IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 3

WCC No. 2017-3947

CARMEN HEICHEL

Petitioner

vs.

LIBERTY MUTUAL INSURANCE

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION IN LIMINE

Summary: Petitioner moves for an order excluding her employer's former store manager's written statements — which recount that Petitioner stated she injured her shoulder when she tripped over her dogs — from evidence as inadmissible hearsay. Petitioner also asserts that the written statements are inadmissible because Respondent did not make the employer's former store manager available for a deposition or subpoena her after she told Respondent's attorney that she would not appear without a subpoena.

Held: Petitioner's Motion in Limine is denied. This Court reserves ruling on whether the written statements are admissible under the hearsay exception for present sense impressions, M.R.Evid. 803(1), until trial, at which time Respondent will have the opportunity to lay the required foundation. Moreover, because the store manager no longer worked for Petitioner's employer, Respondent had no duty to produce the former store manager for a deposition and no duty to subpoena the store manager to a deposition Petitioner had scheduled.

¶ 1 This matter is before this Court on Petitioner Carmen Heichel's Motion in Limine, in which Heichel seeks an order excluding from evidence two written statements from her employer's former store manager recounting that Heichel said she hurt her shoulder when she tripped over her dogs. Heichel contends that the written statements are inadmissible hearsay. Respondent Liberty Mutual Insurance (Liberty) opposes Heichel's motion.

FACTS

¶ 2 Heichel worked at Manito Super 1 Foods (Super 1) in Kalispell. In the fall of 2015, Deanna Guertin, f/k/a Deanna Hegdahl (Guertin) was the store manager at Super 1.

¶ 3 Guertin wrote a statement, dated October 13, 2015, and put it in Heichel's personnel file, stating:

> Carmen Heichel came into my office to drop by her doctor's note about being off of work. I asked her what had happened and she said that [she] tripped over her dog and hurt her shoulder, after wards [sic], by the other dogs being on top of her. Mary Dahlke was also in the office at the time of this statement.

Guertin wrote another statement, dated November 16, 2015, and put it in Heichel's personnel file, stating:

> Carmen Heichel came to see me today with her FMLA paperwork in hand. She wanted to talk to me about her insurance and how cobra got started. She shared her concerns about how she was going to pay for the possible upcoming surgery. She said, at that point, that she didn't understand why work wasn't covering it because it was due to the donut frying. I reminded Carmen at that point, that she had told me and others at the time of the original accident, (at the beginning of October) that she had hurt her shoulder by tripping over her dogs. She said she knew that but maybe it was from donut frying. I just said again that she had told us it was from tripping over her dogs. She didn't say anything back to me.

¶ 4 On November 23, 2015, Heichel filed a First Report of Injury or Occupational Disease. She alleges she injured her shoulder and neck while lifting a bucket on September 21, 2015, in the course of her employment with Super 1.

¶ 5 Liberty denied liability for Heichel's claim, asserting that Heichel did not suffer a compensable injury at work. In the alternative, Liberty asserts that Heichel did not timely notify Super 1 of her alleged injury, pursuant to § 39-71-603, MCA.

¶ 6 On August 1, 2017, Liberty took Heichel's deposition. Liberty marked Guertin's written statement dated October 13, 2015, as Exhibit 8. Heichel did not object. When questioned about the contents of this written statement, Heichel testified that she gave Guertin her doctor's note, that Mary Dahlke was in Guertin's office, but that she did not remember telling Guertin that she hurt her shoulder when she fell over her dog. Liberty marked Guertin's written statement dated November 16, 2015, as Exhibit 9. Heichel did not object. When questioned about the contents of this written statement, Heichel testified that she and Guertin spoke about whether Heichel needed another MRI and surgery, but that she did not remember telling Guertin that she hurt her shoulder when

she was frying or cranking donuts, and that she did not remember talking about falling over her dog.

¶ 7 On August 11, 2017, Heichel's attorney emailed Liberty's attorney regarding additional depositions. Heichel's attorney asked Liberty's attorney to produce the witnesses that still worked for Super 1. He further stated he intended to notice the deposition of Guertin, whom he knew no longer worked for Super 1, and said he would subpoena her if necessary.

