

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 12

WCC No. 2021-5490

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HENRY RICKERT  
and  
CALEB EDWARDS d/b/a CSE CONSTRUCTION

Petitioners

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

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ORDER GRANTING THE UEF'S MOTION FOR PROTECTIVE ORDER SUBJECT TO  
THIS COURT'S *IN CAMERA* REVIEW OF CLAIMANT'S MEDICAL RECORDS

**Summary:** The UEF moves for a protective order, asserting that one of the alleged employer's request for the claimant's medical records is not reasonably calculated to lead to the discovery of admissible evidence because the only issue in this case is which of the Petitioners was the claimant's employer on his date of injury. The UEF also argues that it cannot produce the claimant's medical records without violating his right of privacy under Mont. Const. art. II, § 10, or its duty to keep the claimant's information confidential. The alleged employer asserts that it is entitled to the claimant's medical records because they might contain statements attributed to him that are relevant to the issue of who his employer was on the date of his injury or statements attributed to him which are inconsistent with his other statements, which would support the alleged employer's position that the claimant is not a credible witness. The alleged employer also asserts that the claimant has completely waived his right of privacy to his medical records by filing a workers' compensation claim.

**Held:** The Court granted the UEF's motion subject to its *in camera* review of the claimant's medical records. The claimant — who is not a party to this case — has a constitutional right of privacy to his medical information. Because medical records are to be given "the utmost constitutional protection," this Court cannot order the UEF to produce the claimant's medical records to an alleged employer when the only issue in the case is

who was the claimant's employer on the date of his industrial injury. Under established Montana law, the claimant does not completely waive his right of privacy to his medical information by filing a workers' compensation claim. However, to ensure that the parties have access to all discoverable evidence, the Court will review the claimant's medical records *in camera* to determine whether they contain any discoverable evidence. If any of the claimant's medical records contain discoverable evidence, this Court will order the UEF to redact the private medical information on the record and to produce the discoverable evidence.

¶ 1 The issue in this case is which of the Petitioners was Kaden Bradley's employer on March 18, 2020, when he was injured while working on a construction jobsite. Petitioner Henry Rickert alleges that Bradley was no longer working for him and that Bradley was injured while working for Petitioner Caleb Edwards d/b/a CSE Construction (Edwards). Edwards denies that he was Bradley's employer on the date of injury, alleging that Rickert was still Bradley's employer, as evidenced by, *inter alia*, Rickert's payment of Bradley's wages. Although Edwards does not clearly set forth his legal theory, it appears that he also seeks to avoid liability to the UEF on the grounds that Rickert engaged in fraud by representing to him that Bradley was working as an independent contractor. Neither Rickert nor Edwards had workers' compensation coverage on the date of Bradley's injury. Thus, Respondent Uninsured Employers' Fund (UEF) alleges that it is entitled to reimbursement for benefits it has paid on Bradley's claim from either Rickert or Edwards, or both under a theory of joint and several liability, under §§ 39-71-504 and -541, MCA. Bradley is not a party to this case.

¶ 2 The UEF now moves for a protective order regarding Rickert's Request for Production No. 3, in which Rickert asks the UEF to produce Bradley's medical records. The UEF argues that because the dispute in this case is over whether Rickert or Edwards was Bradley's employer on the date of his industrial injury, and not over any aspect of Bradley's injury, Rickert's discovery request is not reasonably calculated to lead to the discovery of admissible evidence because Bradley's subjective belief as to who his employer was on his date of injury is irrelevant.<sup>1</sup> The UEF also argues that it cannot produce Bradley's medical records without violating his right of privacy under Mont. Const. art. II, § 10, and its duty to keep a claimant's information confidential, as set forth in § 39-71-525, MCA. Alternatively, the UEF argues that this Court should review Bradley's medical records *in camera* to determine what, if any, information therein is discoverable.

¶ 3 Rickert argues that his discovery request is reasonably calculated to lead to the discovery of admissible evidence. Rickert asserts that Bradley's medical records might contain statements attributable to Bradley that are relevant to the issue of who his employer was on the date of his injury. Rickert also asserts that Bradley's medical records

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<sup>1</sup> See *Peck v. Int'l Paper Co.*, 2010 MTWCC 35, ¶ 24-25 (ruling that the determination of a claimant's employer is made under the control test and that a claimant's subjective belief as to who was his employer on his date of injury does not determine who was his employer).

might contain statements attributable to Bradley that are inconsistent with his other statements and, therefore, that Bradley's medical records might contain evidence bearing on his credibility. Without providing any supporting evidence, Rickert alleges that Bradley has already given inconsistent statements. Rickert argues that by filing a workers' compensation claim, Bradley has completely waived his constitutional right of privacy to his medical records. Rickert maintains that this Court should not review Bradley's medical records *in camera* to determine what information therein is discoverable because he is in a superior position to know what information is relevant to the claims and defenses in this case. Thus, Rickert maintains that this Court should order the UEF to produce complete and unredacted copies of Bradley's medical records.

