

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 13

WCC No. 2013-3147

AMY VULK

Petitioner

vs.

EMPLOYERS COMPENSATION INS. CO.

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL AND GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

Summary: Respondent moved to compel Petitioner to respond to two discovery requests to which Petitioner had objected on the grounds of work-product privilege. Respondent further moved for a protective order to bar Petitioner from seeking certain information relating to the physician who performed an IME of Petitioner at Respondent's request. Petitioner opposed Respondent's motions.

Held: Respondent's motion to compel is granted. Respondent's motion for a protective order is granted in part and denied in part, consistent with the holdings of *Fjelstad v. Fireman's Fund* and *Hegwood v. Montana Fourth Judicial Dist. Court*.

Topics:

Discovery: Privileges: Attorney Work Product. Respondent asked Petitioner for specific information regarding her allegation that Respondent had *ex parte* communications with certain doctors. Petitioner objected to the discovery, arguing that this information was opinion work product. The Court held that the information is discoverable, as Respondent must have the opportunity to prepare a defense against the allegations.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905. A claimant must reveal the specific benefits to

which she believes she is entitled since this Court has jurisdiction over a claim only if a dispute over benefits exists. Therefore, the Court ordered Petitioner to answer Respondent's discovery request which asked her to quantify the benefits to which she believes she is entitled.

Discovery: Independent Medical Examinations. Even though the parameters set forth in *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, 317 Mont. 30, 75 P.3d 308, are more expansive than those in *Fjelstad v. Fireman's Fund*, 1999 MTWCC 62, the Court found the decisions largely consistent with each other. Both contemplate the discovery of financial information and details related to the IME physician's work for other insurers or their agents. *Hegwood* makes it clear that it is acceptable for claimants to investigate any potential bias.

Discovery: Independent Medical Examinations. The Court held that Petitioner could discover certain information regarding an IME physician's other work for insurers for the past three years in order to investigate any potential bias.

Discovery: Privileges: Medical Information. The Court held that Petitioner could discover certain information regarding an IME physician's other work for insurers for the past three years in order to investigate any potential bias.

Discovery: Objections to Discovery: Overly Burdensome. The Court declined to order an IME physician to manually search his records to respond to Petitioner's query about how many IMEs he performed for Respondent or Respondent's third-party administrator after the physician asserted in an affidavit that his financial software would not allow such a search.

Discovery: Generally. The Court granted Respondent's motion for a protective order where Petitioner sought the names of claimants to which Respondent's IME physician or Respondent's third-party adjuster provided services. The information sought intrudes into the privacy of claimants who are not parties to the action.

Discovery: Objections to Discovery: Overly Burdensome. The Court held that Petitioner's interrogatory which asked how many times a specific

IME physician had been listed as a witness by Respondent or Respondent's third-party adjuster was overly burdensome.

Discovery: Relevancy and Materiality. The Court held that Petitioner's interrogatory which asked for a list of insurance companies for which an IME physician had performed services to lack relevancy.

Discovery: Generally. Where an IME physician stated in an affidavit that he did not possess a list of all the insurance companies to which he had provided services in the last five years, and that he did not have a list of all the Rule 35 and insurer- or lawyer-referred workers' compensation examinations which he had performed in the last five years, the Court granted Respondent's motion for a protective order against these interrogatories.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 26. Since Rule 26 disclosures filed in court are a matter of public record and their production would not create a privacy issue, the Court denied Respondent's motion for a protective order against Petitioner's interrogatory which requested production of all Rule 26 disclosures filed in State or Federal District Court on behalf of an IME physician. However, the Court limited the scope of the discovery request to the last three years and only those disclosures which are in the possession of Respondent or of the IME physician.

¶ 1 Respondent Employers Compensation Ins. Co. (Employers) moves this Court for an order compelling Petitioner Amy Vulk to respond to certain discovery requests made by Employers.¹ Vulk objects to Employers' motion, arguing that the information Employers seeks to obtain is protected work product.²

¶ 2 Employers has further moved for a protective order, asking the Court to grant it protection from answering certain discovery requests from Vulk regarding John C. Schumpert, M.D., who conducted an independent medical examination (IME) of Vulk at Employers' request.³ Vulk opposes Employers' motion, arguing that the information she

¹ Motion to Compel Discovery (Opening Brief to Motion to Compel), Docket Item No. 28.

² Petitioner's Response to Respondent's Motion to Compel (Response Brief to Motion to Compel), Docket Item No. 36.

