIS

¶ 23 The work-product privilege protects materials prepared in anticipation of litigation from discovery by the adverse party, giving "a qualified immunity to materials prepared 'in anticipation of litigation,' and nearly absolute immunity to the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party to the litigation.' "[3] The Montana Supreme Court has explained, "the work product doctrine

[3] *Burnside Lund v. St. Paul Fire & Marine Ins. Co.*, 2002 MTWCC 13, ¶ 8 (emphasis omitted) (quoting *State of Mont. ex. rel., Burlington N. R.R. Co. v. Mont. Eighth Jud. Dist. Ct.*, 239 Mont. 207, 217, 779 P.2d 885, 892 (1989)). *See also* M.R.Civ.P. 26(b)(3).

serves the adversarial process directly by enabling attorneys to prepare cases without fear that their work product will be used against their clients."[4]

¶ 24 The work-product privilege can be waived.[5] However, the Montana Supreme Court has explained that, unlike the attorney-client privilege, "voluntary disclosure does not necessarily waive confidentiality of attorney work product."[6] Rather, the work-product privilege is waived by voluntary disclosure only when the disclosure would potentially allow the attorney's client's adversary to obtain the information:

> The purpose underlying the work product doctrine requires us to distinguish between disclosures to adversaries and disclosures to non-adversaries. Disclosure only waives work product protection if it is inconsistent with the maintenance of secrecy from the disclosing party's adversary.[7]

¶ 25 *In American Zurich Ins. Co. v. Montana Thirteenth Judicial District Court (American Zurich)*, the Montana Supreme Court addressed waiver of the work-product privilege in the context of a workers' compensation claim. American Zurich insured Roscoe Steel & Culvert Co. (Roscoe) at the time Phillip Peters suffered an industrial injury.[8] During Peters' workers' compensation claim, American Zurich's claims examiner sent a copy of American Zurich's attorney's opinion and evaluation letter to Roscoe.[9] After Peters and American Zurich settled his workers' compensation claim, Peters brought a bad faith case against American Zurich.[10] Peters served Roscoe with a Subpoena Duces Tecum, requesting Roscoe's entire file, including any correspondence from the attorney who represented American Zurich during his workers' compensation claim.[11] Roscoe moved

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[4] *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶ 24, 364 Mont. 299, 280 P.3d 240 (citation omitted) (internal quotation marks omitted). *See also Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (stating, in case which first recognized the work-product privilege, "In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the Work product of the lawyer." (citation omitted) (internal quotation marks omitted)).

[5] *Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 118, 861 P.2d 895, 912 (1993).

[6] *Am. Zurich*, ¶ 24 (citation omitted).

[7] *Am. Zurich*, ¶ 26 (citations omitted) (internal quotation marks omitted).

[8] *Am. Zurich*, ¶ 2.

[9] *Am. Zurich*, ¶ 3.

[10] *Am. Zurich*, ¶ 4.

[11] *Id.*

to quash, asserting that American Zurich's attorney's letter was protected by the attorney-client privilege and the work-product privilege.[12]

¶ 26 The court ruled that American Zurich waived the attorney-client privilege and the work-product privilege by voluntarily disclosing its attorney's letter.[13] While voluntary disclosure does not automatically waive the work-product privilege, the court explained that disclosure to a non-adversary which is a potential "conduit" to the adversary waives the work-product privilege unless the disclosing party has "a reasonable basis for believing the recipient would keep the disclosed material confidential."[14] The court explained that a reasonable expectation of confidentiality may derive from: (1) common litigation interests between the disclosing party and the recipient; (2) a confidentiality agreement between the disclosing party and the recipient; or (3) rules of professional conduct which require the recipient to keep the information confidential.[15]

¶ 27 Although the court explained that Roscoe was not "necessarily a conduit" to Peters, the court held that American Zurich waived the work-product privilege because of Roscoe's overlapping relationship with American Zurich and Peters. The court explained that because an employer is not allowed to make decisions in the adjusting of a claim, it was a disinterested third-party and that American Zurich had "no basis for either a confidentiality agreement or assurances of confidentiality."[16] The court explained:

> We conclude that Roscoe was neither an adversary of Zurich nor necessarily a conduit to Peters. As recognized by the District Court, Roscoe had no legal interest in the adjustment of Peters's claim. While Roscoe was not adversarial to Zurich, its overlapping relationship with both Peters and Zurich makes Zurich's expectations of confidentiality in Roscoe during the claims adjustment process unreasonable. Given the law expressly excluding Roscoe from participation in and liability for the claim, there could be no basis for either a confidentiality agreement or assurances of confidentiality. "Common sense suggests that there can be no joint defense agreement when there is no joint defense to pursue."
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> . . . [W]e conclude that Roscoe's effective status as a disinterested third party, and its preclusion by law from participating in the adjustment of the compensation claim, could not support a reasonable expectation that

[12] *Id.*

[13] *Am. Zurich*, ¶¶ 22, 29.