¶ 4 This Court need not address all of the UEF's and Rickert's arguments because the UEF's argument regarding Bradley's constitutional right to privacy is dispositive. Mont. Const. art. II, § 10, states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." The Montana Supreme Court "has long recognized that the privacy interests concerning a person's medical information implicate Article II, Section 10, of the Montana Constitution"<sup>2</sup> and that this provision "guarantees informational privacy in the sanctity of one's medical records."<sup>3</sup> The Court has also explained, "Medical records are quintessentially 'private' and deserve the utmost constitutional protection."<sup>4</sup>

¶ 5 Given the level of constitutional protection to be given to medical records, this Court cannot order the UEF to produce Bradley's medical records to Rickert. Bradley is not a party to this case and his private medical information is irrelevant to the issue of whether Rickert and/or Edwards was his employer when he suffered his industrial injury, which is the sole issue in this case.<sup>5</sup> Moreover, there is no merit to Rickert's argument that Bradley completely waived his constitutional right of privacy to his medical records by filing a workers' compensation claim. Although a workers' compensation claimant waives his right of privacy to medical records for the injury at issue with regard to the

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<sup>2</sup> *Malcomson v. Liberty Nw.*, 2014 MT 242, ¶ 23, 376 Mont. 306, 339 P.3d 1235 (citing *State v. Nelson*, 283 Mont. 231, 241-42, 941 P.2d 441, 447-48 (1997)).

<sup>3</sup> *Henricksen v. State*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38.

<sup>4</sup> *Wenger v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 37, ¶ 28, 403 Mont. 210, 483 P.3d 480. See also § 50-16-502(1), MCA (stating, "The legislature finds that: (1) health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests; . . .").

<sup>5</sup> As set forth above, Edwards alleges that Rickert engaged in fraud by representing that Bradley was working as an independent contractor. However, in Edwards' prayer for relief, Edwards does not seek any relief from Rickert. If Edwards intended to bring a fraud claim against Rickert, this Court does not have subject matter jurisdiction over that claim because it sounds in tort. See *Liberty Nw. Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, ¶ 10, 289 Mont. 475, 962 P.2d 1167 (holding that the WCC did not have subject matter jurisdiction over a misrepresentation claim by one insurer against another insurer under § 39-71-2905, MCA, which provides that the WCC has jurisdiction over cases involving a dispute over workers' compensation benefits, because the WCC does not have "jurisdiction over tort actions, even though the tort action might result in a judgment requiring another party to pay, as damages, the amount which an insurer has paid to a claimant under the Workers' Compensation Act").

insurer or, as in this case, the UEF,<sup>6</sup> a claimant does not waive his right to privacy to his medical records with regard to his employer, or an alleged employer, when his medical information is irrelevant to the issue in the case. The Montana Supreme Court has explained, “That a worker consents to release of relevant medical information [by filing a workers’ compensation claim] does not mean the worker loses all privacy interests in how that information is circulated or disseminated. The right to control circulation of private information would be lost if the individual does not know what healthcare information is being circulated or to whom.”<sup>7</sup> Thus, by filing a workers’ compensation claim, Bradley did not completely waive his constitutional right to keep his medical records private.

¶ 6 Notwithstanding, to ensure that Rickert has access to all discoverable evidence, this Court will review Bradley’s medical records *in camera* to determine if there is any discoverable information therein.<sup>8</sup> Despite Rickert’s claim to the contrary, this Court can discern what, if any, of the information in Bradley’s medical records is discoverable. If this Court determines that any of Bradley’s medical records contain discoverable evidence, it will order the UEF to redact the private medical information on the medical record and to produce the discoverable portion of the medical record.

¶ 7 Accordingly, this Court enters the following:

ORDER

¶ 8 The UEF’s Motion for Protective Order is **granted subject to this Court’s *in camera* review of Bradley’s medical records.**

¶ 9 The UEF shall organize and Bates stamp the medical records of Bradley that it has in its possession and file them under seal on or before **July 30, 2021.**

DATED this 16<sup>th</sup> day of July, 2021.

(SEAL)

/s/ DAVID M. SANDLER  
DAVID M. SANDLER  
Judge

c: Evan F. Danno  
Tammy Wyatt-Shaw and Thomas A. Hollo  
Ben Williams  
Submitted: July 13, 2021

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<sup>6</sup> See § 39-71-604(2) and (3), MCA.

<sup>7</sup> *Malcomson*, ¶ 29.

<sup>8</sup> See § 39-71-525, MCA (providing that the UEF can release “relevant and necessary information to other public entities”).