

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 32

WCC No. 9308-6872

STEVEN K. YAGER

Petitioner

vs.

**MONTANA SCHOOLS GROUP INSURANCE/
ALEXIS RISK MANAGEMENT SERVICE**

Respondents/Insurers for

LIVINGSTON SCHOOL DISTRICT NOS. 4 AND 1

Employer.

**ORDER DENYING MOTION TO COMPEL IN PART;
ORDER GRANTING MOTION TO COMPEL IN PART**

Petitioner, Steven K. Yager (claimant), previously filed a motion to compel the production of investigative documents contained in the claim file of the respondent insurers, Montana Schools Group Authority and Alexis Risk Management Service. On March 14, 1994, the Court entered an Order directing respondents to provide claimant with copies Mr. Warren's investigative reports and to provide the Court with copies of Mr. Dunbar's reports for purposes of an *in camera* inspection. Respondents have complied with the Order.

There are actually three sets of documents at issue. The first two are investigative reports prepared by Pete Dunbar, an investigator working for respondents and directed to Robert Leonhardt, an employee of respondent. The two reports are dated December 18, 1992 and January 18, 1993. The third set of documents consists of two letters, dated January 6 and January 11, 1993, from investigator Mike Warren to Pete Dunbar. Respondent has apparently provided Mr. Warren's letters to claimant without redaction. The Court's present review is therefore limited to Mr. Dunbar's investigative reports.

Mr. Dunbar has not been identified as a potential witness by respondent. As the Court indicated in its previous order, unless Mr. Dunbar's reports include statements made by Mr. Warren which are otherwise discoverable, Mr. Dunbar's report need not be disclosed. Upon review of Mr. Dunbar's two reports, the Court found no statements of Mr. Warren included within them.

Claimant also seeks production of the investigative reports on the basis that they were used to refresh the recollection of Karen Wiles prior to her deposition. Claimant relies on Rule 612 Mont.R.Evid. as authority. Rule 612 permits the Court "in its discretion" and "in the interest of justice" to order disclosure of a writing used to refresh a witness' recollection before testifying. The Court has reviewed Ms. Wile's deposition testimony. In light of that review, the Court has identified certain portions of the investigative reports which it believes should be provided. In Ms. Wile's deposition, she testified that claimant was observed driving fenceposts, but upon further questioning she was unsure whether he was actually driving fenceposts or building a fence. (Wiles Dep. at 48-49.) To clarify this issue, portions of the December 18, 1992 report concerning claimant's driving fenceposts and building or fixing a fence shall be produced. Those portions are contained at page one, fifth paragraph; page two, fourth paragraph; and page three, second paragraph, second sentence.

Ms. Wiles was also questioned in her deposition about other post-injury activities that claimant was observed performing. Ms. Wiles testified to a number of these activities, but did not mention certain activities which are referred to in the reports, specifically observations of claimant working on an addition to his house and plowing snow with a tractor. Respondent shall produce the portions of the report which refer to those activities, specifically, located at: the December 18, 1992 report at page one, fifth paragraph; page three, paragraph seven, lines four and five; and on the January 18, 1993 report, page one, paragraph 4.

IT IS THEREFORE ORDERED AS FOLLOWS:

The claimant's motion to compel production is **granted** as to the specific paragraphs, sentences, and lines of the investigative report which are identified in this Order, and is **denied** as to the remainder of the investigative reports.

DATED in Helena, Montana, this 7th day of April, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. Leo S. Ward