

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 68

WCC No. 9407-7094

JOLANDA "SUSIE" GLAUDE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER GRANTING MOTION TO COMPEL,
DEFERRING MOTION FOR SUMMARY JUDGMENT,
AND REQUIRING AMENDED RESPONSE

Summary: Claimant refused to answer discovery requests seeking information concerning her employment and income, and other claims she may have filed. She argued her employment status was not at issue given State Fund's response to her petition.

Held: State Fund's response was for purposes of its motion to dismiss only and does not now bind the insurer. The information sought by State Fund may lead to admissible evidence on crucial questions in this case, including whether claimant was an independent contractor and the true identity of her employer.

Topics:

Discovery: Generally. Where issues before the Court include whether claimant was an independent contractor and the true identity of her employer in a multiple contractor situation, claimant must answer discovery seeking information about her employment and income.

Discovery: Employment Records. Where issues before the Court include whether claimant was an independent contractor and the true identity of her employer in a multiple contractor situation, claimant must answer discovery seeking information about her employment and income.

Discovery: Income. Where issues before the Court include whether claimant was an independent contractor and the true identity of her employer in a multiple contractor situation, claimant must answer discovery seeking information about her employment and income.

The petition in this case alleges that claimant was injured while working for Don Ellis, an uninsured independent sub-contractor hired by Transit Homes of America, which in turn was an independent contractor hired by Rangitsch Brothers Mobile Homes. Ellis and Transit are allegedly uninsured, while the State Compensation Insurance Fund, which is the respondent, insured Rangitsch. Based on the uninsured status of Ellis and Transit, claimant seeks compensation from the State Fund.

On September 21, 1994, this Court dismissed the case for failure to state a claim. Dismissal was based on my interpretation of section 39-71-405(1), MCA, as imposing liability upon the uninsured subcontractor's immediate employer only. I ruled that liability did not extend to Rangitsch because the section does not impose liability on contractors who are higher up in a linear chain of multiple contractors and subcontractors.

Claimant appealed the dismissal. On May 8, 1995, the Montana Supreme Court reversed the dismissal based on arguments which had not been presented to this Court. It held that "under a given set of facts not yet adduced in the Workers' Compensation Court, Glaude may be able to recover under her petition" and remanded for further proceedings.

Following remand, on July 12, 1995, the State Fund propounded five interrogatories and two requests for production. On August 8, 1995, claimant filed responses stonewalling all but one of the requests for discovery. She simultaneously filed a motion for summary judgment. On August 18, 1995, the State Fund filed a motion to compel responses to its discovery requests and for sanctions. The final brief regarding that motion was filed August 30, 1995. Meanwhile, the parties agreed to hold in abeyance any further proceedings regarding the motion for summary judgment. (August 30, 1995 letter of Charles G. Adams to Patricia J. Kessner.)

The interrogatories and requests for production concern claimant's employment and income since 1989 and other claims arising from her 1993 injury. The actual interrogatories and requests for production are set forth in an addendum to this Order.

Claimant objected to four of the five interrogatories (numbers 1 through 4) and to both requests for production. In each case, claimant's objections were:

1. This Interrogatory [Request] is overly broad and unduly burdensome; and
2. The information sought by this Interrogatory [Request] is irrelevant to this action and is not reasonably calculated to lead to the discovery of relevant evidence in accordance with Rule 26(b)(1), M.R.Civ.P. [Sic.]

(Plaintiff's Answers to Respondent's First Set of Discovery Requests.)

State Fund argues that the requested information is relevant to whether claimant was an independent contractor or to the true identity of her employer. It has provided information indicating that there are factual issues concerning her status. Don Ellis has provided information indicating that claimant was an independent contractor. (Affidavit of Tom Fritch, Ex. 2.) In her claim form, claimant listed "Rangitsch Bros/Transit Homes/Don Ellis" as her employer. (*Id.* at Ex. 1.)

