IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 25

WCC No. 2010-2630

BRUCE MARTIN

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, ORDER GRANTING PETITIONER'S MOTION TO EXCLUDE CONSIDERATION OF EVIDENCE OF PROBATION VIOLATION, ORDER DENYING PETITIONER'S MOTION TO COMPEL, AND ORDER DENYING PETITIONER'S MOTION TO SUPPLEMENT RECORD

Summary: Petitioner alleges that he injured his low back while preparing metal siding for installation on a job site. Respondent denied Petitioner's claim, alleging that its investigation led it to conclude that Petitioner was not injured in the course and scope of his employment. In separate motions, Petitioner moves this Court to exclude evidence regarding an alleged probation violation, moves to compel Respondent to produce an investigative report, and moves to supplement the record with a 2007 W-2 form to refute the employer's testimony that Petitioner first worked for him in March 2008.

Held: Petitioner has not proven that he was injured as a result of an industrial accident. Petitioner's motion to exclude evidence of an alleged probation violation is granted because the evidence is not relevant to the issue in this case. Petitioner's motion to compel production of an investigative report is denied because the report is protected work product. Petitioner's motion to supplement the record is denied because it is irrelevant as to whether Petitioner's first day of employment with the employer occurred in 2007 or 2008.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Although Petitioner's treating physician identified

objective medical findings to support Petitioner's claim of lumbar spine problems, Petitioner did not establish that his injury occurred because of a specific event on a single day or during a single work shift. Neither his co-worker nor his employer could corroborate his account of an industrial accident. Petitioner and his co-worker both testified that Petitioner said nothing about an injury at the time Petitioner alleged it occurred, and Petitioner's employer testified that Petitioner specifically denied injuring himself on the job. Petitioner contradicted himself on this point between his trial and deposition testimony. Petitioner failed to establish that his injury was caused by an accident within the meaning found in § 39-71-119, MCA.

Injury and Accident: Causation. Although Petitioner's treating physician identified objective medical findings to support Petitioner's claim of lumbar spine problems, the evidence demonstrated that Petitioner had had recurring sciatic pain for a significant period of time prior to the date of his alleged industrial injury. Furthermore, neither Petitioner's co-worker nor his employer could corroborate Petitioner's account of an industrial accident, and between his deposition and trial testimony Petitioner contradicted himself on whether he reported an injury to his employer. Petitioner failed to prove that his lumbar spine condition was caused by an industrial injury.

Discovery: Privileges: Private Investigators. More than two months after trial, Petitioner moved to compel Respondent to disclose certain documents and information contained within surveillance reports. Since this case had already been tried and Respondent never named the investigator as a witness nor attempted to introduce the surveillance report or its contents into evidence, the report is protected as work product and Petitioner's motion was denied.

Evidence: Objections – Timeliness. Where Petitioner had known for some time that his employer did not recall with certainty the date of Petitioner's initial employment, he had ample time prior to trial to supplement the record with tax records proving that he had worked for the employer longer than the employer recalled. Since he had ample notice that his employer did not accurately recall his date of hire, he had ample opportunity to submit his tax form as an exhibit and his motion to supplement the record was denied.

¶ 1 The trial in this matter occurred on March 18, 2011, at the Workers' Compensation Court. Petitioner Bruce Martin was present and was represented by Lucas J. Foust. Greg E. Overturf represented Respondent Montana State Fund (State Fund). Claims adjuster Michele Fairclough was also present.

¶ 2 With the Court's leave, Martin filed a post-trial motion to exclude consideration of evidence of a probation violation. Martin also filed a motion to compel, on which the Court heard oral argument on July 1, 2011, and a motion to supplement the record. These motions are resolved below.

¶ 3 Exhibits: I admitted Exhibits 1 through 19 without objection. I admitted Exhibits 20 and 21 after Respondent withdrew its objection and stipulated to their admission.

¶ 4 Witnesses and Depositions: The parties agreed that the depositions of Martin, Jesse Chase, Philip Aumann, Barry Hollander, and Michele Fairclough can be considered part of the record. Martin, Hollander, Fairclough, and Chase testified at trial.