[14] *Am. Zurich*, ¶ 27 (citing *U.S. v. Deloitte, LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010)).

[15] *Am. Zurich*, ¶ 27 (citing *Deloitte*, 610 F.3d at 141-42).

[16] *Am. Zurich*, ¶¶ 13, 28.

> Zurich's work product would be kept confidential. Zurich's disclosure of the letter therefore waives work product protection.[17]

¶ 28 Technology argues that this case is distinguishable from *American Zurich* because its attorney had a reasonable expectation that Payne West would keep his e-mails confidential because it has a common litigation interest with Payne West. Technology asserts that they have a common litigation interest because they share the position that Raines elected the minimum wage and compensation coverage under the policy. Technology asserts that Raines' litigation interests are "directly adverse" to those of Technology and Payne West, because his position is that he elected wage and compensation coverage based on his actual earnings, which were significantly higher than the minimums. Thus, Technology argues its attorney's disclosure of his work product to Deyo and Carver did not constitute a waiver of the work-product privilege.

¶ 29 Raines argues that Technology waived the protection afforded by the work-product privilege. Raines argues that Payne West served as his agent to procure a workers' compensation policy for his business and that Payne West is therefore a "conduit" to him. Raines also argues that Technology did not have a reasonable expectation that Payne West would keep its attorney's work product confidential because Payne West does not have a common legal interest with Technology. Thus, Raines asserts that Technology's attorney waived the protection of the work-product privilege by voluntary disclosure of his work product to Payne West.

¶ 30 Here, under *American Zurich*, Technology's attorney waived the work-product privilege by voluntarily disclosing his work product to Payne West. Payne West was a potential "conduit" to Raines because, like an employer, an independent insurance agency, which, obviously, tries to keep an ongoing relationship with its clients to maintain its book of business, has an overlapping relationship with its client and the insurer that issues the policy.[18] Indeed, Payne West recognizes its overlapping relationship with Raines and Technology; Carver explained that Payne West wanted a subpoena because it was caught "in the middle" of the request for information.

¶ 31 Moreover, Technology's attorney could not have had a reasonable basis to believe that Payne West would keep his e-mails confidential. In *American Zurich*, the court

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[17] *Am. Zurich*, ¶¶ 28-29 (internal citation omitted).

[18] *See, e.g.*, *Allstate Ins. Co. v. Posnien, Inc.*, 2015 MT 162, ¶ 5, 379 Mont. 398, 352 P.3d 1 (noting that an insurance agency's "book of business" is "understood as an agency's 'customer accounts' "); *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, ¶ 20, 370 Mont. 73, 300 P.3d 1149 ("Under Montana law, it is well established that an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure." (citations omitted) (internal quotation marks omitted)); *Monroe*, ¶¶ 37-41 (holding that an independent soliciting agent first acts as an agent of its client when "solicited by the client to investigate and select the appropriate insurance company" but "once the agency has solicited and procured a specific policy, that agency becomes an agent of the insurer" (citations omitted)); *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2000 MT 238, ¶¶ 7, 56, 301 Mont. 347, 9 P.3d 622 (noting that an independent soliciting agent was appointed to "service" the insured's clients and that, "An agent may represent both the insurer and the insured at various stages in conducting an insurance transaction.").

explained, "[F]or the common interest doctrine to apply, the parties must share a common legal interest, rather than a commercial or a financial interest."[19] There is no merit to Technology's argument that Payne West has a common litigation interest because the evidence from Payne West will allegedly support its position in this case. In *American Zurich*, the court explained that an employer does not have a common legal interest with the insurer because its sole role is to provide information:

> Despite their common interests in some areas, an employer and an insurer do not share a common legal interest in the adjustment of an employee's claim for compensation for which the insurer exclusively is liable. In evaluating and settling Peters's benefits claim, Zurich bore direct liability to Peters. Roscoe's role as an employer during the adjustment process was similar to that of a witness — it would be called upon to provide background information to Zurich about the employee's duties, history and facts about the injury. While the employer supplies information to the insurer in its evaluation of a compensation claim, the employer is not a co-litigant and bears no liability.[20]

¶ 32 Likewise, Technology does not have a common litigation interest with Payne West because, like an employer, an independent insurance agency does not make decisions in the adjusting of a workers' compensation claim[21] and cannot be liable for workers' compensation benefits.[22] Payne West is not a co-litigant in this case and, like an employer, its only role in this case is to provide information. Thus, under *American Zurich*, Payne West is a "disinterested third party" and does not share a common legal interest with Technology; therefore, Technology's attorney could not have a reasonable expectation that Payne West would keep his work product confidential.[23]

¶ 33 Technology misplaces its reliance on this Court's decision in *Blount v. Conagra, Inc.*, where this Court ruled, in part, that an insurer's attorney's letters to the employer's employees were protected by the work-product privilege on the grounds that the employer

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[19] *American Zurich*, ¶ 17 (citation omitted) (internal quotation marks omitted).

