

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 9

WCC No. 9307-6858

JAMES P. SMITH

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE COMPANY

Respondent/Insurer for

RSA-USA, INC./IDC SERVICES, INCORPORATED

Employer.

ORDER REGARDING DISCOVERY MOTIONS

The parties have filed cross-motions to compel discovery. Respondent (National Union) has also filed a **Motion To Admit Deposition As A Statement**.

National Union's motion to compel seeks an order directing petitioner to serve overdue responses to **Respondent's Request For Supplementation Of Prior Responses**.

Subsequent to the filing of the motion the petitioner (Smith) filed a notice stating that he had supplemented his responses as requested. The motion therefore is moot.

National Union's second motion asks that a transcript of a deposition of Janet Weiringa be admitted "as a sworn statement." The deposition was taken by National Union in a prior proceeding involving the parties but stricken because of inadequate notice to Smith, who did not attend the deposition. **Order Granting Motion For Protective Relief, *Smith v. National Union Fire Insurance*, WCC No. 9205-6445 (October 14, 1992)**. Granting the present motion would circumvent the Court's prior Order. Moreover, the deposition does not satisfy the criteria of Rule 804, Mont.R.Evid., since petitioner did not have an opportunity to cross-examine the deponent.

However, an affidavit of Thomas A. Marra indicates that Smith's counsel, Randall O. Skorheim, failed to respond to his request made on October 21, 1993, that Mr. Skorheim contact him regarding a new deposition. Why Mr. Marra or Ms. Sexe did not follow up sooner is unexplained. In reviewing the motions presently before the Court, as well as the October 14, 1992 Order, it appears that the parties' attorneys have difficulty cooperating

and communicating with one another. The time for taking Ms. Weiringa's deposition will therefore be extended to March 18, 1994.

Finally, I have considered Smith's motion to compel further responses to Requests for Production Nos. 1 through 4 and Interrogatories Nos. 1, 2, 3 and 5. National Union interposed relevancy objections to all but Interrogatory No. 1 and Request for Production No. 2. Petitioner asks that the objections be overruled because they were not served within the 20 days allowed by Court rules, ARM 24.5.323 and 324, and argues that the information sought is relevant. He also argues that the responses to Interrogatories Nos. 1 and Request for Production No. 2 are inadequate.

The response to Request For Production No. 2 is adequate. The request and the response were as follows:

REQUEST NO. 2: Any an [sic] all writings regarding employment of the Petitioner by the employer, R.S.A. - U.S.A., Inc. or I.D.C. Services Inc.

RESPONSE: The entire file regarding James Smith maintained by R.S.A. - U.S.A., Inc., or I.D.C. Services, Inc. was produced to the Claimant and his attorney on 9/3/92 and in addition was supplemented on 10/20/92.

Smith contends that the entire file was not produced. National Union replies that it was. Smith has not provided any supporting evidence for his contention, so the Court must assume that the entire file was provided.

The answer to Interrogatory No. 1 is similarly adequate. The interrogatory and its answer were as follows:

INTERROGATORY NO. 1: Did the Employer R.S.A. - U.S.A., Inc. or I.D.C. Services, Inc., comply with A.R.M. 24.29.708 during the time of Petitioner's employment in 1991? If so, please describe the exact location of the work place where any such notice was posted and the dates that such notice was posted.

ANSWER: It is unknown if a notice was posted. If any further information is obtained, we will supplement this Interrogatory.

If it is unknown to National Union whether the notice was posted, then what other answer can be given? No evidence has been presented which would show that National Union did not make a diligent inquiry concerning the matter. Moreover, National Union has a duty to reasonably supplement its answer if further information later becomes available. Any failure to do so will preclude it from presenting evidence concerning the matter.

In response to Smith's claim that National Union's objections were untimely, Ms. Sexe has filed an affidavit indicating that she contacted Mr. Skorheim concerning responses to discovery and that he indicated "that he had no problem with me taking more time to

prepare responses to the discovery." No motion for extension was filed, however, so as a technical matter Ms. Sexe did not obtain an extension of time. On the other hand, if her affidavit is true, Mr. Skorheim's arguments amount to unacceptable sharp practice on his part. Resolving the various motions is time consuming as it is, and I will not become bogged down in trying to determine exactly what transpired between counsel. However, I suggest that both counsel strictly comply with the rules to avoid these types of controversies. I further admonish them that the Court condemns sharp practice and expects counsel to conduct themselves courteously and professionally in discovery matters.

With that said, I have reviewed each of the discovery requests to which an objection was interposed. Most appear to relate to the question of coverage. National Union concedes coverage. However, many could possibly lead to discoverable evidence concerning petitioner's estoppel argument, including the identity of the actual employer and whether the employer and its agents conducted themselves in a manner which made it difficult or impossible for petitioner to give notice of his injury. National Union has argued that petitioner made no attempt to give notice as one reason for ignoring the discovery. That argument, however, goes to the merits of the case. The Court will not cut off discovery so long as it "appears reasonably calculated to lead to the discovery of admissible evidence," Rule 26(b)(1), Mont.R.Civ.P. Responses to Request for Production No. 1 and Interrogatories Nos. 2, 3 and 5 could conceivably lead to the discovery of admissible evidence and must therefore be fully answered.

In accordance with the foregoing discussion, IT HIS HEREBY ORDERED as follows:

- 1) National Union's motion concerning the admission of the transcript of a deposition of Janet Weiringa is **denied**.
- 2) National Union's motion to compel petitioner to supplement his previous discovery answers is **denied** as moot.
- 3) Petitioner's motion to compel discovery answers is **granted in part** and **denied in part**. National Union is **ordered** to respond fully to petitioner's Request for Production No. 1 and to Interrogatories Nos. 2, 3 and 5.
- 4) The time for deposing Janet Weiringa is hereby extended up to and including March 18, 1994.

DATED in Helena, Montana, this 3rd day of February, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim
Mr. Thomas A. Marra