

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 7

WCC No. 2009-2419

CRAIG CONNORS

Petitioner

vs.

U.S. FIDELITY & GUARANTEE

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR A PROTECTIVE ORDER,
DENYING RESPONDENT'S MOTION TO COMPEL, AND DENYING PETITIONER'S
MOTION TO COMPEL

Summary: This case involves only the issue of whether Petitioner is entitled to attorney fees and a penalty. Petitioner moved for a protective order against Respondent's first discovery requests, alleging that the information Respondent sought was irrelevant in light of the narrow issues presented for determination. Respondent moved to compel Petitioner to answer that discovery. Petitioner also moved to compel Respondent to respond to some of Petitioner's discovery requests which pertain to Respondent's relationship with the IME doctor.

Held: Respondent has not convinced the Court that it is entitled to the discovery it seeks. Its motion to compel is therefore denied and Petitioner's motion for a protective order is granted. Petitioner's motion to compel is denied as Petitioner relies solely on a previous ruling of this Court which does not support Petitioner's position.

Topics:

Discovery: Generally. This Court has held that discovery done simply for discovery's sake is a waste of time and money. Where the insurer admitted that the primary reason it served its discovery on the claimant was in retaliation for the claimant asking those discovery questions of the insurer, the Court will not require the claimant to answer that discovery.

Discovery: Relevance and Materiality. Where the only issues for the Court to determine involve the claimant's entitlement for attorney fees and a penalty due to the insurer's alleged unreasonableness in adjusting the claim, the insurer's requests for discovery of information such as the claimant's previous employers and past medical providers are not relevant. The insurer cannot learn things through discovery which it can use to retroactively justify its previous adjusting of the claim.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.325. Claimant is entitled to a protective order where the insurer admitted that it sought discovery from the claimant in retaliation for the claimant asking certain discovery of the insurer, and where the discovery sought by the insurer is not relevant to the issues before the Court.

Discovery: Compelling Discovery. Where the claimant represented that a previous determination of this Court held that the information he seeks is discoverable, the case which the claimant cites actually holds that the information the claimant seeks is not discoverable as it is an overly broad and burdensome request. Since the insurer, relying on the cited case, provided the information discoverable within the parameters of that case, the claimant's motion to compel is denied.

¶1 Three discovery motions are pending in this Court. Petitioner Craig Connors has moved for a protective order, asking the Court to relieve him from having to answer discovery posed by Respondent U. S. Fidelity & Guarantee (USF&G).¹ USF&G subsequently moved this Court to compel Connors to answer this same discovery.² Connors moved this Court to compel USF&G to respond to two interrogatories from Connors' discovery requests which Connors alleges USF&G refused to answer adequately.³ These three motions will be resolved in this Order.

¹ Petitioner's Motion for a Protective Order and Brief in Support, Docket Item No. 8.

² U.S. Fidelity & Guaranty's Brief in Support of Motion to Compel, Docket Item No. 13.

³ Petitioner's Motion to Compel and Brief in Support, Docket Item No. 14.

Connors' Motion for a Protective Order and USF&G's Motion to Compel

¶2 Connors objects to USF&G's initial discovery requests and asks this Court to rule that he is not required to answer. In support of his request, Connors argues that the case before the Court concerns only the narrow issue of whether USF&G's adjustment of his claim was unreasonable, entitling him to a 20% penalty and attorney fees.⁴ Connors argues that USF&G's discovery requests are irrelevant to that issue.

¶3 USF&G responds that Connors requested "almost identical" information from USF&G in his discovery requests and therefore Connors' motion for a protective order should be denied for being "hypocritical." USF&G argues that Connors has demanded information from USF&G, but has refused to provide similar information in return. USF&G alleges, "Unreasonableness is a two-way street, and if Petitioner or his attorney acted unreasonably in pursuing his claim, that information, in whatever form, is relevant."⁵

¶4 Connors replies that USF&G has not set forth any grounds upon which the Court could find that the information USF&G seeks is relevant to the issues before the Court.⁶

¶5 Both USF&G in its response brief and Connors in his reply brief devote the majority of their respective briefs to discussing the discovery requests Connors made to USF&G. USF&G is the respondent in the present case. USF&G has not filed a cross-petition against Connors for "unreasonable pursuit of his claim." Except for a boilerplate reference to "the liberal standards of relevance," the sum total of USF&G's argument against Connors' motion for a protective order is that Connors made similar discovery requests of USF&G. In fact, it appears from USF&G's response brief that the primary reason it sought this discovery from Connors was because Connors sought similar information from USF&G.

¶6 Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.⁷ As a general matter, the rules of discovery are "liberally construed to make all relevant facts available to the

⁴ See Petition for Hearing, Docket Item No. 1, at 6.

⁵ U.S. Fidelity & Guaranty's Brief in Opposition to Petitioner's Motion for a Protective Order, Docket Item No. 11.

⁶ Petitioner's Reply Supporting Motion for Protective Order, Docket Item No. 16.

