

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 41

WCC No. 2009-2242

MONTANA STATE FUND

Petitioner/Insurer

vs.

RANDALL SIMMS

Claimant/Respondent.

ORDER EXCLUDING DR. SCHABACKER'S JUNE 28, 2007, OPINION LETTER
AND EXCLUDING THE USE OF ANY CONFIDENTIAL CRIMINAL JUSTICE
INFORMATION NOT DISSEMINATED IN ACCORDANCE WITH THE CRIMINAL
JUSTICE INFORMATION ACT

Summary: Respondent moves to exclude an opinion letter of his treating physician which was elicited by Petitioner. Respondent argues that the letter was based on surveillance videos which were confidential criminal justice information which Petitioner disclosed in violation of the Criminal Justice Information Act. Respondent also moves to preclude the use or further publication or dissemination of the surveillance videos in these proceedings because of Petitioner's alleged violations of the Criminal Justice Information Act. Petitioner argues that the surveillance was properly disclosed. Although Petitioner concedes the surveillance is now confidential criminal justice information, Petitioner argues it did not become confidential criminal justice information until after Respondent's treating physician reviewed the surveillance.

Held: The surveillance constituted confidential criminal justice information before it was disclosed to Respondent's treating physician and was disseminated in violation of the Criminal Justice Information Act. The opinions elicited from Respondent's treating physician and any other physicians to whom the surveillance was improperly disseminated are excluded. Respondent's motion to prospectively preclude the use of the surveillance "for all time" and "for any purpose," even if the surveillance is disseminated in compliance with the Criminal Justice Information Act, is overbroad and is denied.

¶ 1 Respondent Randall Simms moves this Court for an Order precluding the use or any further publication or dissemination in these proceedings of a June 28, 2007, expert opinion letter written by his then-treating physician, Michael Schabacker, M.D., to Thomas E. Martello, counsel for Petitioner Montana State Fund (State Fund). Simms also moves the Court for an Order precluding the use or further publication or dissemination in these proceedings of 10 segments of video surveillance of Simms taken by the State Fund Fraud Unit on the following dates: September 27, September 28, October 10, November 16, and December 12, 2006; and February 9, February 12, April 30, and May 1, 2007.¹

¶ 2 State Fund opposes Simms' motions. It responds that the information it provided to Dr. Schabacker was appropriate and an accepted practice in the ongoing handling of a workers' compensation claim.² State Fund contends that the video surveillance Simms seeks to exclude did not become confidential criminal justice information until after Dr. Schabacker opined that the activities recorded on the videos caused him to suspect that Simms may have fraudulently obtained certain workers' compensation benefits; therefore, State Fund argues, the videos were not improperly used or disseminated by State Fund since State Fund disseminated the videos prior to receiving Dr. Schabacker's opinion letter.³

¶ 3 Simms replies that the videos were confidential criminal justice information prior to Dr. Schabacker's opinion letter because State Fund's Special Investigative Unit (SIU) conducted the surveillance of Simms. Simms argues that because the SIU is a criminal justice agency, the videos are confidential criminal justice information and must be excluded.⁴

¹ Claimant's Motion to Exclude Dr. Michael Schabacker's June 28, 2007 Opinion Letter and to Preclude its Use for any Purpose in these Proceedings and Claimant's Motion to Exclude Confidential Criminal Justice Information Improperly Disclosed and Published by the State Fund and to Preclude its Use for any Purpose in these Proceedings and Brief in Support (Opening Brief) at 1-2, Docket Item No. 5.

² State Fund's Response to Claimant's Motion to Exclude Dr. Michael Schabacker's June 28, 2007 Opinion Letter, Docket Item No. 10.

³ State Fund's Response to Claimant's Motion to Exclude Confidential Criminal Justice Information (Response Regarding Confidential Criminal Justice Information), Docket Item No. 11. See also State Fund's Statement of Background Facts Applicable to Responses to Motions to Exclude Evidence, filed as a supplement to State Fund's response briefs, Docket Item No. 12.

⁴ Claimant's Answer Brief to State Fund's Briefs in Opposition to Motion to Exclude Dr. Michael Schabacker's June 28, 2007 Opinion Letter and Motion to Exclude Confidential Criminal Justice Information, Docket Item No. 17.