¶ 8 On December 21, 2017, Liberty's attorney responded to a letter from Heichel's attorney and let him know she was available for Guertin's deposition on January 8, 2018. She also asked him to let her know if he was going to subpoena Guertin, or if she had agreed to appear.

¶ 9 On December 29, 2017, Heichel served a Notice of Perpetuation Deposition upon Liberty, giving notice that she was taking Guertin's deposition on January 8, 2018. Heichel did not serve a subpoena on Guertin.

¶ 10 Despite Heichel's attorney's statement in his August 11, 2017, email that he would subpoena Guertin for her deposition if necessary, on January 3, 2018, he sent Liberty's attorney an email, stating, in relevant part:

> We do not intend to subpoena Ms. [Guertin] for her deposition, and have not had any regular contact with her. The insurer has listed her as a witness, and intends to rely on her statements at trial. Without an opportunity to cross exam her prior to the trial, we will have to move to limit those statements accordingly as there is no guarantee she will appear at trial.

¶ 11 Liberty's counsel responded with an email stating, in relevant part:

> I spoke with Ms. [Guertin] this morning and she indicated that you will have to subpoena her if you want her to testify at a deposition (she also said she has to work on Monday). I would like to emphasize that since she is no longer an employee of Super 1, the insurer does not have a duty to make her available for deposition. I do plan to subpoena her to appear at trial if necessary.

¶ 12 Heichel's attorney responded with an email stating, in relevant part:

> We will not be issuing a subpoena, but I do want to proceed with making a record that the deposition took place on January 8, 2018, even if she does not appear. It sounds like she will not be there, please advise if this changes. As it stands, I intend to appear for deposition to make a record.

¶ 13 On January 8, 2018, the attorneys appeared for Guertin's deposition. Predictably, Guertin did not appear.

¶ 14 This Court held its Pretrial Conference on February 5, 2018, at which time the parties submitted their Proposed Pretrial Order and Exhibit Sheet. Liberty has listed Guertin as a witness and offered Guertin's written statements as trial exhibits. Heichel objects to these exhibits on hearsay grounds.

LAW AND ANALYSIS

¶ 15 Heichel argues this Court should exclude Guertin's written statements because they, and the statements therein, are inadmissible hearsay. Heichel also argues that this Court should exclude Guertin's written statements because Liberty did not produce Guertin for her deposition or subpoena her when she told Liberty's attorney she would not attend without a subpoena. Heichel asserts, "It is prejudicial to allow introduction of statements made by Ms. [Guertin] without providing Petitioner an opportunity to depose her to record her testimony, learn what relevant information she may offer, and to properly be able to prepare for cross-examination." Heichel maintains that if this Court admits these written statements, it will violate her rights to due process and full legal redress.

¶ 16 Liberty counters that Guertin's written statements are admissible under the present sense impression exception to the hearsay rule, M.R.Evid. 803(1), and under the business records exception, M.R.Evid. 803(6). Liberty further argues that the statements attributed to Heichel in Guertin's written statements are not hearsay under M.R.Evid. 801(d) because they contain statements inconsistent with Heichel's sworn deposition testimony and because they are statements of a party-opponent. Liberty also argues it was under no duty to produce or to subpoena Guertin for her deposition. Liberty argues Heichel should not be rewarded for refusing to subpoena Guertin and contends that Heichel did not subpoena Guertin as a strategic move, thinking that if Guertin did not appear at her deposition, then her written statements would be inadmissible. Finally, Liberty asks this Court to admit Guertin's written statements under ARM 24.5.322(5) — which permits this Court to deem objections waived if they are not made at a deposition — because Heichel did not object when it used Guertin's written statements as exhibits at Heichel's deposition.

¶ 17 To be admissible, Guertin's written statements, which are hearsay, must come under an exception to the hearsay rule *and* the statements attributed to Heichel in the written statements must be admissible.[1]

[1] M.R.Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of a combined statement conforms with an exception to the hearsay rule provided in these rules."). *See also Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, ¶ 24, 290 Mont. 496, 965 P.2d 256 (holding that even if a report qualified as a business record under M.R.Evid. 803(6), the hearsay statements in the report attributed to third-party who was not charged with accurately reporting information to the business were inadmissible).