The only matter resolved on appeal was the sufficiency of the petition, a matter which involved statutory interpretation. In its initial response to the petition, the State Fund admitted claimant's allegation of employment by Ellis for purposes of its motion to dismiss only. The allegation of employment is set forth in paragraph 1 of the petition. In paragraph 1 of the response the State Fund admits paragraph 1 of the petition "for purposes of the pending motion." It filed its motion to dismiss simultaneously with its response, and it is thus clear that the admission of employment was for purposes of the motion to dismiss only. (Unlike the Montana Rules of Civil Procedure, the rules of the Workers' Compensation Court do not expressly defer the filing of a response during the pendency of a motion to dismiss.) Well pleaded facts are ordinarily deemed admitted for purposes of a motion to dismiss, *Farris v. Hutchinson*, 254 Mont. 334, 336, 838 P.2d 374, 375 (1992), and I decline to construe the State Funds admission more broadly than that. In light of the decision on appeal, however, the State Fund should, and will be permitted to, file an amended response which specifically addresses the merits of the allegations of the petition.

Since the only thing that has been adjudicated in this case is the sufficiency of the petition, the claimant must establish all facts essential to her claim, including employment by Ellis and the lack of insurance coverage for Ellis and Transit. The State Fund's interrogatories and requests for production conceivably could lead to admissible evidence regarding those matters. Therefore, they pass muster under Rule 26(b)(1), Mont.R.Civ.P, which provides in relevant part, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the **discovery** of admissible evidence." (Emphasis added.) Claimant's relevancy objection is therefore **overruled** with the exception noted hereafter.

The claimant's second objection also fails. The information sought is for a limited time, specifically from 1989 to date. Financial and employment information, income tax returns, and such are routinely requested and produced in damage actions. The information requested in this case may lead to evidence of claimant's status as an independent contractor or to the identity of an employer. And claimant can surely identify with little effort the claims she has made or settled with respect to her injuries. The discovery is neither overbroad nor oppressive.

Therefore, the claimant shall answer interrogatories 1 through 4 and provide the documents requested in requests for production 1 and 2 with the exception of pay stubs and records for monies earned by other members of claimant's immediate family. Earnings of other family members is not likely to lead to admissible evidence. Documentation concerning monies earned by claimant, however, must be produced.

In addition to an order compelling discovery, the State Fund seeks sanctions. Rule 24.5.326 provides for sanctions, including attorney fees, in connection with a successful motion to compel discovery, stating in relevant part, "With respect to a motion to compel discovery, the court may impose such sanctions as it deems appropriate, including, but not limited to, awarding the prevailing party attorney fees and reasonable expenses incurred in obtaining the order or in opposing the motion." The rule expressly leaves it to the Court's discretion to determine when sanctions are "appropriate." Rule 37(a)(4), Mont.R.Civ.P., which governs an award of expenses in district court actions, provides that the district court "shall" award expenses incurred in connection with a successful motion to compel *"unless* the court finds the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." (Italics added.)

While the motion to compel has been granted, I am not persuaded that an award of expenses in connection with the motion is justified. Claimant in this case took the position that the matter of employment was admitted. That position was based on the response, which admitted the fact of employment, albeit for purposes of the motion to dismiss. In district court practice, an admission which is contained in an answer is deemed binding and conclusive of the matter alleged. That result is not reached in this case because of the difference in motion practice in this Court and the express limitation the State Fund attached to its admission. While I have rejected claimant's argument in this regard, the argument was not frivolous and was substantially justified.

The Court acknowledges the State Fund's request for oral argument concerning its motion to compel discovery but finds that oral argument is unnecessary to the resolution of the motion.

For the reasons set forth above, IT IS HEREBY ORDERED AS FOLLOWS:

1. The State Fund's motion to compel discovery is **granted** except as to records of monies earned by other members of claimant's family. Within 14 days of this Order the petitioner shall fully answer the State Fund's interrogatories 1 through 4, identify and furnish the State Fund with copies of all documents requested in request for production 1, and identify and furnish all documents requested in request for production 2 with the exception of documents relating to other family members.

2. The State Fund's motion for sanctions is **denied**.

3. Pending completion of discovery, further briefing and proceedings regarding claimant's motion for summary judgment are **stayed**.

4. The parties' attorneys shall arrange a conference call with the Court's hearing examiner, Ms. Clarice V. Beck, to discuss amendment of the deadlines presently fixed by the scheduling order.

5. Within 10 days of this order the State Fund shall file an amended response which responds to the merits of the allegations contained in the petition.

Dated in Helena, Montana, this 5th day of September, 1995.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Steve M. Fletcher
Mr. Charles G. Adams