Procedural History and Background Facts

¶ 4 On May 3, 1999, Simms suffered a laceration to the radial artery of his right arm while working as a glazier for Bozeman Glass. State Fund, Bozeman Glass' insurer, accepted liability for the claim. Simms was later diagnosed with Complex Regional Pain Syndrome, which purportedly affected his arms and spread into his legs, which caused him to be confined to a wheelchair. Simms and State Fund resolved part of his claim, reserving medical benefits with the exception of durable medical goods and domiciliary care.⁵

¶ 5 In a separate action, on September 20, 2007, State Fund filed a Petition for Declaratory Ruling, asking this Court to enter a declaratory ruling and/or modification or amendment of the Court's Judgment regarding the rights and liabilities of the parties concerning the settlement/stipulation and judgment regarding resolution of the claim; order reimbursement of the settlement proceeds including attorney fees; and grant State Fund an award of reasonable attorney fees, expenses, and costs. In its Petition for Declaratory Ruling, State Fund contended that Simms defrauded or deceived State Fund about his benefit entitlement and that Simms received a settlement from State Fund in the amount of \$610,000 due to his misrepresentation of his disability. Pertinent to the present case, State Fund contended:

9. The State Fund obtained video surveillance of Claimant beginning in 2002. The video surveillance post settlement shows Claimant ambulating without any aids except immediately before and after attending medical appointments. At those times, Claimant would utilize a walker while entering and exiting doctor appointments.

10. State Fund sought interpretation of the video activities of the Claimant by his treating physician, Dr. Schabacker. . . . Based upon Dr. Schabacker's report [dated June 28, 2007], which was received on August 17, 2007, the State Fund learned that it had been deceived/defrauded by Claimant and/or that Claimant was otherwise not properly entitled, in whole or in part, to the benefits he claimed and received and the settlement he secured.⁶

⁵ Petition for Hearing, ¶¶ 1-5, Docket Item No. 1; Response to Petition for Hearing, ¶ 1, Docket Item No. 3.

⁶ Petition for Declaratory Ruling (Petition), *Montana State Fund v. Simms*, WCC. No. 2007-1955 at page 3, Docket Item No. 1.

¶ 6 In the present action, State Fund has asked the Court to order Simms to make himself available for a panel independent medical examination (IME), and to order Simms to reimburse State Fund for the cost of any prescription drugs the IME panel finds not to be related to the care and treatment of his industrial injury. State Fund has alleged that, after it scheduled a panel IME in response to issues raised by Simms regarding his entitlement to certain prescriptions and to the re-implantation of a spinal stimulator, Simms unreasonably refused to attend the IME after he learned that State Fund had provided Dr. Schabacker's June 28, 2007, opinion letter to the panel.⁷

Simms' Motions to Exclude Dr. Schabacker's June 28, 2007, Opinion Letter
and to Exclude Confidential Criminal Justice Information

¶ 7 At issue are ten segments of video surveillance which were taken of Simms as part of an investigation of Simms' claim by the SIU. Simms alleges that the SIU is a "criminal justice agency" within the meaning of § 44-5-103(7)(b), MCA,⁸ and that the video surveillance at issue constitutes confidential criminal justice information within the meaning of § 44-5-103(3)(a), MCA.⁹ Simms argues that under § 44-5-303, MCA, confidential criminal justice information may not be disseminated without a district court order, and that the SIU unlawfully disseminated the videos by giving them to Martello, who in turn unlawfully disseminated the videos by sending them to Dr. Schabacker. Simms argues that this Court should prohibit State Fund from disseminating or using the surveillance videos and Dr. Schabacker's opinion letter and that it should specifically prohibit State Fund from presenting the videos and/or the opinion letter in connection with any proposed IME or IME panel.

¶ 8 Simms draws the Court's attention to § 39-71-211(1), MCA, which states:

The state fund shall establish a fraud prevention and detection unit. The unit is responsible for developing detection and prevention procedures, providing detection services, and providing training in the prevention and detection of fraudulent conduct under Title 39, chapters 71 and 72, that is

⁷ Petition for Hearing at 2-3.

⁸ "Criminal justice agency" means any federal, state, or local government agency designated by statute or by a governor's executive order to perform as its principal function the administration of criminal justice.

⁹ "Confidential criminal justice information" means criminal investigative information. Section 44-5-103(6)(a), MCA, in turn defines "criminal investigative information" as information associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes. It includes information about a crime or crimes derived from reports of informants or investigators or from any type of surveillance.

subject to prosecution under Title 45. The unit shall refer all cases of suspected fraudulent conduct to the workers' compensation fraud investigation and prosecution office established in 2-15-2015.

