

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MT WCC 74

WCC No. 9907-8280

STATE COMPENSATION INSURANCE FUND

Petitioner/Insurer

vs.

**MONTANA SIGN, SKINNER ENTERPRISES LIFESTYLE HOMES
and ANDY SKINNER**

Respondents/Purported Employers

DANIEL GLOVER

Claimant/Respondent.

ORDER REGARDING MOTION TO COMPEL

Summary: State Fund moved to compel responses to interrogatories and requests for production in a case involving whether claimant was injured in the course and scope of an employment covered by a policy with State Fund. Respondent provided no discovery at all, but objected to each interrogatory and request to produce with identical language. Among other things, respondent contended the number of interrogatories exceeded the Court's limitation of 20 interrogatories (ARM 24.5.323(6)) if subparts were counted.

Held: While the interrogatories contain some subparts, most subparts are merely specification of the information needed to answer the interrogatory and should not be counted separately. Given that, the interrogatories do not exceed the limit. Interrogatories seeking information about construction projects of respondents not close in time to the alleged injury are overbroad in time; respondents' objections to those interrogatories are sustained. The remaining interrogatories, designed to obtain information about employment of other people by the companies in question, and contractor-subcontractor relationships, are appropriate. Requests for production, seeking documents concerning the project at issue and which companies were responsible for it, are appropriate. Sanctions were awarded under ARM 24.5.326 because respondent stonewalled and provided no discovery at all, but were withdrawn sue sponte because the Court failed to provide respondent with a hearing prior to awarding sanctions. A hearing for that purpose was calendared.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.323(6). Discovery sanctions were awarded under ARM 24.5.326 because respondent stonewalled, provided no discovery at all, and objected by rote without consideration of individual discovery requests. Sanctions were withdrawn sue sponte, however, because the Court failed to provide respondent with a hearing prior to awarding sanctions. A hearing for that purpose was calendared.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.326. Where subparts contained within interrogatories merely specify the information needed to answer the interrogatory, they should not be counted as separate interrogatories for purposes of determining whether the number of interrogatories exceeded the Court's limitation of 20 interrogatories (ARM 24.5.323(6)).

Discovery: Interrogatories. Where subparts contained within interrogatories merely specify the information needed to answer the interrogatory, they should not be counted as separate interrogatories for purposes of determining whether the number of interrogatories exceeded the Court's limitation of 20 interrogatories (ARM 24.5.323(6)).

Discovery: Interrogatories. In a case involving whether claimant was injured in the course and scope of an employment covered by a policy with State Fund, interrogatories seeking information about construction projects of respondents not close in time to the alleged injury are overbroad in time; respondents' objections to those interrogatories are sustained. The remaining interrogatories, designed to obtain information about employment of other people by the companies in question, and contractor-subcontractor relationships, are appropriate.

Discovery: Requests for Production. In a case involving whether claimant was injured in the course and scope of an employment covered by a policy with State Fund, requests for production seeking documents concerning the construction project at issue and which companies were responsible for it, are appropriate.

Discovery: Sanctions. Discovery sanctions were awarded under ARM 24.5.326 because respondent stonewalled, provided no discovery at all, and objected by rote without consideration of individual discovery requests. Sanctions were withdrawn sue sponte, however, because the Court failed to provide respondent with a hearing prior to awarding sanctions. A hearing for that purpose was calendared.

¶1 The matter before the Court is the petitioner's, State Compensation Insurance Fund's, motion to compel further discovery responses to first discovery requests propounded to respondents Montana Sign, Skinner Enterprises, Lifestyle Homes, and Andy Skinner

(Skinner). The other respondent, Daniel Glover (claimant), joins in the State Fund's motion. (September 27, 1999 Letter of Carol A. Knight, Secretary to Norman H. Grosfield.)

¶12 The State Fund's discovery consisted of four interrogatories and ten requests for production. The respondents objected generally to all interrogatories on the ground that the interrogatories, with subparts, exceeded the Court's limitation of 20 interrogatories, ARM 24.5.323(6), and constituted "numerous and complex interrogatories which aren't limited to the important facts of the case and which are concerned with numerous minor details." With respect to each of the four individual interrogatories, respondents invoked the following mantra:

Object to this interrogatory as the same is oppressive, an annoyance, expensive, irrelevant, burdensome and the information is sought to embarrass these Respondents, and any response will not lead to any useful information necessary for resolution of the issues presented in the petition to this Court on the issue of the status of Daniel Glover.

(Respondents' Purported Employers' Responses to Petitioner's First Discovery Requests.) In response to each of the ten requests for production, the respondents invoked a similar mantra, objecting as follows:

Object to this request for production as the same is oppressive, an annoyance, expensive, irrelevant, burdensome and the informatin is sought to embarrass these Respondents, and any response will not lead to any useful information necessary for resolution of the issues presented in the petition to this Court on the issue of the status of Daniel Glover. Further, there is no time period specified and what transpired prior to the date of the incident is of no probative or evidentiary value to the issues presented here by this petition.