⁷ Mont. R. Civ. P. 26(b)(1), in pertinent part.

parties in advance of trial and to reduce the possibilities of surprise and unfair advantage.”⁸ ARM 24.5.325(1) provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

¶7 In the present case, USF&G makes clear that the primary reason it served its discovery on Connors was in retaliation for Connors asking the same questions of USF&G. Discovery is not intended to be used for retaliation. This Court has previously held, “Discovery done simply for discovery’s sake is a waste of time and money.”⁹ Despite USF&G’s misapprehensions to the contrary, there is no “I’m rubber, you’re glue” rule of discovery.

¶8 USF&G has also moved this Court to compel Connors to answer the discovery which is the subject of Connors’ motion for protective order. In its brief in support of its motion, USF&G offers additional reasons as to why it believes it is entitled to the discovery it seeks. USF&G argues that the discovery it seeks is relevant because:

Petitioner has brought a penalty claim which implicates the nature of his medical care, the nature of his subsequent employment as an auto mechanic, the extent and nature of his contacts individually or through his attorney with his medical providers, former employer, and co-employees, and his attorney’s file as his attorney has identified himself as a witness. He has also raised the issue through his discovery requests of the bias of USF&G’s IME physician, Dr. Singer.¹⁰

¶9 In his brief in response to USF&G’s motion, Connors asserts that the only pending issue is whether USF&G acted unreasonably. Connors argues that since the only issue is USF&G’s conduct, there can be nothing relevant for USF&G to discover that relates to Connors’ employers for the last 10 years; Connors’ employment records; Connors’ past medical providers; Connors’ attorney’s file; everyone Connors ever spoke with about his claim; other claimants represented by his attorney who have had the same treating physician as Connors; correspondence between Connors’ treating

⁸ *Chagnon v. Travelers Ins. Co.*, 1993 MTWCC 27 at 2. (Citation omitted.)

⁹ *Burnside v. St. Paul Fire & Marine Ins. Co.*, 2001 MTWCC 62, ¶ 10.

¹⁰ U.S. Fidelity & Guaranty’s Brief in Support of Motion to Compel at 2.

physician and his attorney; and a blanket request for all documents relating to his injury or claim.¹¹ Connors contends:

In addressing the penalty issue, the Workers' Compensation Court has traditionally asked two questions[:] 1) what did the insurer know, and 2) when did the insurer know it. Here, the question will be what information did the insurer have in June 2008 when it attempted to un-accept the claim, and what information did it have in April 2009 when it accepted the claim for the **second time**.¹²

¶10 USF&G further alleges that Connors has refused to submit to a deposition “unless he can review the questions in advance.”¹³ In support of this contention, USF&G refers the Court to a February 9, 2010, letter from Connors' counsel to USF&G's counsel, in which Connors' counsel asserts that he is unsure whether this Court will compel Connors to answer the discovery USF&G seeks. Connors' counsel adds, “Please advise specifically what you intend to depose Mr. Connors about. We can then discuss whether Respondent is entitled to a deposition.”¹⁴

¶11 In response, Connors asserts that he has not refused to sit for a deposition, but has asked what issues would be covered by the proposed deposition in light of USF&G's discovery questions which Connors believes are overbroad.¹⁵ I believe my rulings on the discovery at issue will clarify the scope of Connors' deposition and therefore conclude that the parties will be able to work out the parameters of Connors' deposition amongst themselves.

¶12 While USF&G's brief in support of its motion to compel lays out some ostensible grounds to justify its discovery requests, its response to Connors' motion for a protective order belies the justifications offered in this subsequent brief. As to the substance of USF&G's basis for these discovery requests, this is purely a penalty case regarding whether USF&G was unreasonable in “un-accepting” and later re-accepting Connors' claim. USF&G cannot therefore learn things through discovery which it could use to retroactively justify its previous adjusting of the claim.

¹¹ Petitioner's Brief Opposing Motion to Compel, Docket Item No. 17.

¹² *Id.* at 1. (Emphasis in original.)

¹³ U.S. Fidelity & Guaranty's Brief in Support of Motion to Compel at 2.

¹⁴ Ex. E to U.S. Fidelity & Guaranty's Brief in Support of Motion to Compel.

¹⁵ Petitioner's Brief Opposing Motion to Compel at 3.

¶13 Connors is entitled to a protective order pursuant to ARM 24.5.325(1)(a), and need not answer USF&G's discovery requests. USF&G's motion to compel is denied.

Connors' Motion to Compel

¶14 Connors has also moved to compel USF&G to answer the following two interrogatories:

INTERROGATORY #5: With reference to Dr. Singer, please state the following:

- a. For each of the last six years, the total yearly number of independent medical examinations that Dr. Singer has performed at the request of U.S. Fidelity & Guarantee.
- b. For each of the last six years, the total yearly compensation that U.S. Fidelity & Guarantee has paid to Dr. Singer for his performing independent medical examinations.
- c. For each of the last six years, the total yearly compensation and/or remuneration that U.S. Fidelity & Guarantee has paid to Dr. Singer for any reason.
- d. Please consider this request for production of all **DOCUMENT(S)** for each of the last six years, which reflect the total yearly compensation described above in subparagraphs b and c.
- e. Please consider this request for production of each and every **DOCUMENT(S)**, which provides a summary of any of the information requested by subparagraphs a, b, and c above.
- f. Please consider this a request for production of each and every **DOCUMENT(S)** which Dr. Singer has provided to the U.S. Fidelity & Guarantee 1) regarding his qualifications/foundation to perform an IME, 2) regarding his work/services for U.S. Fidelity & Guarantee.