¶ 9 The Legislature enacted this statute in 1993. In October 1993, Governor Racicot issued an Executive Order which designated the State Fund Fraud Group as having the principal function of administering criminal justice relating to the Workers' Compensation Act and Occupational Disease Act, and further stated, "That, as such, the State Fund Fraud Group may operate as a 'criminal justice agency' as that phrase is defined in section 44-5-103(7)(b), MCA."¹⁰

¶ 10 This Executive Order unequivocally designates the State Fund Fraud Group as a "criminal justice agency" under § 44-5-103(7), MCA.¹¹ State Fund asserts that only "an exceedingly small part" of the SIU's activities deal with criminal investigations. Although this may be true, it does not somehow negate the effect of the Executive Order which designated the Fraud Group – including SIU – as a criminal justice agency.

¶ 11 State Fund urges the Court to read the word "may" with particular emphasis: that the State Fund Fraud Group *may* operate as a "criminal justice agency." State Fund suggests that this phrase means that the State Fund Fraud Group may also operate as something other than a "criminal justice agency."¹² State Fund alleges, "The minor investigative assistance provided by SIU in relation to the Simms surveillance was . . . totally civil claim handling related and not incident to any criminal investigation."¹³ State Fund alleges that Simms' interpretation of § 44-5-103(6)(a), MCA,

would eviscerate State Fund's ability to do any kind of investigation in the ordinary course of adjusting, because of course, every single claimant has the opportunity to commit fraud, so every claim could potentially, become a criminal matter and be turned over to DCI. Under Simms' reading, that means State Fund would always operate under the weight of the CJIA and

¹⁰ Executive Order Designating the Fraud Unit Benefits Department and Underwriting Department of the State Compensation Insurance Fund as a Criminal Justice Agency, Executive Order No. 15-93, October 20, 1993.

¹¹ State Fund acknowledges that the SIU is a part of the group which comprises the State Fund Fraud Group. (See Response Regarding Confidential Criminal Justice Information at 2-3.)

¹² Response Regarding Confidential Criminal Justice Information at 7-8.

¹³ Response Regarding Confidential Criminal Justice Information at 8.

always require a court order when it sends information to treating physicians, other medical providers, pharmacies, etc.¹⁴

State Fund misapprehends Simms' argument. Simms does not argue that State Fund, as a whole, is a criminal justice agency. Simms argues that SIU is a criminal justice agency. State Fund, as a whole, does not "operate under the weight of the CJIA;" only the State Fund Fraud Group does, since it is a designated criminal justice agency.

¶ 12 State Fund's contentions blur the distinction between State Fund as a whole and the State Fund Fraud Group, the only part of State Fund which was designated as a criminal justice agency by Executive Order. State Fund argues, for example: "The State Fund's SIU serves as an investigative tool both in the State Fund's role as a criminal justice agency as well as its primary role as an insurer."¹⁵ Again, State Fund as a whole was *not* designated as a criminal justice agency; only that portion of State Fund which comprises the State Fund Fraud Group constitutes a criminal justice agency under § 44-5-103(7), MCA.

¶ 13 The core of State Fund's argument is that the SIU wears two hats: it sometimes functions just as any other investigator would for any other insurance company, and it sometimes functions as a criminal justice agency. The difficulty in State Fund's position is that the Executive Order and the applicable statutes do not provide for this distinction. The SIU cannot conduct an investigation and then decide whether or not it did so wearing its criminal justice agency hat or its insurance investigator hat. That determination is made by statute.

¶ 14 Section 44-5-103(6)(a), MCA, provides in pertinent part:

"Criminal investigative information" means information . . . compiled by a criminal justice agency *in the course of conducting an investigation of a crime or crimes*. It includes information about a crime or crimes derived from . . . *any type of surveillance*. (Emphasis added.)

Section 44-5-103(3)(a), MCA, provides that criminal investigative information is confidential criminal justice information.

¹⁴ Response Regarding Confidential Criminal Justice Information at 11.

¹⁵ Response Regarding Confidential Criminal Justice Information at 3.