¶ 5 Issues Presented: The Final Pretrial Order sets forth the following issue:

> Was Bruce Martin injured as a result of an industrial accident as claimed in his petition?[1]

FINDINGS OF FACT

¶ 6 Martin testified at trial. I did not find him to be a credible witness. I found it difficult to reconcile the discrepancies between Martin's deposition and trial testimony. I found his testimony that he suffered a significant injury yet continued working without any indication to his coworker or supervisor not credible. Where Martin's testimony contradicts the testimony of other witnesses, I give less weight to Martin's version of events.

¶ 7 Martin currently resides in Bozeman. He grew up in the Lewistown area and worked in carpentry and ranching. In 1994, Martin broke his neck in a motor vehicle accident; he did not injure his low back in the 1994 accident.[2]

---

[1] Final Pretrial Order at 2.

[2] Trial Test.

¶ 8 Martin testified that he began working for Chase Skogen Homes, owned by Jesse Chase, in October 2007. His job duties consisted mainly of framing and finish work.[3] Martin testified at his deposition that he ceased to work for Chase in August 2009 because he was laid off.[4] At trial, Martin admitted that although he testified at his deposition that he had been laid off, he actually left his employment because he had violated his probation and was incarcerated.[5]

¶ 9 Approximately one week before his industrial accident, Martin returned to work for Chase.[6] After he returned to work, he had some problems with his back "knotting up" and his sciatic nerve would "kick in," causing a pinching sensation in his back with numbness and aching in his legs. He testified that he had had problems with his sciatic nerve while working for Chase in the spring of 2008 while removing windows from a residence. Martin testified that his sciatic problems occasionally recurred, but usually resolved if he sat or laid down and stretched.[7]

¶ 10 Martin did not file a workers' compensation claim for the sciatic problems he experienced after the incident lifting the windows. However, he alleges that Chase paid for him to see a chiropractor.[8] Martin testified that he saw a chiropractor several times and Chase paid in cash for the treatments.[9]

¶ 11 In February 2009, Martin began to treat with Dr. Aumann for ongoing back problems. Martin testified that these problems were in his upper back and related to his previous neck surgery. Martin last saw Dr. Aumann on April 1, 2009. Martin did not seek any chiropractic treatment after April 1, 2009, until June 2010.[10]

¶ 12 On June 28, 2010, Martin treated with Dr. Michael A. Lebrecht. Martin testified that his upper back was "knotted up" and that he had been having issues with sciatica.[11]

---

[3] Trial Test.

[4] Martin Dep. 16:4-23.

[5] Trial Test.

[6] Martin Dep. 16:24 - 17:2.

[7] Trial Test.

[8] Trial Test.

[9] Martin Dep. 33:2-20.

[10] Trial Test.

[11] Trial Test.

Martin testified that he had previously seen Dr. Lebrecht in the spring of 2008 for sciatic pain.[12]

¶ 13 On June 29, 2010, Martin spent his work shift installing metal siding with Barry Hollander. Each sheet of siding was approximately two feet wide by ten to twelve feet long and came with a protective plastic veneer on it. Martin testified that he pulled the veneer off each sheet and cut the siding to the size Hollander requested. Hollander then installed it. Martin testified that he and Hollander had been installing the siding for approximately three days at that point, and that they had installed several hundred pieces of siding.[13]

¶ 14 On cross-examination, Martin clarified that he and Hollander worked together at the start of each shift to remove the plastic off several sheets of siding. Martin was only responsible for single-handedly removing the plastic if they ran out of prepared sheets after Hollander began installing. Martin admitted that for the majority of the time, he and Hollander worked together to remove the veneer.[14]

¶ 15 Martin testified that on June 29, he was pulling plastic veneer off of a sheet of siding when he felt a sensation like liquid flowing down his back into his legs. Martin stated that the sensation was not the same as the problems which had caused him to seek treatment with Dr. Lebrecht the previous day. Martin testified that he kept working because he did not want to jeopardize his employment.[15]

¶ 16 Martin testified that his injury occurred at approximately 10:00 a.m.[16] He finished his normal work shift that day.[17] Martin did not say anything to Hollander when he injured his back.[18] That evening, Martin took ibuprofen for his back pain.[19]

¶ 17 On June 30, 2010, Martin reported to work at 7:00 a.m.[20] He was at the job site for approximately one hour.[21] Martin then informed Hollander that he was in too much

---

[12] Martin Dep. 30:7-14.