.....

INTERROGATORY #8: With reference to Dr. Singer, please state the following:

- a. For each of the last six years, the total yearly number of independent medical examinations that Dr. Singer has performed at the request of Crawford & Company;
- b. For each of the last six years, the total yearly compensation that Crawford & Company has paid to Dr. Singer for his performing independent medical examinations;
- c. For each of the last six years, the total yearly compensation and/or remuneration that Crawford & Company has paid to Dr. Singer for any reason;.
- d. Please consider this a request for production of all **DOCUMENT(S)**, for each of the last six years, which reflect the total yearly compensation described above in sub-paragraphs b and c.
- e. Please consider this a request for production of each and every **DOCUMENT(S)**, which provides a summary of any of the information requested by subparagraphs a, b and c above.
- f. Please consider this a request for production of each and every **DOCUMENT(S)**, which Dr. Singer has provided, to Crawford & Company[:]

(1) regarding his qualifications/foundation to perform an IME;

(2) regarding his work/services for Crawford & Company.¹⁶

¶15 To each of these requests, USF&G responded, “This information is not readily available, nor compiled in the normal course of business.”¹⁷

¶16 Connors urges this Court to compel USF&G to adequately respond to these interrogatories, arguing that this information is readily discoverable, as this Court previously held in *Fjelstad v. Fireman’s Fund*.¹⁸

¹⁶ Petitioner’s Motion to Compel and Brief in Support, at 2-3.

¹⁷ *Id.*

¹⁸ 1999 MTWCC 62.

¶17 USF&G responds that Connors' discovery requests regarding Dr. Singer are overly broad and unduly burdensome. USF&G disagrees with Connors' characterization of the *Fjelstad* holding, noting that Connors' counsel was also Fjelstad's counsel, that he posed similar discovery requests of Fireman's Fund, and that the Court granted only part of Fjelstad's motion to compel. USF&G asserts that it has now provided Connors with the information this Court ruled was discoverable in *Fjelstad*. USF&G argues that Connors' motion to compel should therefore be denied.¹⁹

¶18 In *Fjelstad*, the petitioner filed a motion to compel the insurer to answer an interrogatory and request for production which, except for the names of the doctor and the insurer, is nearly verbatim with Interrogatory #5 above.²⁰ The insurer objected to the discovery request on the same grounds as USF&G objects to the present discovery request.²¹

¶19 In *Fjelstad*, this Court held:

The Court understands that claimant's likely contention is that it should evaluate Dr. Rappaport's credibility in light of the frequency with which he conducts independent medical examinations at the request and expense of the insurer. However, claimant can make his point without the extensive and burdensome discovery sought. The Court will grant claimant's motion to compel only insofar as it seeks information identifying the total annual number of independent medical examinations Dr. Rappaport has conducted at the request of the insurer over the last three-year period, and the amount of compensation paid to Dr. Rappaport by the insurer for such work. . . . If that information is not readily available, the insurer may respond with its estimates for both. The motion to compel is denied insofar as it seeks production of documents within Interrogatory No. 12. The Court finds any additional information sought by the claimant, and the request for documents, to be overly broad and burdensome.²²

¶20 Connors cites to this holding in his brief, alleging that, "This Court has already ruled that this type of information is discoverable. In *Fjelstad* . . . this Court ordered that the insurer would have to produce this type of information about the defense medical

¹⁹ USF&G's Brief in Opposition to Petitioner's Motion to Compel, Docket Item No. 18.

²⁰ *Fjelstad*, ¶ 6.

²¹ *Fjelstad*, ¶ 7.

²² *Fjelstad*, ¶ 8.

examination.”²³ Connors’ characterization of the *Fjelstad* holding is, at best, disingenuous. *Fjelstad*, in fact, specifically held that “this type of information” is **not** discoverable as it is an overly broad and burdensome request. Whether *Fjelstad* should be broadened is not an issue I will consider at this time because rather than argue that the holding in *Fjelstad* was too narrow, Connors chose instead to rely on *Fjelstad*’s holding without elaboration. Therefore, I conclude that he is entitled to only the information this Court held to be discoverable in *Fjelstad*. Since USF&G has already provided Connors with the information discoverable within the parameters of *Fjelstad*, Connors’ motion to compel is denied as moot.

JUDGMENT

¶21 Connors’ motion for a protective order is **GRANTED**.

¶22 USF&G’s motion to compel is **DENIED**.

¶23 Connors’ motion to compel is **DENIED**.

DATED in Helena, Montana, this 31st day of March, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Chris J. Ragar
Leo S. Ward
Submitted: March 17, 2010

²³ Petitioner’s Motion to Compel and Brief in Support at 4.