

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 38

WCC No. 9601-7474

J.B. BAUGUS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

EMPIRE SAND & GRAVEL

Employer.

ORDER GOVERNING PRODUCTION OF DOCUMENTARY EVIDENCE
AND DEPOSITIONS

Summary: Petitioner facing felony charges in district court for alleged theft of workers' compensation benefits sought protective order against his deposition testimony and against requiring his wife to disclose spousal communications. Insurer sought reconsideration of prior WCC order finding documents suppressed in criminal proceeding also subject to suppression in this proceeding.

Held: Following discussion with counsel, agreement was reached for certain testimony of petitioner in light of interrogatory answers he had previously given.

Topics:

Discovery: Depositions: Objections. After hearing, claimant conceded he had at least partially waived claim of fifth amendment privilege against answering deposition questions by previously providing interrogatory answers on certain topics.

There are several matters before the Court. First, there is petitioner's (claimant's) motion for a protective order prohibiting respondent, State Compensation Insurance Fund (State Fund), from questioning claimant and his wife as to issues surrounding pending criminal charges in Yellowstone County. Second, claimant has requested an Order precluding the examination of his wife concerning spousal communications. Third, the State Fund has

requested the Court to reconsider its previous Order denying its motion to compel discovery of documents and records seized in the criminal case.

Factual Background

The following facts appear from documents provided to the Court and which are contained in the Court file. The documents are copies of documents from the district court file in *State of Montana v. J.B. Baugus*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DC 94-554 and *State of Montana v. J.B. Baugus, Margaret Baugus and James M. Rogina, Jr.*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. 95-195.

This present Petition for Hearing was triggered by a criminal prosecution which commenced on October 18, 1994. On that date, the State of Montana presented Judge Russell Fillner with a motion for leave to file a Criminal Information. Judge Fillner granted the State leave to file the Information. The State then filed an Information charging claimant with felony theft of workers' compensation benefits. It thereafter filed an Amended Information on January 4, 1996, alleging that between May 1982 and October 16, 1994, the claimant obtained "approximately \$136,963.85" in workers' compensation benefits by misstating his physical condition and by failing to report income he received from construction and excavation projects. (Affidavit of Counsel in Support of Claimant's Response to Motion for Stay or in the Alternative to Continue, Ex. A at 1.)

At the same time he approved the Information, Judge Fillner also issued a search warrant. The warrant authorized agents of the Montana Criminal Investigation Bureau (CIB) to search claimant's home and property.

CIB agents went to claimant's home the next day, October 19, 1994, and carried out an extensive search of the home. They were there for several hours. During that time, they invited reporters from the Billings Gazette into the home to photograph their efforts. Ultimately, they seized numerous items, including financial records belonging to claimant.

Subsequently, claimant filed a motion to suppress all evidence seized during the search, citing the State's violation of his constitutional right to privacy. The violation was based on CIB agents permitting reporters to roam through the house and photograph items while the search was being conducted. The claimant also attacked the search warrant as over broad.

On June 5, 1996, Judge Robert W. Holmstrom, who had assumed jurisdiction over the criminal case, issued an Order finding that the search violated claimant's right to privacy and that it was indeed over broad. He ordered that all evidence obtained during the search be suppressed.

The State appealed the suppression order to the Montana Supreme Court. However, the appeal was dismissed at the request of the Montana Attorney General.

In the meantime, on January 9, 1996, claimant filed the present action in this Court. His petition seeks a determination of his entitlement to past and future workers' compensation benefits.

On January 8, 1996, the day before he filed his petition with this Court, claimant filed a motion with Judge Holmstrom requesting that the criminal case be dismissed. He argued that the Workers' Compensation Court has exclusive jurisdiction to determine his legal entitlement to benefits and that "[u]ntil these workers' compensation issues are decided this Court [the District Court in the criminal matter] is unable to instruct a jury as to what Mr. Baugus' rights and entitlement under the workers' compensation law were during the period of time for which he is charged with theft." (Affidavit of Counsel in Support of Claimant's Response to Motion for Stay or in the Alternative to Continue, Ex. C at 7.)