¶ 18 Working backwards, Liberty is correct that the statements attributed to Heichel in Guertin's written statements are not hearsay under M.R.Evid. 801(d).[2] The statements attributed to Heichel are not hearsay under M.R.Evid. 801(d)(1)(A), because the statements attributed to Heichel are inconsistent with her sworn deposition testimony, where she testified that she could not remember making the statements to Guertin.[3] Moreover, the statements attributed to Heichel are not hearsay under M.R.Evid. 801(d)(2)(A), because the statements attributed to Heichel are admissions of a party-opponent.[4] Thus, if offered by a competent witness with personal knowledge during testimony, Heichel's purported statements to Guertin are admissible.

¶ 19 However, at this juncture, there is insufficient evidence for this Court to make a ruling as to whether either or both of Guertin's written statements are admissible. Either or both might be admissible under the exception for present sense impressions, M.R.Evid. 803(1), which is defined as, "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." While a written statement can be a present sense impression,[5] this Court does not know when Guertin prepared the written statements; i.e., it does not know whether Guertin prepared the written statements while Heichel was in her office, or immediately thereafter. Thus, this Court will defer its ruling until trial, at which time Liberty will have the opportunity to lay the foundation for admission of Guertin's written statements.

¶ 20 This Court agrees with Heichel that Guertin's written statements are not admissible under the business records exception, M.R.Evid. 803(6). The written statements were not records made as part of Super 1's "routine business activity" of selling groceries; rather, they were made as part of Super 1's activities of scheduling and providing human resources services to its employees — activities incidental to its main business activity.[6]

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[2] M.R.Evid. 801(d) states, in relevant part:

Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony . . . ; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity . . . .

[3] *State v. Lawrence*, 285 Mont. 140, 159-60, 948 P.2d 186, 198 (1997) (holding, "a claimed lapse of memory is an inconsistency within the meaning of Rule 801(d)(1)(A).").

[4] *See, e.g., Heltborg v. Modern Mach.*, 244 Mont. 24, 39, 795 P.2d 954, 963 (1990) (citation omitted) (internal quotation marks omitted) (stating, "The statements made out of court by a party opponent are universally deemed admissible, when offered against him.").

[5] *State v. Hope*, 2001 MT 207, ¶ 14, 306 Mont. 334, 33 P.3d 629 (holding that while a note can be a recorded present sense perception and therefore admissible under M.R.Evid. 803(1), it must be made contemporaneously or immediately after the declarant perceives the event).

[6] *Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, ¶¶ 21-23, 290 Mont. 496, 965 P.2d 256 (holding that an "Incident Report" of a nurse's alleged misconduct did not fall under the business records exception because it was not prepared as part of the nursing home's "routine business activity of administering nursing services to elderly residents,"

¶ 21 This Court rejects Heichel's argument that this Court should exclude Guertin's written statements because Guertin did not appear for her deposition. Liberty is correct that, because Guertin no longer worked for Super 1, it had no duty to produce Guertin for her deposition. Montana law requires employers to cooperate with its insurer, which includes a duty to assist in responding to discovery.[7] Here, Super 1 met its duty to assist in responding to discovery by making the six employees that Heichel wanted to depose available. Liberty, in turn, produced Super 1's employees at their depositions. But, at the time Heichel noticed Guertin's deposition, Guertin was no longer a Super 1 employee; therefore, Super 1 did not have the authority to direct Guertin to appear at a deposition. Liberty does not have a duty to produce a witness over which neither it nor its insured has any authority.[8]

¶ 22 Moreover, Heichel was the party who noticed Guertin's deposition; therefore, Heichel had the duty to subpoena her.[9] Heichel has offered no good reason for refusing and failing to do so. Liberty's attorney was forthright; after speaking with Guertin, she told Heichel's attorney that Guertin would not appear at the deposition unless Heichel served a subpoena. At that point, if Heichel actually wanted Guertin's testimony, Heichel could have, and should have, subpoenaed her. As explained by the Montana Supreme Court, "The subpoena procedure for obtaining witnesses is efficient, orderly, and gives consistent and reliable results."[10] Heichel had the opportunity to depose Guertin, and any prejudice Heichel now suffers is a result of her attempt to game the discovery process.