(*Id.*)

Discussion

I. Nature of Controversy

¶13 Respondent's objections to the individual interrogatories and requests for production must be considered in the factual context of this case. The petition alleges that Daniel Glover was injured while working at a residence owned by Andy Skinner. Skinner apparently owns or is principal shareholder in Montana Sign, Skinner Enterprises, and Lifestyle Homes, some of which are insured by the State Fund. State Fund alleges that at the time of the accident Glover was an employee of Andy Skinner, personally, hence its policies insuring Skinner companies do not provide coverage for the accident.

¶14 The State Fund's Brief in Support of Motion to Compel Discovery sets out the nature of the controversy, as follows:

This case centers around an injury on August 14, 1998 suffered by Daniel Glover while working on a residence owned by Andy Skinner. At the time of the injury Daniel Glover was a member of a construction partnership, KRD Builders (D. Glover depo. pg. 33, exhibit E). KRD Builders had in the past done work for Skinner Enterprises, Lifestyle Homes and possibly Montana Sign Supply (D. Glover depo. pgs. 16-18). All three of these companies or corporations are owned by Andy Skinner (A. Skinner depo. pgs. 5-7, exhibit A).

Andy Skinner alleges that Daniel Glover was working in 1998 as an independent contractor for Skinner Enterprises, Inc. building a deck for his personal residence (A. Skinner depo. pgs. 8-11 and Skinner Third Party Complaint, exhibit B). Skinner also alleges that, except for the day of injury, Glover was an independent contractor. However, while alleging that on August 14, 1998 Glover was an employee of Skinner Enterprises, Skinner admits that Glover was paid for his work on that day by Montana Sign Supply Company. (Skinners' Answers To Glovers' First Set Of Discovery Requests, exhibit C, Third Party Complaint and A. Skinner depo. pgs. 32-35). Andy Skinner also filed a First Report with the State Fund representing that Dan Glover was injured on August 14, 1998 while employed by Andy Skinner under the commercial name of Montana Sign Supply. (First Report, exhibit D) Skinner's explanation for the transition from independent contractor to employee without explanation for payment and reporting under Montana Sign Supply is that KRD builders did not perform adequately in the construction of the deck and therefore, instead of compelling them to fix their alleged mistakes, he hired Daniel Glover and Rulon Glover, Dan's father, as employees of Skinner Enterprises Inc. (Affirmative Defenses to Complaint, exhibit B, Third Party Complaint and A. Skinner depo. Pg. 35).

The Glovers' version of events is quite different. They claim that Andy Skinner directed everything they did on his personal residence. Skinner selected the materials and provided close supervision. (D. Glover depo. pg. 47 and R. Glover depo. pgs. 20-27, exhibit F) They indicate that no mention was made of "shoddy work" (D. Glover depo. pg. 59) and the designation of employees was something Andy Skinner did after the fact. For example a W-4 purporting to be signed by Daniel Glover dated August 12, 1998 was not in fact completed nor signed by him. It was instead signed by Kathy Glover several days after Daniel's injury at the direction of Andy Skinner (D. Glover depo. pgs. 38-43, R. Glover depo. pgs. 40-46 and K. Glover pgs. 30-36, exhibit G).

¶15 The State Fund identifies the following possible employment scenarios are:

- Glover was an employee of Skinner Enterprises, Inc., Montana Sign or Lifestyle Homes.
- Glover was an employee of Andy Skinner, individually, or of Andy and Carol Skinner, who are husband and wife.

- Glover, if an employee of Skinners personally or of one of the businesses, was a casual employee exempt from workers' compensation requirements.
- Skinner disregarded corporate entities in employing Glover, making Glover his personal employee.
- Glover was an independent contractor.

II. Number of Interrogatories

¶16 The four interrogatories certainly contain subparts which must be counted. However, some of the subparts ask for information that is essential to answering the main question, hence they are not subparts at all. For example, Interrogatory 4 asks:

INTERROGATORY NO. 4: Identify each and every construction project that Skinner Enterprises, Montana Sign or Lifestyle Homes has worked on as a general contractor. Include the dates of such work and the names of the owners of the projects.

If you count the "dates" and "names" as subparts, then this interrogatory is actually three interrogatories. But without information concerning dates and names, any answer would be meaningless, hence the interrogatory is singular. After considering what is essential to answering the main interrogatory, the Court counts only 15 interrogatories. Respondent's objection to the number of interrogatories is **overruled**.