On May 21, 1996, Judge Holmstrom denied the motion to dismiss. However, he stayed further criminal proceedings "until the Workers' Compensation Court determines his [claimant's] benefits under the Workers' Compensation Act." (Petitioner's Response to State Fund's Motion to Compel and Request for Declaratory Ruling Regarding Release of Evidence, Ex. 10.) He noted that the State Fund had conceded that claimant was entitled to compensation "up to a certain point in time" (*id.*, Ex. 10 at 7) and concluded that before any criminal prosecution can proceed the Workers' Compensation Court must determine the extent of claimant's entitlement to benefits:

[T]he Defendant's guilt or innocence cannot be determined without making a determination of what, if any, benefits the Defendant was actually entitled to. Section 39-71-2905 is unequivocal in its assignment to the Workers' Compensation Court of exclusive jurisdiction over workers' compensation disputes.

(*Id.*; Ex. 10 at 9.)

Following that decision, discovery proceeded in this action. Respondent propounded and claimant responded to interrogatories and requests for production. Claimant, however, resisted discovery of the evidence suppressed by Judge Holmstrom.

On March 20, 1997, the State Fund moved to compel production of the evidence. (Motion to Compel and Request for Declaratory Ruling Regarding Release of Evidence.) Claimant resisted the motion and on April 23, 1997, I denied the discovery request, holding that Judge Holmstrom's Orders had made this action an ancillary one to the criminal proceeding and that his suppression order must therefore be honored.

On April 23, 1997, the State Fund noticed the depositions of claimant and his wife. The notices triggered a motion for a protective order by claimant. On May 1, 1997, claimant filed Petitioner's Motion and Brief for Protective Order Wcc Rule 24.5.325, requesting the Court to issue a protective order precluding the State Fund from examining claimant or his wife concerning pending criminal charges in Yellowstone County. The motion invoked

claimant's and his wife's Fifth Amendment Rights against self-incrimination. Claimant also requested an order prohibiting the State Fund from examining his wife with regard to spousal communications.

After reviewing the motion, I held a telephone conference call with counsel. During that conference, counsel for the State Fund indicated their intention to file a motion for reconsideration of my ruling regarding the suppressed evidence. They questioned whether any determination made by the Workers' Compensation Court could ever be used in the criminal case, and thus questioned my conclusion that this proceeding is ancillary to the criminal case. They also indicated that they intended to argue that the suppressed evidence would have been inevitably discovered and should therefore be admitted. *Nix v. Williams*, 467 U.S. 431 (1994). State Fund counsel also urged that claimant had waived his Fifth Amendment right by responding to written discovery.

During the conference, I concluded that my previous ruling and the Fifth Amendment issue required further consideration and that the parties should be permitted to present evidence pertaining to those issues. A hearing was scheduled on these matters and further briefing was requested.

On May 27, 1997, State Fund filed State Fund's Motion and Memorandum Regarding Discovery Issues. In its motion, the State Fund requested the Court to reconsider its Order of April 23, 1997, and to deny claimant's motion for protective order. In its memorandum, the State Fund asserted that claimant waived his Fifth Amendment privilege against self-incrimination, that the blanket assertion of the privilege by claimant is improper, that if the privilege has not been waived, the petition should be dismissed, that claimant's broad reliance on the spousal privilege is misplaced, and that the evidence suppressed in the criminal action should be available for use by the State Fund in this case.

On June 6, 1997, claimant responded. (Petitioner's Reply to State Fund's Motion and Memorandum Regarding Discovery Issues.) He conceded that he can be questioned concerning his responses to the interrogatories. He acknowledged that he had partially waived his Fifth Amendment privilege, but urged that the waiver should apply only to the matters directly raised in his interrogatory answers. He continued to assert that his Fifth Amendment rights apply to issues which are outside the scope of the interrogatory answers.