[13] Trial Test.

[14] Trial Test.

[15] Trial Test.

[16] Martin Dep. 20:3-7.

[17] Martin Dep. 20:8-11.

[18] Martin Dep. 21:2-4.

[19] Martin Dep. 22:9-13.

[20] Martin Dep. 22:25 – 23:2.

pain to work.[22] Martin testified that he notified Chase of his injury by calling him on the telephone and explaining that he was in too much pain to work. Martin stated that Chase interrupted him and urged him to rest and return to the job, and so he did not get the opportunity to specifically state that he believed he had injured himself on the job. On cross-examination, Martin admitted that he had testified at his deposition that during that phone conversation, Chase asked if the injury was work-related and Martin said yes.[23]

¶ 18 Martin left the job site between 8:30 and 9:00 a.m.[24] He went home and rested for the remainder of the day.[25] Martin made an appointment to see Dr. Aumann.[26]

¶ 19 On July 3, 2010, Martin went to the Bozeman Urgent Care Center (Urgent Care), complaining of bilateral low-back pain radiating into the backs of his thighs with numbness into his calves. Martin reported that he had been lifting and carrying sheet metal on uneven ground for two days. He was assessed with low-back pain with "LS strain" and informed that his symptoms were likely a muscle strain and not a disk injury.[27]

¶ 20 On July 5, 2010, Martin went to Urgent Care for follow-up care. He was referred back to Dr. Aumann and released to return to work with significant restrictions.[28] Martin has continued to treat with Dr. Aumann since then.[29]

¶ 21 On approximately July 23, 2010, Martin filed a workers' compensation claim with State Fund.[30] He indicated that he was injured at 10:00 a.m. on June 29, 2010. He described the accident: "I was taking plastic off of metal siding and I pinched my siactic [sic] nerve in my lower back. I think I twisted wrong."[31]

---

[21] Martin Dep. 23:13-14.

[22] Martin dep. 24:5-19.

[23] Trial Test.

[24] Martin Dep. 25:3-5.

[25] Martin Dep. 25:22-24.

[26] Martin Dep. 26:1-12.

[27] Ex. 17 at 1.

[28] Ex. 12 at 1.

[29] Trial Test.

[30] Trial Test.

[31] Ex. 5 at 2.

¶ 22 Martin testified that he personally filed his claim because Chase insisted that Martin's back problem was not work-related. Martin further alleged that he initially attempted to report his back problem as a work-related injury when he presented to Urgent Care on July 3, 2010, but Chase informed Urgent Care that Martin was a subcontractor and not covered by workers' compensation insurance. Martin testified that he called Chase and Chase informed him that he intended to "fight me over tooth and nail" regarding the claim. Martin waited a few weeks and then filed the claim himself. Martin ceased to try to resolve the situation with Chase because he thought Chase was trying to discourage him from filing a claim.[32]

¶ 23 Martin testified that he has been unable to work since his industrial accident because Dr. Aumann has him on work restrictions that preclude him from finding employment.[33]

¶ 24 Hollander testified at trial. I found him to be a credible witness. Hollander has intermittently worked for Chase Skogen Homes as an independent contractor for the past two years.[34]

¶ 25 Hollander testified that at the start of each shift, he and Martin would get their tools ready for the day. Then they would uncrate and remove the plastic from approximately 50 pieces of siding.[35] They prepared the siding for installation by opening the crate, pulling out the siding pieces, removing the plastic coating from the siding, and placing it on a table.[36] After the siding was stacked, Martin cut each piece of siding and brought it to Hollander, who installed it on the building.[37]

¶ 26 On a productive day, they installed approximately 70 pieces of siding. If they ran out of prepared siding pieces, Martin peeled the plastic from the siding by himself. Hollander sometimes helped Martin so that he could get back to installation more quickly.[38] Hollander testified that he could not recall a situation where Martin would have been peeling plastic off of pieces of siding by himself at 10:00 a.m. because there

---

[32] Trial Test.