[20] *American Zurich*, ¶ 15 (internal citation omitted).

[21] *See* § 39-71-2203(3), MCA ("Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that the insurer is directly and primarily liable to and will pay directly to the employee or in case of death to the employee's beneficiaries or major or minor dependents the compensation, if any, for which the employer is liable."). *See also Hernandez v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2003 MTWCC 5, "Held" paragraph (stating that the insurer is directly liable to claimants and has a "direct duty to claimants when adjusting claims").

[22] *See American Zurich*, ¶ 15 (explaining that an employer and a workers' compensation insurer do not have a common legal interest in the adjustment of the employee's claim for compensation because the insurer is exclusively liable for the benefits).

[23] *See American Zurich*, ¶ 29 ("[W]e conclude that Roscoe's effective status as a disinterested third party, and its preclusion by law from participating in the adjustment of the compensation claim, could not support a reasonable expectation that Zurich's work product would be kept confidential.").

had a common-litigation interest with the insurer.[24] However, that part of *Blount* is no longer good law because in *American Zurich*, the Montana Supreme Court expressly held that an insurer and an employer do not have a common litigation interest in a workers' compensation case.[25]

¶ 34 Citing *Yager v. Montana Schools Group Ins.*[26] and *Mutchie v. Old Republic Ins. Co.*,[27] Technology requests that if this Court rules that the e-mails must be produced, it be permitted to delay production until after Raines' deposition. According to Technology, delayed production is necessary to protect its right to a fair trial, because, otherwise, there would be no way to assure that Raines' deposition answers were based on his actual knowledge and belief as opposed to tailored to counter Technology's attorney's legal theories and mental impressions.

¶ 35 Raines argues that Technology's request relies on an unjustified presumption that Raines will testify untruthfully. Raines further argues that under longstanding discovery rules, he is entitled to the information without delay.

¶ 36 Here, there is no reason to delay production of Technology's attorney's e-mails. The Montana Supreme Court recently explained:

> The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation. In that vein, the discovery rules are liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage.[28]

Under these principles, Raines has the right to obtain Technology's attorney's e-mails without delay. Moreover, this Court has no reason to think that Raines will not testify truthfully, and he will be subject to cross examination.[29] Finally, Technology has not given a valid reason to delay production of its attorney's e-mails because Technology's attorney

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[24] 1994 MTWCC 27.

[25] *American Zurich*, ¶¶ 13, 28.

[26] 1994 MTWCC 24 (ruling, in part, that if the claimant had not been deposed, the insurer could defer production of a private investigator's surveillance report until after it took the claimant's deposition).

[27] 1995 MTWCC 3 (ruling, in part, that under *Yager*, the insurer did not have to produce surveillance information until five days after the claimant's deposition).

[28] *Cox v. Magers*, 2018 MT 21, ¶ 15, 390 Mont. 224, 411 P.3d 1271 (emphasis omitted) (citations omitted) (internal quotation marks omitted).

[29] *See, e.g., State v. Clark*, 1998 MT 221, ¶ 23, 290 Mont. 479, 964 P.2d 766 ("Cross-examination is the hallmark of our system of justice because it produces truth.").

is solely to blame for the disclosure of his work product as it was unnecessary for him to disclose his work product to obtain the documents and evidence from Payne West.[30]

¶ 37 Accordingly, this Court now enters the following:

ORDER

¶ 38 Technology's Amended Motion for Protective Order is **denied**. Technology shall produce to Raines the e-mails on or before **Friday, August 14, 2020**, via a supplemental answer to Raines' discovery requests.

DATED this 5th day of August, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas M. Murphy
Kelly M. Wills

Submitted: July 1, 2020

[30] *See In re Marriage of Kesler & Rogers*, 2018 MT 231, ¶ 30, 392 Mont. 540, 427 P.3d 77 (stating that "in our system of representative litigation, civil litigants must be held accountable for the acts and omissions of their attorneys." (citation omitted) (internal quotation marks omitted)).