¶ 15 State Fund does not dispute that the ten segments of surveillance video at issue **now** constitute confidential criminal justice information. State Fund argues, however, that the surveillance video did not **become** confidential criminal justice information until after it was reviewed by Dr. Schabacker and he reported back to State Fund that Simms' activities depicted in the video were inconsistent with his reported limitations. State Fund argues:

The [surveillance] tapes did not become confidential criminal justice information until after the receipt of the Schabacker report and a determination that probable cause existed that a crime had been committed and the matter was referred to the Attorney General for criminal investigative purposes. The use and dissemination of the tapes prior to that time was appropriate.¹⁶

¶ 16 State Fund's use of the "probable cause" standard for determining when an SIU investigation becomes confidential criminal justice information is incorrect. In the criminal code, probable cause is the standard for issuance of a search warrant,¹⁷ arrest of a criminal suspect,¹⁸ and filing criminal charges.¹⁹ In virtually all of those circumstances, some degree of criminal investigation **precedes** a probable cause determination. State Fund's argument that it is only **after** a probable cause determination is made that the preceding investigation becomes criminal in nature, puts the proverbial cart before the horse. Following State Fund's reasoning, a criminal justice agency could take surveillance video of a suspected drug dealer selling small baggies of white powder, yet the surveillance would not constitute a criminal investigation – and the surveillance thereby become confidential criminal justice information – until the criminal justice agency confirmed that the white powder was cocaine. Moreover, since the criminal justice agency itself makes the initial probable cause determination, State Fund's argument would allow a criminal justice agency to unilaterally determine when, if ever, investigatory materials "become" confidential criminal justice information. This would eviscerate the privacy protections afforded by the Criminal Justice Information Act.

¹⁶ Response Regarding Confidential Criminal Justice Information at 9. (Emphasis removed.)

¹⁷ § 46-5-221, MCA.

¹⁸ § 46-6-311, MCA.

¹⁹ § 46-11-110, MCA.

¶ 17 It is abundantly clear from the record that State Fund reasonably suspected Simms to be guilty of criminal activity long before it disseminated SIU's surveillance video to Dr. Schabacker on June 20, 2007. On January 15, 2007, State Fund's counsel exchanged e-mails with one of the attorneys defending a medical malpractice case that Simms had filed in relation to the treatment for his work-related injuries. The parties had settled the malpractice and the defendants in that case were contemplating an action against Simms for return of the settlement proceeds. In pertinent part, the e-mail to State Fund's counsel stated: "I always suspected Simms was a malingerer or a fake, but I could not prove it. . . . Catching Simms or Angel [Simms' original attorney] would make my day."²⁰ State Fund's counsel responded: "I am pretty sure that the State Fund would agree."²¹

¶ 18 It is disingenuous for State Fund to contend that SIU's surveillance of a claimant to whom it had paid \$610,000 in settlement and who it subsequently suspected to be a "malingerer or a fake" was conducted in the course of "ordinary claims adjustment." Even assuming *arguendo* that SIU's surveillance began as ordinary claims adjustment, there can be no question that at least by January 15, 2007,²² the SIU surveillance constituted "information . . . compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes."²³

¶ 19 State Fund argues that although SIU was a designated criminal justice agency, it was not acting in that capacity when it surveilled Simms. This argument is without merit. As discussed above, the record is clear that long before State Fund disseminated the SIU surveillance to Dr. Schabacker, it reasonably suspected Simms of fraud. Accordingly, the SIU surveillance constituted "investigation of a crime or crimes." State Fund's argument that a designated criminal justice agency may investigate a suspected crime and not be functioning as a criminal justice agency while conducting the investigation simply does not fly. The SIU surveillance of Simms was confidential criminal justice information at the time it was disseminated to Dr. Schabacker.

¶ 20 Having determined that the SIU surveillance of Simms was confidential criminal justice information, I must next determine the appropriate remedy for dissemination of

²⁰ Opening Brief, Ex. 9 at 1.

²¹ Opening Brief, Ex. 9 at 2.

²² The record before me suggests that State Fund's suspicions that Simms was malingering predated the January 15, 2007, e-mail exchange. For purposes of this Order, however, I need only conclude that State Fund's suspicions predated the June 20, 2007, dissemination of the surveillance to Dr. Schabacker.

²³ § 44-5-103(6)(a), MCA.

the surveillance in violation of the Criminal Justice Information Act. Confidential criminal justice information can only be disseminated in compliance with § 44-5-303, MCA, which provides that dissemination is authorized in three circumstances:

1. Dissemination to a criminal justice agency.
2. Dissemination to those authorized by law to receive it.
3. Dissemination to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.