[33] Trial Test.

[34] Trial Test.

[35] Trial Test.

[36] Trial Test.

[37] Trial Test.

[38] Trial Test.

would have been peeled siding available from what the two of them prepared at the start of the shift.[39]

¶ 27 Hollander testified that on the morning of June 30, 2010, Martin approached him first thing in the morning, announced that he could no longer do the work, and left. Hollander never spoke to him again.[40] Hollander assumed that Martin left because he was in pain, because throughout the time Martin and he had worked together, Martin had periodically complained about problems with his sciatic nerve.[41] Hollander further testified that Martin did not say anything about being injured on the job.[42] Later, Chase asked Hollander if Martin had been injured on the job and Hollander told Chase that he had not.[43]

¶ 28 Chase testified at trial. I found him to be a credible witness. Chase owns a residential and commercial contracting business called Chase Skogen Homes. Chase testified that he knew of Martin's previous neck injury and he knew that Martin did not like working on roofs, so he gave Martin lighter job duties and used him as a "cut man" rather than as an installer. Chase testified that Martin was a good worker and was particularly skilled at detail work and trim.[44]

¶ 29 Chase testified that in June 2010, he was supervising the large job site on which Martin was working. He would typically see Martin four or five times a day as he checked on projects on the job site.[45] On June 30, 2010, Martin called him at approximately 10:00 a.m. and stated that he was having problems with sciatica and that he needed to go home. Chase testified that he asked Martin if he had injured himself on the job and Martin responded that he had not. Chase recommended that Martin go home and rest. Chase testified that Hollander confirmed to him that Martin had not gotten injured on the job.[46]

¶ 30 Chase testified that the first time that he learned Martin was claiming a work-related injury was when he received a phone message from Urgent Care sometime

---

[39] Trial Test.

[40] Trial Test.

[41] Trial Test.

[42] Trial Test.

[43] Hollander Dep. 21:9-20.

[44] Trial Test.

[45] Trial Test.

[46] Trial Test.

after July 4, 2010, stating that the clinic needed Chase to pay for Martin's visit.[47] Chase called Martin and Martin told Chase that he thought he might have gotten injured on the job.[48]

¶ 31 Chase testified that he pays all his business expenses with checks managed by his bookkeeper. He testified that he has never given Martin cash to pay for chiropractic visits. Chase further testified that in two instances with other employees, he paid for medical bills rather than filing a workers' compensation claim. Chase stated that in both of those instances, he either paid with a company check or company credit card.[49]

¶ 32 Philip F. Aumann is a doctor of chiropractic.[50] Dr. Aumann first treated Martin on February 19, 2009.[51] During that visit, Dr. Aumann took a history of Martin's back and neck conditions.[52] Dr. Aumann also ordered x-rays of Martin's back. Dr. Aumann testified that the x-rays show a slight posteriority of the L5 vertebra which creates a slight stenosis of the L5-S1 intervertebral foramen. The x-ray also reveals mild stenosis of the L4-5 foramen.[53] Dr. Aumann noted that Martin had a preexisting fusion of C4 through C6 and that he complained of right ulnar nerve pain and some stenosis in the cervical spine.[54]

¶ 33 Although Martin testified that the visits were only for treatment related to his earlier neck injury, Dr. Aumann noted that Martin reported stiffness and pain in his lumbar spine and specific complaints in his right hip and right sacroiliac joint radiating into his right leg with right footdrop problems, and occasional left leg numbness. Dr. Aumann began treating Martin's lower back.[55] Dr. Aumann testified that Martin received 11 treatments between February 23 and April 10, 2009, and at each treatment he performed full spine adjustments and treated the cervical, thoracic, lumbar, and pelvic

---

[47] Chase Dep. 13:1-13.

[48] Trial Test.

[49] Trial Test.

[50] Aumann Dep. 5:8-9.

[51] Aumann Dep. 6:21-24.

[52] Aumann Dep. 9:13-18.

[53] Aumann Dep. 16:12 – 17:8.

[54] Aumann Dep. 9:23 – 10:4.