³ Motion for Protective Order, Docket Item No. 31; Memorandum in Support of Motion for Protective Order (Opening Brief to Motion for Protective Order), Docket Item No. 32.

seeks about Employers' expert witness is discoverable, relevant, and necessary for effective cross-examination.⁴

¶ 3 On February 13, 2014, I initiated a conference call with the parties to hear further argument and to make oral rulings on Employers' motions.⁵ This Order incorporates my oral rulings and expounds upon my reasoning for those rulings.

Employers' Motion to Compel

¶ 4 Employers argues that the Court should compel Vulk to respond to its Discovery Request No. 1, which asks Vulk whether she contends that Employers or its agents had *ex parte* conversations with Vulk's examining or treating physicians. In responding to Employers' first discovery requests, Vulk stated that she believed Employers' agents had had *ex parte* conversations with her examining or treating physicians, but that she formed this belief through her counsel's review of records provided by Employers. Vulk asserted that since she had no plans to personally review those files, she had no personal knowledge with which to answer Employers' discovery request and that her counsel's information was protected as privileged work product.⁶

¶ 5 Montana's work-product doctrine is found in M. R. Civ. P. 26(b)(3).⁷ It states that ordinarily, a party may not discover documents and tangible things prepared by another party in anticipation of litigation or for trial, with certain exceptions. Employers argues that the work-product doctrine does not apply to its Discovery Request No. 1 because it is seeking a factual basis for an allegation and is not seeking any document or tangible object.⁸ Vulk responds that the work-product doctrine has not been so narrowly construed and that the discovery Employers seeks is opinion work product, which is specifically protected against disclosure by M. R. Civ. P. 26(b)(3)(B).⁹ Vulk contends that since she has no personal knowledge with which to answer the discovery request,

⁴ Petitioner's Memorandum in Opposition to Respondent's Motion for Protective Order (Response Brief to Motion for Protective Order), Docket Item No. 35.

⁵ See Minute Book Hearing No. 4533, Docket Item No. 51.

⁶ Petitioner's Responses to Respondent's First Discovery Requests to Petitioner, attached as an exhibit to Opening Brief to Motion to Compel.

⁷ ARM 24.5.352 provides that if no express provision is made under this Court's rules for a matter of procedure, the Court will be guided by the Montana Rules of Civil Procedure. See *Lund v. St. Paul Fire & Marine Ins. Co.*, 2002 MTWCC 13, in which this Court applied the work-product rule in a discovery dispute involving a workers' compensation insurer's claims file.

⁸ Opening Brief to Motion to Compel at 2.

⁹ Response Brief to Motion to Compel at 5.

Employers is attempting to discover her counsel's mental impressions, conclusions, opinions, and legal theories, which are protected.¹⁰

¶ 6 After hearing oral argument from the parties, I ruled that the information Employers seeks in response to its Discovery Request No. 1 is discoverable and its motion to compel disclosure of this information is granted. While I do not believe Vulk's counsel is obligated to reveal the specific details of the discovery Vulk will rely upon to support her allegation that Employers had *ex parte* contact with her physicians, Employers must have the opportunity to prepare a defense against these allegations. Vulk must identify the dates of the alleged *ex parte* communications if known, and must further identify any witnesses who will testify for Vulk on this issue.

¶ 7 Employers further contends that the Court should compel Vulk to respond to its Discovery Request No. 4, which asks Vulk to quantify the benefits she believes she is entitled to under §§ 39-71-701, -702, or -703, MCA. Vulk refused to answer this discovery request on the grounds that the information is protected work product.¹¹

¶ 8 Employers argues that Vulk should not be able to conceal the amount of, and basis for, her claim by claiming it is privileged information.¹² Vulk responds that she should not be compelled to respond to Employers' Discovery Request No. 4 because Employers is asking her to provide legal conclusions which she is not qualified to give.¹³

¶ 9 Under § 39-71-2905, MCA, this Court has jurisdiction over a claim only if a dispute over benefits exists. Therefore, a claimant must reveal the specific benefits to which she believes she is entitled – not only to the respondent, but also to the Court. Since Vulk must provide the answer to Employers' Discovery Request No. 4 in order to invoke this Court's jurisdiction to hear her claim, I am granting Employers' motion to compel Vulk to respond to this discovery request.

¹⁰ Response Brief to Motion to Compel at 7.

¹¹ Petitioner's Responses to Respondent's First Discovery Requests to Petitioner.

¹² Opening Brief to Motion to Compel at 2.

¹³ Response Brief to Motion to Compel at 8.