The Court held a hearing on June 11, 1997, in Helena, Montana. Claimant was present and represented by Mr. R. Russell Plath. The State Fund was represented by Mr. Daniel J. Whyte and Mr. Charles G. Adams. At the hearing I engaged counsel in a frank discussion of the issues. I compliment counsel on their candid and helpful responses to my questions and observations.

Counsel for claimant stated that claimant and his wife were prepared to go forward with their depositions and to answer questions within the scope of claimant's responses to interrogatories. Those responses involve the claim for benefits,⁽¹⁾ thus claimant has indicated his willingness to respond, as a general matter, to questions relevant to his entitlement to benefits.

However, claimant's counsel advised the Court that there is another pending criminal prosecution charging claimant and his wife with possession of stolen vehicles. The evidence against them apparently stems from the October 19, 1994 search. That search led to the application and issuance of another search warrant. Claimant has moved to suppress that evidence on the ground that the original search violated his constitutional rights and that any information resulting from that search should not have been used in obtaining the second search warrant. The motion is presently pending before Judge Diane Barz, who is presiding over the second criminal action.

Invoking his Fifth Amendment Right, claimant objects to any inquiry concerning the alleged stolen property. Counsel for the State Fund stated their desire to inquire regarding the property as it might be relevant to the claimant's entitlement to benefits. I commented that the inquiry might be relevant if claimant paid for the items, and his benefits and wife's income were insufficient to permit the purchases, but if that were the case, then the State of Montana criminal case is seriously flawed.

During the hearing I told counsel that it was my recollection that suppressed evidence may be admitted for impeachment purposes should a defendant testify. Claimant's counsel acknowledged that possibility and agreed that it is appropriate to provide the State Fund with copies of the suppressed documents. After the hearing I confirmed that there is case law supporting the admission of illegally seized evidence for impeachment purposes. *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354 (1954).

In light of the above, counsel and the Court agreed that claimant shall request the CIB to provide the State Fund with copies of all seized documents. The State Fund agreed to shoulder the cost of copying.

Counsel mentioned that they have attempted to contact Agent Tom Blankenship, who is the agent in charge of the investigation, concerning the documents, but that Agent Blankenship has not responded to their inquiries. In this regard, the Court notes that the documents properly belong to claimant and that they are subject to this Court's authority to order him to produce the documents. While Judge Holmstrom declined to order the documents returned to claimant, the claimant still has a right of access to the documents. They are not criminal justice information any more than a previously created document is subject to the attorney-client privilege merely because the client delivers the document to the attorney. *Clark v. Norris*, 226 Mont. 43, 734 P.2d 182 (1987) (stating that a privilege cannot be created in a subject matter merely by transmitting it to an attorney.) In light of the

long delay in this case, and the claimant's expressed desire to bring the case to trial as soon as possible, the prompt cooperation of Agent Blankenship and the CIB is essential. If that cooperation cannot be secured by counsel, the Court is prepared to issue a subpoena duces tecum directing Agent Blankenship to personally appear before the Court and bring with him all the documents.

Counsel agreed with the Court's suggestion that the depositions be deferred until the State Fund has an opportunity to review the requested documents. After such review, the depositions shall proceed. If claimant or his wife invokes the Fifth Amendment with regard to particular questions, or if claimant objects to the use of a seized document, then counsel shall contact the Court for a ruling. To aid the Court, I requested that prior to commencing the depositions, counsel should provide point briefs setting out pertinent law concerning specific issues which may arise during the depositions. I also asked counsel to provide copies of any out-of-state, federal, or United States Supreme Court cases they cite.