[55] Aumann Dep. 10:5-21.

regions of the spine.[56] Martin ended his treatment because his condition was stable and he was basically pain free.[57]

¶ 34 On June 17, 2010, Martin returned to Dr. Aumann and reported right arm numbness, cervical spine pain, and upper thoracic pain. Dr. Aumann made adjustments to Martin's spine, wrists, right hip, and T1, C6, and C2 vertebrae.[58] Dr. Aumann did not make any adjustments to Martin's lumbar spine.[59] Dr. Aumann testified that he palpated that region of Martin's spine and did not find any problems at that time.[60]

¶ 35 Dr. Aumann testified that Martin arrived at his office on June 30, 2010, complaining of a back injury the previous day which occurred while Martin was pulling plastic off of metal siding. Martin described constant lower back pain since the accident at the lumbosacral junction. Martin also complained of bilateral leg numbness down into his calves.[61] Dr. Aumann suspected that Martin might have a disk herniation between L4-5 and L5-S1.[62] Dr. Aumann testified that an MRI would be the best way to determine if Martin had herniated or ruptured a disk, but that standard chiropractic tests demonstrated that Martin had a disk inflammation of some nature.[63]

¶ 36 Dr. Aumann testified that he has seen Martin approximately once a week since June 30, 2010.[64] Dr. Aumann estimated that Martin has improved approximately 50%, but he has frequent relapses and exacerbations.[65] Dr. Aumann opined that Martin's improvement plateaued some months ago, and that his adjustments simply maintain his current level.[66] Dr. Aumann opined on a more-probable-than-not basis that Martin's injury was the result of the industrial accident he described.[67]

---

[56] Aumann Dep. 11:1-9.

[57] Aumann Dep. 12:13-16.

[58] Aumann Dep. 13:7-19.

[59] Aumann Dep. 13:20-22.

[60] Aumann Dep. 15:9-16.

[61] Aumann Dep. 18:6-25.

[62] Aumann Dep. 20:8-14.

[63] Aumann Dep. 21:5-14.

[64] Aumann Dep. 21:15-21.

[65] Aumann Dep. 22:8-14.

[66] Aumann Dep. 22:15-20.

[67] Aumann Dep. 25:2-8.

¶ 37 Dr. Aumann wrote to Fairclough on August 9, 2010, in response to Fairclough's August 6, 2010, letter and recommended that Martin participate in physical therapy for muscle strengthening and rehabilitation to help strengthen the lumbar spine. Fairclough did not authorize the treatment.[68] Dr. Aumann stated that on June 17, 2010, Martin came to his office complaining of right arm numbness, neck pain, and upper thoracic pain. Dr. Aumann stated that Martin had no complaint of lower back pain; however, his right hip socket was tight and Dr. Aumann made an adjustment to that area. Dr. Aumann further stated that he had previously seen Martin for 11 visits occurring between February 23 and April 1, 2009. Dr. Aumann's original diagnoses were: cervical subluxation, brachial neuritis, cervical spondylosis, lumbar subluxation, sacroiliac subluxation, and sciatica. Dr. Aumann stated that he released Martin from his care in stable condition after his April 1, 2009, appointment.[69] Dr. Aumann further stated that his current diagnoses of Martin included: sciatic neuritis, lumbar intervertebral disk syndrome, lumbar sprain/strain injury, lumbar subluxation, and sacroiliac subluxation. He opined that Martin's prognosis was slow and guarded and suggested physical therapy to speed healing. Dr. Aumann's treatment plan consisted of additional chiropractic care in conjunction with physical therapy.[70] Dr. Aumann testified that he would recommend an MRI to determine the extent of Martin's disk herniation, and possibly subsequent orthopedic treatment if warranted.[71]

¶ 38 On August 9, 2010, Dr. Aumann informed State Fund that Martin was not at maximum medical improvement (MMI) and that he was currently unable to work in any capacity. Dr. Aumann predicted that Martin might be able to return to work in September if he received physical therapy.[72]

¶ 39 Fairclough testified at trial. I found her to be a credible witness. Fairclough has been a claims adjuster for approximately 21 years.[73] She has worked at State Fund for approximately 7 years.[74] Fairclough testified that she conducts an investigation whenever she receives a new claim. She contacts the employer, the injured worker,

---

[68] Aumann Dep. 22:23 – 23:12.

