

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 34

WCC No. 9311-6935

IN THE MATTER OF RONALD GENE COLE

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

STRATFORD FARMS, INC., R.L.

STRATFORD, and JOHN STRATFORD

Employer.

ORDER GRANTING SANCTIONS AND COMPELLING DISCOVERY

The petitioner, Ronald Gene Cole (claimant), was involved in an automobile accident on November 11, 1991. In his petition he alleges that he was injured in the course and scope of his employment. Because the employer was uninsured at the time of the accident, claimant has joined both the employer, Stratford Farms, Inc., R. L. Stratford and John Stratford (Stratford), and the Uninsured Employer's Fund (UEF). Both Stratford and UEF deny that claimant was acting within the scope and course of his employment when injured; therefore, they deny liability.

Stratford has served written discovery and attempted to take the claimant's deposition. Claimant has failed to respond to the written discovery or to make himself available for deposition. Counsel for Stratford made numerous requests that claimant find a time convenient for his deposition. Finally, Stratford noticed the deposition for March 17, 1994; claimant did not appear and his own attorney was unable to ascertain his whereabouts. Stratford now moves for sanctions, asking that the petition be dismissed with prejudice. Should the Court find dismissal too harsh, Stratford asks the Court to enter an order compelling discovery and directing claimant to pay Stratford's costs and attorney fees.

The history recited by Stratford shows that claimant has disappeared on numerous occasions and does not keep his own counsel informed as to his whereabouts. In response to Stratford's motion, claimant's attorney states, "Mr. Cole has again disappeared and has not contacted counsel since about mid-February." Claimant's counsel, however, states

that claimant has previously been treated for depression at the Miles City Veteran's Hospital and speculates that he again may be suffering from depression. He requests that the Court fix a date certain for claimant to appear for his deposition and states, "If Mr. Cole does not appear for his deposition by that time, it is in the court's discretion as to what sanctions would be appropriate, including dismissal."

Claimant filed this petition. In doing so he subjected himself to discovery obligations imposed by the rules of this Court. ARM 24.5.326 provides the consequences of a failure to respond to discovery, providing:

FAILURE TO MAKE DISCOVERY - SANCTIONS (1) If a party fails to respond to discovery pursuant to these rules, or makes evasive or incomplete responses to discovery, or objects to discovery, the party seeking discovery may move for an order compelling responses. Upon filing such motion, the moving party shall also file a supporting brief or affidavit and failure to do so shall be deemed an admission that the motion is without merit. An adverse party shall have ten days following service of the motion within which to file an answering brief or affidavit. A reply brief may be filed no later than five days from the date of service of the answer of the adverse party. Unless ordered by the court, oral argument will not be permitted in motions to compel discovery. 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. If the party shall fail to make discovery following issuance of an order compelling responses, the court may order such sanctions as it deems required and just under the circumstances.

Under the rule, Stratford is entitled to an order compelling discovery. In light of claimant's history of non-cooperation and his failure to keep his own counsel informed of his whereabouts, Stratford should also be awarded its fees and costs in connection with its motion to compel. Finally, since it is claimant who has delayed this matter, the trial setting will be vacated.

Based on the foregoing discussion, IT IS HEREBY ORDERED AS FOLLOWS:

1. Claimant is ordered to serve complete responses to Stratford's written discovery requests on or before June 1, 1994.
2. Claimant is further ordered to make himself available for deposition no later than June 15, 1994. Claimant and his counsel are responsible for notifying opposing counsel of available dates for the deposition.
3. Claimant is ordered to pay Stratford its reasonable costs and fees in an amount to be determined by the Court.

4. Stratford shall have until April 22, 1994, in which to submit an affidavit setting forth an itemization of fees and costs incurred in connection with its motion to compel. If claimant objects to the reasonableness of the fees and costs submitted, he shall have until May 4, 1994, in which to file his objections. The Court will then fix the amount due Stratford.

5. The trial setting in this matter, which is for the week of May 2, 1994, is **vacated**. The trial will not be reset until claimant complies with all orders of this Court.

6. The claimant is admonished that his **failure to comply** with this Order and with the rules of this Court **may lead to dismissal of his petition with prejudice**.

DATED in Helena, Montana, this 13th day of April, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Brad L. Arndorfer

Mr. Brad H. Anderson

Mr. Robert J. Campbell