¶ 21 There can be no dispute that provisions 1 and 2 are inapplicable to this case.²⁴ Likewise, there is no dispute that State Fund did not have authorization from a district court to disseminate the surveillance video to Dr. Schabacker at the time the surveillance was disseminated; nor did State Fund have authorization to disseminate Dr. Schabacker's report, which contained information from the surveillance, to the IME panel. The issue, then, is determining the appropriate remedy for these violations of the Criminal Justice Information Act. Simms argues:

There is one and only one appropriate remedy for these egregious violations of the important legal principles at state in this case, and that is to entirely prohibit for all time, the use of the video tapes and the Schabacker Opinion Letter for any purpose in this litigation, including the use of these materials to "poison the well" of any proposed IME panel.²⁵

¶ 22 In response to Simms' requested relief that the Court "entirely prohibit for all time, the use of the video tapes and the Schabacker Opinion Letter for any purpose in this litigation," State Fund argues:

Simms' request to exclude evidence is broad and unfounded. He has not asked for inadmissibility, based on some provision of the rules of

²⁴ Although State Fund suggests that Dr. Schabacker was authorized by law to receive the surveillance as Simms' treating physician, this argument is premised upon a determination that the surveillance was not confidential criminal justice information when it was sent to Dr. Schabacker. (Response Regarding Confidential Criminal Justice Information at 12.) Having determined that the surveillance was confidential criminal justice information at the time it was sent to Dr. Schabacker, State Fund's argument that he was authorized by law to receive the surveillance must fail.

²⁵ Opening Brief at 24.

evidence or civil procedure. He has not asked for the evidence to be struck as a sanction for specific conduct in this litigation. He has referenced no authority for the relief sought. He simply does not want the evidence to be available to the State Fund or to any independent medical panel, so he has contrived as many reasons as he can find to make that seem reasonable. The Court, however, must have some authority for excluding evidence.²⁶

¶ 23 State Fund is correct that Simms' requested exclusion of the evidence is broad; however, the request is not completely unfounded. It is well established that a trial court possesses broad discretion to determine the admissibility of evidence. The court abuses its discretion "when it acts arbitrarily without conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice."²⁷ The Montana Supreme Court has noted that the disclosure of confidential criminal justice information implicates the "Right to Privacy" provision of the Montana Constitution.²⁸ Conscientious judgment in this case requires the exclusion of the Schabacker Opinion Letter and to preclude any opinions from the IME panel to whom the letter was disclosed. To do otherwise would be to allow a party to disseminate with impunity constitutionally protected information in violation of the Criminal Justice Information Act.

¶ 24 Regarding Simms' request that the Court entirely prohibit "for all time" and "for any purpose" the surveillance videos, such a remedy is overbroad at this juncture. Simms raises no challenge to the manner in which the videos were obtained. Simms' challenge rests solely on the improper dissemination of the videos to Dr. Schabacker and the subsequent improper dissemination of Dr. Schabacker's letter to the IME panel. I agree with Simms that the well has been poisoned as it pertains to both Dr. Schabacker and the IME panel and that the only appropriate remedy is to preclude any opinions from either Dr. Schabacker or the IME panel subsequent to the improper dissemination of the surveillance videos. However, to prospectively preclude the use of properly obtained surveillance "for all time" and "for any purpose," even if the surveillance is disseminated in compliance with the Criminal Justice Information Act, would be an arbitrary act that would arguably exceed the Court's broad discretion.

²⁶ Response Regarding Confidential Criminal Justice Information at 2.

²⁷ *Malcolm v. Evenflo Co., Inc.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514.

²⁸ *Jefferson County v. Montana Standard*, 2003 MT 304, ¶ 13, 318 Mont. 173, 79 P.3d 805.

ORDER

¶ 25 Respondent's motion to exclude Dr. Schabacker's June 28, 2007, opinion letter and to preclude its use for any purpose in these proceedings is **GRANTED**.

¶ 26 Respondent's motion to exclude confidential criminal justice information improperly disclosed and published by Montana State Fund to Dr. Schabacker and the IME panel is **GRANTED**.

¶ 27 Respondent's motion to prospectively preclude the use of the surveillance videos for any purpose is **DENIED**.

DATED in Helena, Montana, this 29th day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Bradley J. Luck
Thomas E. Martello
Michael G. Eiselein
Gene R. Jarussi
Lawrence A. Anderson
Submitted: June 18 and 23, 2009