Insofar as my previous Order regarding the use of suppressed evidence is inconsistent with the present discussion, it is overruled. However, at the present time it is unnecessary for me to reconsider my holding that this case is ancillary to the criminal proceeding and therefore requires me to honor Judge Holmstrom's suppression ruling. It is also unnecessary for me to consider the State's argument concerning inevitable discovery. Use of the evidence for impeachment purposes, if appropriate, may allow the admission of the evidence even if it is otherwise inadmissible. My ruling is without prejudice to the State Fund renewing its motion for reconsideration at a later time.

THEREFORE IT IS HEREBY ORDERED AS FOLLOWS:

1. Claimant shall request Mr. Tom Blankenship and the Montana Criminal Investigation to provide the State Fund with copies of all of the documents seized in the October 19, 1994 search of claimant's home and property. The State Fund shall pay the costs of such copying. If Mr. Blankenship and the CIB fail to comply with the request, then counsel shall advise the Court and a subpoena duces tecum shall issue to compel Mr. Blankenship to personally appear before the Court and produce the documents.

2. After the State Fund has an opportunity to view and copy the documents, the parties shall proceed to take the depositions of claimant and his wife. Before the taking of the depositions, the parties may supply the Court with point briefs and copies of any out-of-state, federal, or United States Supreme Court cases cited by the parties, regarding the possible assertion of Fifth Amendment privilege and spousal privilege. If, during the depositions, objections are raised based on the Fifth Amendment or to the relevancy of documents proffered for impeachment purposes, the parties shall contact the Court.

3. The Court reserves ruling on the State Fund's request to reconsider the Order of April 23, 1997.

DATED in Helena, Montana, this 13th day of June, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. R. Russell Plath
Mr. Charles G. Adams
Mr. Daniel J. Whyte

1. INTERROGATORY NO. 2: Please state your gross income for the years 1982 to date.

ANSWER: Workers' Compensation benefits were received until November of 1994. I have had no income since November of 1994.

INTERROGATORY NO. 3: Please state if you have engaged in any form of self-employment, whether for income, profit or hobby from 1982 to the present. If so, please state the following for each form of self-employment:

- a. the nature of such self-employment;
- b. the precise amount of income received for such self-employment;
- c. whether such self-employment is conducted as a sole proprietorship, partnership, family business, or other form; and
- d. the precise dates upon which you have engaged in such self-employment.

ANSWER: a. Helped a friend load and haul off some concrete.

b. Barter.

c. None.

d. Unknown.

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INTERROGATORY NO. 7: Please itemize by source and amount the current periodic income of yourself or any member of your household.

ANSWER: I object to producing information regarding monies or income generated by my spouse or other household members as not being relevant to this case. Workers' compensation benefits were paid to the Petitioner by the State Compensation Insurance Fund until benefits were terminated in November of 1994. The Montana Criminal Investigation Bureau has all of our personal records which were seized pursuant to a search warrant and as part of a criminal investigation in October of 1994.

REQUEST FOR PRODUCTION NO. 1: Please produce Petitioner's federal and state tax returns, whether filed jointly or separately, W-2's, and withholding statements for the years 1982 through 1995.

RESPONSE: Records will be produced as soon as they are made available.

INTERROGATORY NO. 8: Please give a description and the value of each of the fixed assets owned by you or your spouse, including the following:

- a. home and property;
- b. other real estate;
- c. retirement funds;
- d. motor vehicles;
- e. personal property;
- f. excavation equipment.

ANSWER: I object to providing an inventory of assets for property owned by my spouse as not being relevant to this case. The following is a list of assets I currently own:

- a. 3 acres at 3401 Old Blue Creek valued at \$110,000, owe \$100,000 on property, owned jointly with wife;
- b. lot at 3609 McDougal, valued at \$19,000, owned jointly with wife;
- c. N/A;
- d. 1992 Mazda pickup worth/owing \$7,500 and 1991 Buick Riviera worth/owing \$8,500;
- e. N/A;
- f. 580C Case Backhoe valued at \$5,000.00; W20B Case Loader valued at \$8,000.00