Employers' Motion for Protective Order

¶ 10 Employers has moved for a protective order, requesting this Court to relieve it from responding to certain interrogatories and requests for production Vulk served on it.¹⁴ Employers states that Vulk has sought information about Dr. Schumpert which it does not have in its possession, and which Dr. Schumpert may not have in his possession. Employers represents that it has provided a copy of the bill for the IME Dr. Schumpert performed of Vulk, as well as a copy of Dr. Schumpert's curriculum vitae, and that it objects to the remainder of the discovery requests Vulk set forth in her Second Written Discovery Requests.¹⁵

¶ 11 Vulk responds that she is entitled to the discovery she seeks concerning Dr. Schumpert. Vulk argues that the information she seeks is relevant and is necessary for effective cross-examination of Employers' expert witness.¹⁶ Vulk contends that the discovery she seeks will allow her to show the Court the potential financial bias of Dr. Schumpert, and the Court may then judge the credibility of Dr. Schumpert's testimony in light of that financial bias.¹⁷ Vulk notes that in *Hegwood v. Montana Fourth Judicial Dist. Court*, the Montana Supreme Court authorized discovery into the financial affairs of expert medical witnesses.¹⁸

¶ 12 The information Vulk seeks in her second discovery requests are interrogatories and requests for production concerning Dr. Schumpert's practice, and specific details about the IME component of his practice, including his income and the identification of insurers for whom he has provided services and the names of the claimants he has examined. Most of Vulk's requests are for information from the past five years (2009, 2010, 2011, 2012, and 2013).¹⁹

¶ 13 During oral argument, Employers pointed out that it had filed an affidavit from Dr. Schumpert on February 6, 2014, which addressed some of the questions raised by Vulk's discovery requests. Employers' counsel further stated that Employers' requests for IMEs could come through various third-party adjusters or attorneys, and therefore

¹⁴ Motion for Protective Order.

¹⁵ Opening Brief to Motion for Protective Order at 2.

¹⁶ Response Brief to Motion for Protective Order at 2, 4.

¹⁷ Response Brief to Motion for Protective Order at 5.

¹⁸ *Id.* See *Hegwood*, 2003 MT 200, ¶ 17, 317 Mont. 30, 75 P.3d 308.

¹⁹ Petitioner's Second Discovery Requests to Respondent, attached as Ex. A to Response Brief to Motion for Protective Order.

Employers cannot readily track its paperwork to answer some of the questions Vulk posed regarding Employers' use of Dr. Schumpert as an IME physician.

¶ 14 In his affidavit, Dr. Schumpert stated that 65% of his practice consists of IMEs and the balance consists of other workers' compensation claim-related matters, such as impairment ratings and site visits. Dr. Schumpert stated that 100% of the IMEs he performs are for insurance companies or their agents. He estimated that he conducts approximately 200 IMEs annually, and further stated that he believed he was legally precluded from disclosing the names of individuals whom he had seen for IMEs. Dr. Schumpert further stated that he does not keep records as to whether the cases he participates in have "a litigation component," and that he does not know who may have listed him as a witness. He further noted that his business records are not separated according to whether clients were referred to him or to his practice partner. Dr. Schumpert also stated that it would require a hand search of his records to determine the nature of the injuries or conditions for which he has received referrals, or to determine how many cases he had had which were similar to Vulk's case.²⁰

¶ 15 During oral argument, Vulk's counsel agreed that Dr. Schumpert's affidavit addressed part of Vulk's discovery queries. However, he argued that Dr. Schumpert had continued to avoid providing any information regarding the amount of income he receives from the IME portion of his practice. He further argued that Dr. Schumpert had not identified any of the insurers who make referrals to him. Vulk's counsel argued that under *Hegwood*, Vulk is entitled to have sufficient identification of these insurers so that Vulk would be able to investigate further by subpoenaing those entities.

¶ 16 In *Hegwood*, the Montana Supreme Court held that a plaintiff's discovery requests regarding a physician who conducted her IME were overbroad, where the requests were for:

each IME [the examiner] performed within the last five years (who retained her services, the subject of each examination, the result of her findings, how much money she received to conduct the IMEs, etc.); all documentation produced in the course of the above IMEs; and tax returns from 1997 to 2001 reflecting [the examiner's] income from all sources.²¹

²⁰ Affidavit of John C. Schumpert, M.D., Docket Item No. 48.

²¹ *Hegwood*, ¶ 3.