[69] Ex. 3 at 17.

[70] Ex. 3 at 18.

[71] Aumann Dep. 23:13-20.

[72] Ex. 3 at 19.

[73] Fairclough Dep. 5:21-22.

[74] Fairclough Dep. 6:4-6.

and the medical provider and makes a liability determination based on the information she obtains.[75]

¶ 40 Fairclough first spoke with Martin on August 5, 2010. On August 23, 2010, she spoke with Chase. On August 23, 2010, Fairclough informed Martin that State Fund was denying his claim because she had been unable to verify that he was injured in the course and scope of his employment.[76] Fairclough testified that in making her decision to deny Martin's claim, there was no single factor which led to the denial; rather, her denial was based upon consideration of several different pieces of information.[77] Fairclough testified that her investigation revealed too many inconsistencies for her to conclude that Martin was injured as he claimed.[78]

CONCLUSIONS OF LAW

¶ 41 This case is governed by the 2009 version of the Workers' Compensation Act since that was the law in effect at the time of Martin's industrial accident.[79]

¶ 42 Martin bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[80] Martin has not met his burden of proof.

Was Bruce Martin injured as a result of an industrial accident as claimed in his petition?

¶ 43 Under § 39-71-119, MCA, injury and accident are defined, in pertinent part, as internal or external physical harm to the body that is established by objective medical findings and that is caused by an unexpected traumatic incident or unusual strain caused by a specific event on a single day or during a single work shift.

¶ 44 In the present case, Dr. Aumann identified objective medical findings to support Martin's claim of lumbar spine problems. However, Martin has not established that this injury occurred because of a specific event on a single day or during a single work shift. I did not find Martin's testimony credible. Neither Hollander, who was working alongside

---

[75] Fairclough Dep. 7:1-8.

[76] Ex. 10 at 1.

[77] Fairclough Dep. 7:16-22.

[78] Trial Test.

[79] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[80] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 598 P.2d 1099 (1979).

Martin, nor Martin's employer Chase could corroborate Martin's account of injuring his back on June 29, 2010, while pulling a piece of plastic veneer from a piece of metal siding. Hollander, as well as Martin himself, testified that Martin said nothing about the injury at the time it allegedly occurred. Chase testified that when he specifically asked Martin if he had injured himself on the job when Martin called him on June 30, 2010, Martin denied doing so. Martin testified at his deposition that he informed Chase that he had been injured on the job on June 29, 2010. At trial, however, Martin testified that Chase interrupted him and that Martin never had the opportunity to inform him one way or the other as to whether he had suffered an injury at work.

¶ 45 The evidence in this case demonstrates that Martin had had recurring sciatic pain for a significant period of time prior to June 29, 2010. Martin has failed to establish with credible evidence that anything occurred on June 29, 2010, to either cause or aggravate his condition. I therefore conclude Martin was not injured by an industrial accident as claimed in his petition.

¶ 46 To receive an award of attorney fees or a penalty, a party must first have a compensable claim.[81] Since Martin has not established his entitlement to workers' compensation benefits, his argument that the Court should entertain his plea for a penalty and attorney fees in spite of these issues not being set forth as issues for determination in the Final Pretrial Order is moot.

Order Granting Martin's Motion to Exclude Evidence of a Probation Violation

¶ 47 At trial, State Fund questioned Martin as to whether he had driven a motor vehicle in violation of the conditions of his probation. Martin declined to answer the State Fund's question, citing U.S. Const. amend. V.

¶ 48 Martin argues that this Court should exclude this evidence and should strike any reference to his pleading the Fifth Amendment. I do not find the issue of whether Martin may have violated the conditions of his probation to be probative to determining any of the issues in this case. Therefore, I find no reason to consider it in rendering my decision in this matter. Martin's motion to exclude is granted.