III. Access to District Court Discovery

¶17 In their brief opposing discovery, respondents assert that the State Fund has access to discovery materials provided in connection with a district court case involving respondents and claimant. Assuming that is true, the State Fund is still entitled to answers, under oath, to its discovery in this case.

IV. Individual Interrogatories

¶18 While respondents have stonewalled all of the State Fund's interrogatories, some of their objections are meritorious, hence each interrogatory must be considered individually:

INTERROGATORY NO. 1: Identify each and every noncommercial residence that Skinner Enterprises, Montana Sign or Lifestyle Homes constructed or provided construction services for the past 10 years. For each such residence state the date; the owner(s) of the residence; the services performed; the company or companies involved; whether construction services were pursuant to written contract; the involvement of Andy Skinner in such project(s); and the names of all subcontractors and employees performing work for Skinner Enterprises, Montana Sign or Lifestyle Homes.

The question raised in the present case is whose, if anyone's, employee claimant was. Information regarding past construction projects would be remotely relevant at best. Even if the Skinner companies played loose with their employees and contractors on non-commercial residences constructed in past years, the question of Glover's status depends on his unique facts. This interrogatory is overly broad in time and the likelihood it will provide information leading is too remote to justify the burdensome nature of examining ten years of records for three companies. Objections **sustained**.

INTERROGATORY NO. 2: Has Andy Skinner, Skinner Enterprises, Montana Sign or Lifestyle Homes ever retained a contractor or subcontractor such as KRD Builders and then considered such subcontractors to be employees? If so, state the name of each such contractor or subcontractor including dates of retention as a contractor or subcontractor and dates of retention as employees. Also include the company that the contractor or subcontractor was retained by and the company that the contractor or subcontractor was subsequently employed by.

This interrogatory is narrower than the last one and requests information concerning circumstances similar to those presented in the present case. If Skinner and his companies had a practice of frequently changing their relationships with their contractors, that evidence may establish a custom, pattern, or practice relevant to the nature of the relationship in the present case or at least Skinner's credibility with respect to his testimony regarding the changing relationship in this case. The potential relevancy of the information sought is more direct than in the case of the previous interrogatory, moreover Skinner and his companies have not provided specific information demonstrating that given its potential relevancy the interrogatory is unduly burdensome or oppressive. Objections **overruled**.

INTERROGATORY NO. 3: Identify all employees and their supervisors of Montana Sign, Skinner Enterprises, and Lifestyle Homes who worked on the "Skinner Residence". Include the dates of such employment and the company or companies each employee and supervisor worked for and the company or companies which each employee and supervisor was paid from and the services each such employee and supervisor performed.

This interrogatory seeks information which is plainly related to the specific issues in the present case and seeks information only with respect to the specific project on which claimant worked. It is plainly not oppressive or burdensome. Respondents' objections to this interrogatory are **frivolous**. Objections **overruled**.

INTERROGATORY NO. 4: Identify each and every construction project that Skinner Enterprises, Montana Sign or Lifestyle Homes has worked on as a general contractor. Include the dates of such work and the names of the owners of the project.

My comments concerning this interrogatory are the same as my comments with regard to Interrogatory No. 1. Objections **sustained**.

V. Requests for Production

¶19 The requests for production are as follows:

REQUEST FOR PRODUCTION NO. 1: Produce all bills and statements for services or goods or materials from Skinner Enterprises, Montana Sign and Lifestyle Homes to Andy Skinner and/or Carol Skinner and/or Andy and Carol Skinner for the construction of the "Skinner Residence".

REQUEST FOR PRODUCTION NO. 2: Produce all bills and statements for goods, materials and services from entities other than Skinner Enterprises, Montana Sign and Lifestyle Homes to Andy Skinner and/or Carol Skinner and/or Andy and Carol Skinner for the construction of the "Skinner Residence".

REQUEST FOR PRODUCTION NO. 3: Produce all written agreements regarding the construction of the "Skinner Residence" between Skinner Enterprises, Montana Sign and Lifestyle Homes and Andy Skinner or Carol Skinner or Andy and Carol Skinner.

REQUEST FOR PRODUCTION NO. 4: Produce all written agreements regarding the construction of the "Skinner Residence" between entities other than Skinner Enterprises, Montana Sign or Lifestyle Homes and Andy Skinner or Carol Skinner or Andy and Carol Skinner.

REQUEST FOR PRODUCTION NO. 5: Produce all insurance applications, binders and policies insuring or attempted to insure the "Skinner Residence". Include coverage for Andy and Carol Skinner individually or as husband and wife which may provide insurance coverage for the "Skinner Residence."

REQUEST FOR PRODUCTION NO. 6: Produce copies of all bids for construction services or estimates for construction services and/or materials on the "Skinner Residence". Include such bids or estimates even if for time and material. Include any bids or estimates from Skinner Enterprises, Montana Sign or Lifestyle Homes.