¶ 17 However, in so doing, the court further stated:

A plaintiff in like actions might well be allowed to discover information such as: the number of cases the examiner has handled for insurance carriers; which insurance carriers were involved in past examinations; the general subject matter of such examinations; whether the examiner testified on the matter and, if so, the venue in which the examiner testified and the subject matter of the testimony; and the income derived from the examinations. However, the examiner should not have to produce such things as prior tax returns and detailed examination reports, absent the requisite relevancy considerations articulated in Rule 26(b), M.R.Civ.P.²²

¶ 18 Prior to *Hegwood*, this Court issued an Order resolving discovery motions made in *Fjelstad v. Fireman's Fund*, in which the claimant sought to obtain discovery about the physician who had performed his IME.²³ In *Fjelstad*, the claimant sought: the total number of IMEs the physician performed for the insurer, and the compensation received, each year for the past six years; the total yearly compensation the insurer had paid to the physician for any reason for the last six years; and requests for production for various related documents.²⁴ The insurer objected to this discovery, arguing that it was overly broad, burdensome, harassing in nature, and that it sought information not reasonably calculated to lead to the discovery of admissible evidence. The insurer further contended that records of this information were not kept in the normal course of the insurer's business, and that the records would be burdensome to assemble.²⁵

¶ 19 This Court acknowledged that a claimant should be able to evaluate the IME physician's credibility in light of the frequency with which the physician conducted IMEs for the insurer, but found that the extent of the discovery sought was burdensome. The Court therefore held:

The Court will grant claimant's motion to compel only insofar as it seeks information identifying the total annual number of [IMEs this physician] has conducted at the request of the insurer over the last three-year period, and the amount of compensation paid to [the physician] by the insurer for such

²² *Hegwood*, ¶ 17.

²³ 1999 MTWCC 62.

²⁴ *Fjelstad*, ¶ 6.

²⁵ *Fjelstad*, ¶ 7.

work If that information is not readily available, the insurer may respond with its estimates for both.²⁶

¶ 20 In considering the discovery dispute before me in the present case, I have considered this Court's analysis in *Fjelstad*, and the Montana Supreme Court's holding in *Hegwood*. I believe these decisions are largely consistent with each other, although the parameters set forth in *Hegwood* are more expansive than *Fjelstad*, as *Hegwood* contemplates the discovery of financial information and details related to the IME physician's work for other insurers or their agents. As I stated at the oral argument, I do not necessarily think that a physician is biased merely because they are conducting an IME for which the insurer is paying. In fact, apropos of the dispute presently before me, I note that Dr. Schumpert has testified in this Court on multiple occasions and I have found him to be a credible witness. For purposes of determining what is appropriate discovery, however, that is largely beside the point. *Hegwood* makes it clear that it is acceptable for claimants to investigate any potential bias. In applying these principles to the present case, I made the following rulings at the close of the parties' oral arguments, as set forth in the minute entry and now memorialized here.

¶ 21 Regarding Interrogatory Nos. 1, 2, 3, 4, and 12:

Interrogatory No. 1: What is Dr. John C. Schumpert's current fee schedule to perform [IMEs], depositions and trials?²⁷

Interrogatory No. 2: How many [IMEs] and/or panel evaluations did Dr. John C. Schumpert perform for [Employers] or the third party administrator in this case [in 2009, 2010, 2011, 2012, and 2013]?

Interrogatory No. 3: What was the percentage of Dr. John C. Schumpert's total gross earnings from [Employers] and the third party administrator [in 2009, 2010, 2011, 2012, and 2013]?

Interrogatory No. 4: What was the percentage of Dr. John C. Schumpert's gross income, [in 2009, 2010, 2011, 2012, and 2013], that was attributed to performing evaluations on behalf of insurers and/or third party administrators, whether in workers' compensation cases or otherwise?

²⁶ *Fjelstad*, ¶ 8.

²⁷ Interrogatory Nos. 1 through 4 have corresponding requests for production, which ask for the production of documentation in support of the responses provided. My rulings on these interrogatories also encompass my rulings on the corresponding requests for production.

Interrogatory No. 12: Please indicate the total gross billings for all [IMEs] done by Dr. Schumpert [in 2010, 2011, 2012, and 2013].²⁸

¶ 22 Employers' motion for a protective order is denied as it pertains to the above interrogatories. However, I believe Employers has already provided a substantive and adequate response to Interrogatory No. 1, and I will not require any supplementation of that response. For Interrogatory Nos. 2, 3, 4, and 12, I am limiting discovery to the years 2011, 2012, and 2013. I am further limiting Interrogatory No. 3 to Employers and two specific third-party administrators: Brentwood Services and Intermountain Claims.