¶ 23 Despite Heichel's general and unsupported claims, admitting Guertin's written statements, if that occurs, will not violate Heichel's rights to due process and full legal redress. Heichel had the opportunity to subpoena Guertin for a deposition, thereby satisfying due process.[11] And the right to full legal redress in Article II, Section 16,

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but was prepared as part of employer's activity of disciplining employees, "an activity incidental to its main business activity.").

[7] ARM 24.5.301(4) (stating, "Except in cases involving a request for relief against an employer, the caption of the petition, as well as subsequent pleadings, motions, briefs, and other documents, must not name the employer. This rule does not relieve any employer from its duty to cooperate and assist its insurer, including any duty to assist in responding to discovery."); *see also Lund v. St. Paul Fire & Marine Ins. Co*., 2001 MTWCC 62, ¶ 8 (stating, "Whether or not the employer is a party in this case, it has a duty to cooperate with the insurer. The insurer can insist that the employer fulfill that obligation. If the employer fails to cooperate in providing information or documents related to a workers' compensation injury, then this Court will make the employer a party to this action, subject the employer to the Court's discovery rules, and impose sanctions if it fails to comply with those rules.").

[8] *See also Richardson v. Indemnity Ins. Co. of North America*, WCC No. 2013-3191, Minute Book Hearing No. 4749, Docket Item No. 87, (January 26, 2018) (rejecting claimant's argument that insurer had a duty to locate and produce his time-of-injury employer's ex-employees for depositions, because the insurer's attorney "has no authority over individuals who no longer work for [the employer].").

[9] *See Knight v. Johnson*, 237 Mont. 230, 232, 773 P.2d 293, 294 (1989) (holding that plaintiff in personal injury suit had duty to subpoena his treating physician and that physician had no duty to appear at trial without a subpoena).

[10] 237 Mont. at 233, 773 P.2d at 294.

[11] *See Miller v. Frasure*, 264 Mont. 354, 364-67, 871 P.2d 1302, 1308-10 (1994) (holding that this Court's rule on medical records, ARM 24.5.317, which provides that medical records are admissible without foundation testimony,

Montana Constitution, which "prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties,"[12] is entirely unrelated to the issues in this case, for obvious reasons.

¶ 24 Finally, this Court declines Liberty's request to admit Guertin's written statements under ARM 24.5.322(5), which provides that parties are to make all objections during depositions. Although Heichel did not object when Liberty made Guertin's written statements exhibits to her deposition, this Court is unlikely to give them any weight unless they are actually admissible, which will require Guertin to testify at trial, and unless this Court finds Guertin a credible witness, which will also require her to testify at trial.[13] This Court favors trials on the merits and, in furtherance of that policy, will not deem Heichel's failure to object a waiver of her hearsay objections.

¶ 25 Accordingly,

¶ 26 Petitioner's Motion in Limine is **denied**.

DATED this 9th day of February, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Kraig W. Moore
Morgan M. Weber

Submitted: February 2, 2018

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comports with due process because it gives the parties the opportunity to object and to call the author of the medical records to testify, under subpoena if necessary).

[12] *Francetich v. State Comp. Mut. Ins. Fund,* 252 Mont. 215, 224, 827 P.2d 1279, 1285 (1992).

[13] *Car Werks, LLC v. Uninsured Employers' Fund*, 2015 MTWCC 21, ¶ 20 (citing *Bonamarte v. Bonamarte*, 263 Mont. 170, 174-76, 866 P.2d 1132, 1134-35 (1994), wherein the court explained that M.R.Evid. 611(e), which provides that "a witness can be heard only in the presence and subject to the examination of all the parties to the action," usually requires in-person testimony, that requiring a person to testify in person serves many important policies and purposes, and that a fact finder cannot make a determination of the credibility of a witness who testifies via telephone; *City of Missoula v. Duane*, 2015 MT 232, ¶¶ 16-20, 380 Mont. 290, 355 P.3d 729, wherein the court held that testimony via Skype is permissible under M.R.Evid. 611(e)).