Order Denying Martin's Motion to Compel

¶ 49 On May 24, 2011, Martin moved to compel State Fund to disclose documents and information it obtained from its request for Confidential Criminal Justice Act

[81] §§ 39-71-611, -2907, MCA.

information under § 44-5-303, MCA. Martin argued that he learned State Fund had requested information under the Act after its Fraud Unit initiated an investigation into Martin's industrial injury. Martin alleged that State Fund failed to provide him with this information in response to his discovery requests and he asked this Court to compel State Fund to produce this information.[82]

¶ 50 State Fund objected to Martin's motion, arguing that it cannot release this information pursuant to the Criminal Justice Information Act and further arguing that it is protected as attorney work product.[83] In its brief, State Fund argued that the information at issue is protected as work product under M. R. Civ. P. 26(b) because the information was procured in anticipation of litigation.[84] State Fund points out that it denied Martin's claim on August 23, 2010, and Martin hired counsel in October 2010. State Fund argues that it did not bring in its investigative unit until November 2010, and "[a]t that point, everyone knew the case was headed toward litigation."[85]

¶ 51 On July 1, 2011, I heard oral argument on Martin's motion and deemed it submitted.[86]

¶ 52 In *Yager v. Montana Schools Group Ins.*, the claimant moved to compel production of two investigative reports which the insurer had declined to produce, alleging that the reports were privileged as work product. The insurer contended that it did not intend to introduce the reports as trial exhibits and therefore argued that it was not obligated to produce them. This Court, relying on *United States v. Nobles*,[87] held that the reports were protected as work product. However, the Court further noted that under *Nobles*, the work-product protection otherwise afforded a private investigator's reports is waived if the party elects to present the investigator as a witness for those portions of the report that relate to testimony. Therefore, in *Yager*, since the insurer listed the author of one of the two investigative reports as a trial witness, the Court held that the portions of that investigator's report which concern any matter to which he might testify at trial were discoverable.[88]

---

[82] Motion to Compel, Docket Item No. 51.

[83] Response to Motion to Compel (Response Brief), Docket Item No. 52.

[84] Response Brief at 4.

[85] Response Brief at 4.

[86] Minute Book Hearing No. 4287, Docket Item No. 57.

[87] *Nobles*, 422 U.S. 225, 238-39 (1975).

[88] *Yager*, 1994 MTWCC 24.

¶ 53 In the present case, this matter has already been tried before this Court. State Fund did not name the investigator as a potential witness nor did it attempt to introduce into evidence the surveillance report or its contents. The report is protected as work product and Martin's motion to compel is denied.

Order Denying Martin's Motion to Supplement Record

¶ 54 On March 28, 2011, Martin moved to supplement the record in this case to include a 2007 W-2 form. Martin argues that this exhibit is necessary to refute Chase's testimony that Martin first worked for him in March 2008.[89] State Fund objects to Martin's motion, arguing that it is untimely, that the document was in Martin's control at the time of trial and therefore could have been submitted into evidence, and that Martin was on notice that Chase believed Martin probably first worked for him in 2008 because that is what Chase testified to in his deposition.[90]

¶ 55 The issue before the Court is whether Martin was injured as a result of an industrial accident which allegedly occurred on June 29, 2010. Whether Martin's first day of employment with Chase occurred in 2007 or 2008 is irrelevant to whether he suffered an industrial injury in 2010. Furthermore, Martin was aware that Chase did not recall with certainty the date of Martin's initial employment and he therefore had ample notice with which to timely submit his W-2 as an exhibit. Martin's motion is denied.

JUDGMENT

¶ 56 Bruce Martin was not injured as a result of an industrial accident as claimed in his petition.

¶ 57 Martin's argument regarding the Court's consideration of an issue regarding attorney fees and a penalty is moot.

¶ 58 Martin's motion to exclude evidence of a probation violation is granted.

¶ 59 Martin's motion to compel is denied.

¶ 60 Martin's motion for leave to supplement the record is denied.

¶ 61 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

---

[89] Motion for Leave to Supplement Record, Docket Item No. 43.

[90] Response to Motion for Leave to Supplement Record, Docket Item No. 44.

DATED in Helena, Montana, this 26th day of August, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Greg E. Overturf
Submitted: March 18, 2011, April 7, 2011, April 14, 2011, and July 1, 2011