

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 28

WCC No. 2011-2670

JUAN SALAZAR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION IN LIMINE

Summary: Respondent moved in limine for an order excluding two documents which it disclosed inadvertently in discovery and which contain information about reserves it set in this case. Petitioner opposes Respondent's motion. While acknowledging that Respondent inadvertently disclosed the reserve information, Petitioner refuses to return the documents and argues that he intends to introduce the reserve information into evidence to prove that Respondent unreasonably adjusted his claim.

Held: Respondent's motion is granted. The reserve information is wholly irrelevant to the issues before the Court and is protected under the work product doctrine. Petitioner may not use the documents at issue as trial exhibits.

Topics:

Unreasonable Conduct by Insurers. Tendering a settlement offer does not constitute unreasonable conduct under § 39-71-611, MCA, because it has no effect on whether the insurer denied liability or terminated benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Tendering a settlement offer does not constitute unreasonable conduct under § 39-71-611, MCA, because it has no effect on whether the insurer denied liability or terminated benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-612. If the Court grants an award greater than the

amount offered by the insurer, it may award attorney fees if it believes the insurer's actions were unreasonable. However, the amount the insurer held in reserve has no relevance to a determination of attorney fees under § 39-71-612, MCA.

Discovery: Relevancy and Materiality. Documents which may help establish the elements for proving a bad faith claim have no relevance to an allegation of unreasonableness under the Workers' Compensation Act.

Discovery: Privileges: Attorney Work Product. Although Petitioner argued that he should be allowed to use inadvertently disclosed letters containing reserve information because he believed the information was "vital" to proving his claim for attorney fees, he failed to prove that this should constitute an exception to the work product rule.

¶ 1 Respondent Montana State Fund (State Fund) moves in limine for an order preventing Petitioner Juan Salazar from entering two documents into evidence as exhibits which reveal reserve information from State Fund.¹ Salazar objects to State Fund's motion. Although he acknowledges that State Fund's disclosure of these two documents was inadvertent, Salazar argues that he is entitled to use these documents at trial as they support his claim that State Fund was unreasonable in adjusting his claim.²

¶ 2 In his brief, Salazar argues that the reserve information "is vital to [Salazar's] claim for attorney fees and [he] has no other method to obtain this information."³ Salazar argues that these documents provide evidence of the "strategy, mental impressions and opinions of the insurer's agent."⁴

¶ 3 In reply, State Fund argues that the reserve information is both protected and irrelevant. State Fund asserts that the reserve information is not relevant to the reasonableness of its adjusting.⁵

¶ 4 Section 39-71-611, MCA, states in pertinent part:

¹ Motion in Limine, Docket Item No. 69.

² Petitioner's Response to Respondent's Motion in Limine (Response Brief), Docket Item No. 70.

³ Response Brief at 4.

⁴ Response Brief at 4.

⁵ Reply Brief (Motion in Limine), Docket Item No. 71.

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

Section 39-71-611, MCA, applies to situations in which an insurer acted unreasonably ***in denying liability or terminating benefits***. Tendering a settlement offer does neither. Therefore, the reserve information bears no relevancy to any claim for attorney fees under § 39-71-611, MCA.

¶ 5 Section 39-71-612, MCA, states in pertinent part:

(1) If an insurer pays or submits a written offer of payment of compensation under this chapter but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, reasonable attorney fees and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorney fees under subsection (1) may be made only if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

¶ 6 As stated above, if I grant an award greater than the amount ***offered by the insurer*** I may award reasonable attorney fees if I believe the insurer's actions were unreasonable. Salazar has established the amount State Fund offered to pay. The amount State Fund held in reserve has no relevance to a determination of attorney fees under § 39-71-612, MCA.

¶ 7 State Fund asserts that reserve information is protected work product. State Fund contends that an inadvertent disclosure of information does not waive its

privilege.⁶ It relies in part on *Church v. Travelers Indemnity Co. of Illinois*, in which this Court conducted an *in camera* review of a claims file and determined that reserve information was protected work product and did not need to be produced to the opposing party.⁷ State Fund asserts that the exclusion is appropriate here, as it was in *Church*, because reserve information is not relevant to the reasonableness issue.⁸

¶ 8 Salazar alleges that the inadvertently disclosed letters containing the reserve information should not be held to be protected work product because “the mental impressions of the insurer (the adjuster) are the exclusive issue to be determined by this Court in determining the reasonableness of the handling and adjustment of this claim.” Salazar contends that the reserve information is “vital” to his claim for attorney fees and that he has no other method to obtain this information, and therefore this constitutes an exception to the work product rule.⁹

¶ 9 Salazar argues that the claims adjuster is likely to testify at trial. Relying on *Holmgren v. State Farm Mut. Automobile Ins. Co.*,¹⁰ he argues that opinion work product may be discoverable when mental impressions are at issue. Salazar states that he needs these documents to establish the “strategy, mental impressions and opinions of the insurer’s agent concerning the handling of the claim.”¹¹

¶ 10 Salazar further argues that M. R. Civ. P. 26(b)(3) does not apply to these documents because he “has a substantial need for the material”¹² Salazar has not established that “substantial need.” Salazar argues that, as set forth in *Holmgren*, “***in a bad faith claim*** the strategy, mental impressions and opinions of [the insurer’s] agents concerning the handling of the claim are directly at issue.”¹³ State Fund replies that Salazar’s reliance on *Holmgren* is misplaced as he sets forth the elements for proving a bad faith claim – and not for unreasonableness under the Workers’ Compensation Act.¹⁴

⁶ See *Pacificorp v. Dept. of Revenue*, 254 Mont. 387, 396-97, 838 P.2d 914, 919 (1992).

⁷ 1997 MTWCC 22.

⁸ Reply Brief at 2.

⁹ Response Brief at 4.

¹⁰ *Holmgren* (9th Cir. 1992), 976 F.2d 573.

¹¹ Response Brief at 4.

¹² Response Brief at 4.

¹³ Response Brief at 7. (Emphasis added.) Citing *Holmgren*, 976 F.2d at 577.

¹⁴ Reply Brief at 4.

The case before this Court is not a bad faith claim. Therefore, the elements required to establish a bad faith claim are irrelevant.

¶ 11 Salazar argues that State Fund's settlement offer was unreasonable and that the reserve information State Fund inadvertently disclosed helps prove the unreasonableness of the offer. Following Salazar's reasoning, any insurer that does not immediately tender its reserve amount would be acting per se unreasonable. If that were the case, one could similarly argue that a claimant's demand was unreasonable if he demanded more than the amount for which he was actually willing to settle and ultimately settled for less than he felt his case was worth. No doubt, the negotiation process would be streamlined considerably if both sides cut to the chase immediately. However, the term "negotiation process" implies that there is a process to the negotiation. Historically, that process begins with one party demanding more than it is willing to take, and the other party offering less than it is willing to pay. Typically, the process ends when one party agrees to take less than it felt it deserved, and the other party agrees to pay more than it felt it should have had to pay. Salazar's argument that the inadvertently disclosed reserve information establishes unreasonableness for purposes of the penalty and attorney fee statutes is without merit.

ORDER

¶ 12 Respondent's motion in limine is **GRANTED**.

¶ 13 Petitioner may not enter the documents described above into evidence in this matter.

DATED in Helena, Montana, this 28th day of December, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Greg E. Overturf
Submitted: October 19, 2011