REQUEST FOR PRODUCTION NO. 7: With regard to the "Skinner Residence", produce copies of all accounting and financial records which memorialize or otherwise reflect transactions between Skinner Enterprises, Montana Sign or Lifestyles Homes and Andy Skinner or Carol Skinner or Andy and Carol Skinner.

REQUEST FOR PRODUCTION NO. 8: Produce copies of all canceled checks or other documents evidencing payments from Andy Skinner or Carol Skinner or Andy and Carol Skinner to Skinner Enterprises, Montana Sign or Lifestyle Homes for the construction of the "Skinner Residence".

REQUEST FOR PRODUCTION NO. 9: Produce copies of all mortgages or other loans utilized to finance the construction of the "Skinner Residence".

None of respondents' objections have any merit whatsoever. Each request seeks information concerning construction of the Skinner residence and whether Skinners individually or one or more of the Skinner companies was responsible for the construction. That information is relevant to the Court's determining who employed or contracted with claimant at the time of his injury. Objections **overruled**.

VI. Sanctions

¶10 State Fund seeks sanctions for respondents' failure to provide discovery.

¶11 The respondents stonewalled the State Fund's interrogatories and requests for production. They interposed identical objections with respect to each discovery request. They answered not a single interrogatory or request for production. Their objections were unsupported by any information supporting their assertions that the interrogatories and requests were burdensome or oppressive. In most cases, their objections were frivolous. **The bottom line is, they provided no discovery at all.**

¶12 Sanctions are governed by ARM 24.5.326, which provides:

RULE 24.5.326 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. With respect to a motion to compel discovery, the court may, at the request of a party or upon its own motion, 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. Sanctions shall be imposed against the non-prevailing party unless the party's position with regard to the motion to compel was substantially justified or other circumstances make sanctions unjust. 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. Prior to any imposition of sanctions, the court shall provide the party who may be sanctioned with the opportunity for a hearing.

This Court's rule is consistent with discovery policies articulated by the Montana Supreme Court:

Imposition of sanctions for failure to comply with the rules of discovery are regarded with favor. Rule 37, M.R.Civ.P., sanctions are imposed in order to deter unresponsive parties. In *Landauer v. Kehrwald* (1987), 225 Mont. 322, 325, 732 P.2d 839, 841, we stated:

A party displaying an attitude of unresponsiveness to the judicial process warrants the imposition of sanctions including dismissal.

Huffine v. Boylan, 239 Mont. 515, 517, 782 P.2d 77, 78 (1989) (citations omitted). I find that the State Fund is entitled to its attorney fees and expenses in connection with its Motion to Compel Discovery.

ORDER

¶13 1. Respondents shall fully answer the State Fund's interrogatories numbers 2 and 3.

¶14 2. Respondents shall fully respond to and furnish the State Fund with those documents requested in each and every one of the State Fund's requests for production.

¶15 3. The State Fund is entitled to sanctions in the form of attorney fees and expenses incurred in prosecuting its Motion to Compel Discovery. It shall submit affidavits concerning the number of hours spent in connection with the motion, a reasonable hourly rate for attorney fees, and its expenses within 20 days of this Order. Respondents shall have 10 days thereafter to submit their objections and counter-affidavits.

DATED in Helena, Montana, this 24th day of November, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas E. Martello

Mr. Norman H. Grosfield

Mr. Robert T. Cummins

Date Submitted: September 28, 1999

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1999 MTWCC 74A

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Petitioner

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**MONTANA SIGN, SKINNER ENTERPRISESLIFESTYLE HOMES
and ANDY SKINNER**

Respondents/Purported Employers

DANIEL GLOVER

Claimant/Respondent.

SUA SPONTE ORDER WITHDRAWING SANCTIONS

¶1 On November 24, 1999, the Court issued its Order Regarding Motion to Compel. In that Order, I imposed sanctions on respondents. In doing so, I overlooked the last sentence of Rule 24.5.326, which provides:

Prior to any imposition of sanctions, the court shall provide the party who may be sanctioned with the opportunity for hearing.

Opportunity for hearing was not provided, thus the Court violated its own rule.

¶2 Accordingly, the sanctions imposed under the Order are **withdrawn and rescinded**.

¶3 A hearing on the petitioner's motion for sanctions is **set** on Thursday, December 16, 1999, 8:00 a.m., fifth floor small courtroom, Federal Building, 301 South Park, Helena, Montana.

¶4 SO ORDERED.

DATED in Helena, Montana, this 30th day of November, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Thomas E. Martello

Mr. Norman H. Grosfield

Mr. Robert T. Cummins

Lesofski & Walstad Court Reporting