¶ 23 For Interrogatory No. 2, I would find the response sufficient if Dr. Schumpert verifies in an affidavit that he has conducted approximately 200 IMEs per year for each of the last three years. Regarding Interrogatory No. 3, if Dr. Schumpert attests in an affidavit that his office does not use financial software which would allow such a search, I will not require a manual search of his records. However, the information Vulk seeks in this interrogatory are parameters suggested in *Hegwood* without being overly intrusive. The information Vulk seeks in response to Interrogatory No. 4 falls within the parameters of *Hegwood* and is discoverable. I would find an affidavit in which Dr. Schumpert states the percentage to be a sufficient response to that interrogatory. Regarding Interrogatory No. 12, I find that the discovery Vulk seeks falls within the parameters of *Hegwood* and is discoverable.

¶ 24 Regarding Interrogatory Nos. 5 through 11:

Interrogatory No. 5: Please provide a list of each case in which Dr. John C. Schumpert provided services to [Employers] or the third party administrator in the last five years. . . . At minimum, please identify the name of the claimant . . . and the name of the . . . attorney that represented the claimant.

Interrogatory No. 6: Please indicate how many times Dr. Schumpert has been listed as a witness by [Employers] or the third party administrator . . . during the preceding five years.

Interrogatory No. 7: Please provide the name of each insurance company for whom Dr. Schumpert has provided services in personal injury and workers['] compensation cases during the preceding five years.

²⁸ Petitioner's Second Discovery Requests to Respondent at 1, 2, 3, 5.

Interrogatory No. 8: Please indicate each of Dr. Schumpert's referral sources for all examinations or evaluations performed by him or REOH for an insurer, third party administrator or a defendant in the past five years.

Interrogatory No. 9: Please list all insurance companies for whom Dr. Schumpert has provided services as an expert witness in the preceding five years.

Interrogatory No. 10: Please provide a list of all Rule 35 and insurer or lawyer-referred workers['] compensation examinations . . . that have been performed by Dr. Schumpert in the preceding five years. . . .

Interrogatory No. 11: Please indicate the total number of [IMEs] performed by Dr. Schumpert in the years 2010, 2011, 2012 and 2013. Please indicate as to each case whether it was a worker's [sic] compensation claim or a personal injury case.²⁹

¶ 25 Employers' motion for a protective order is granted as it pertains to Interrogatory Nos. 5 through 11 for the reasons set forth below:

¶ 26 I am granting the motion with respect to Interrogatory No. 5 because I believe the information Vulk seeks intrudes into the privacy of claimants who are not parties to this action and I do not believe this inquiry is supported by *Hegwood*. I will not require Employers to respond to Interrogatory No. 6 because I find that obtaining this information would be onerous and overly burdensome and not reasonably calculated to lead to the discovery of admissible evidence in light of the discovery that is being allowed by this order.

¶ 27 During oral argument, Vulk's counsel indicated that Vulk is unsure whether she needs the information she sought in Interrogatory Nos. 7 and 8, and therefore I will not order its production. As to Interrogatory No. 9, Vulk has not persuaded me that the information sought is relevant in the present matter nor how it is reasonably calculated to lead to the discovery of admissible evidence. Regarding Interrogatory No. 10, Dr. Schumpert has already indicated that he does not possess the information sought by this interrogatory. Therefore, I am also granting Employers' motion for a protective order as it pertains to Interrogatory Nos. 9 and 10. At oral argument, I also concluded that Interrogatory No. 11 was redundant to Interrogatory No. 2 and granted Employers' motion for protective order as it pertains to this interrogatory.

²⁹ Petitioner's Second Discovery Requests to Respondent at 3, 4.

¶ 28 Regarding Request for Production No. 5:

Request for Production No. 5: Please produce copies of all Rule 26 disclosures that have been filed in State Court or Federal District Court on behalf of Dr. Schumpert in the preceding five years.

¶ 29 I am denying Employers' motion for a protective order in regards to Request for Production No. 5. Since these disclosures would have been filed in State or Federal court, they are a matter of public record and their production would not create a privacy issue. However, I will limit production to the years 2011, 2012, and 2013. Employers is only required to produce the Rule 26 disclosures which are in its possession or which may be in the possession of Dr. Schumpert.

¶ 30 Regarding Request for Production No. 6:

Request for Production No. 6: Please produce a copy of Dr. Schumpert's current Curriculum Vitae ("CV").

¶ 31 Since Employers has produced a copy of Dr. Schumpert's current curriculum vitae, its motion for protective order regarding Request for Production No. 6 is denied as moot.

Order

¶ 32 Respondent's Motion to Compel Discovery is **GRANTED**.

¶ 33 Respondent's Motion for Protective Order is **GRANTED IN PART AND DENIED IN PART** as set forth above.

DATED in Helena, Montana, this 15th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Andrew J. Utick
Charles G. Adams

Submitted: February 13, 2014

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