

Montee, Charles

DISCOVERY

Protective order

Protective orders pertain to discovery under the Civil Rules of Procedure. They are not to be used to sanction a party. Absent a request from a party, it is error for the industrial appeals judge to issue a protective order.*In re Charles Montee*, BIIA Dec., 08 19218 (2010)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: CHARLES W. MONTEE**) **DOCKET NO. 08 19218**
2 **CLAIM NO. AD-36569**) **DECISION AND ORDER**

3 APPEARANCES:
4

5 Claimant, Charles W. Montee, by
6 Beemer & Mumma, per
7 Judith M. Page

8 Employer, Garco Construction, Inc., by
9 Annan & Associates, per
10 Edgar L. Annan

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Annika Scharosch, Assistant

14 The employer, Garco Construction, Inc., filed an appeal with the Board of Industrial
15 Insurance Appeals on October 1, 2008, from an order of the Department of Labor and Industries
16 dated August 18, 2008. In this order, the Department affirmed its order dated July 8, 2008, in which
17 it allowed the claim as an industrial injury. The Department order is **AFFIRMED**.

18 **DECISION**

19 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
20 review and decision. The employer filed a timely Petition for Review of a Proposed Decision and
21 Order issued on October 6, 2010, in which the industrial appeals judge affirmed the Department
22 order dated August 18, 2008.

23 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
24 no prejudicial error was committed except as stated below.

25 We agree with our industrial appeals judge's decision affirming the Department order in
26 which the Department allowed this claim as an industrial injury. We have granted review for the
27 sole purpose of reversing the Order Granting Protective Order that the industrial appeals judge
28 incorporated in the Proposed Decision and Order.

29 An original hearing was scheduled for January 26, 2010, for the employer to present
30 evidence. At that time the employer's attorney requested a continuance because Mr. Montee was
31 unable to testify in person. The continuance was granted. At this hearing, the industrial appeals
32 judge discussed the fact that the employer had raised the issue of other employers' responsibility

1 for Mr. Montee's claim if that judge found that Mr. Montee sustained an occupational disease. It
2 was discussed by the parties and the industrial appeals judge asked the other parties to collect
3 potential employers. This led to a number of conferences and contacts that ultimately found
4 numerous potential employers, including some that were self-insured. Notice was sent to these
5 potential responsible employers and a date was set for a hearing on joinder.

6 Garco's attorney, Mr. Annan, sent an e-mail to the industrial appeals judge about his concern
7 that attorneys for the other employers were contacting him for copies of his joinder motion. He
8 stated that he never filed a motion and thought if other employers were to be joined, the judge had
9 the authority to do it without a motion. He was also concerned that some of the other employers
10 were requesting terms from him. The judge did not cancel the hearing and it was held on May 17,
11 2010. At that time Mr. Annan stated that he would not be moving to join any other employers, and it
12 was his position that if the Board thought they should be joined, it could do it without the employer's
13 motion. He also did not make an offer of proof as to any potential responsible employers. The
14 judge then did not join any additional employers and issued a "protective order" barring any
15 evidence that attempted to demonstrate that other parties may be responsible for the claim. Garco
16 filed a request for interlocutory review which was denied. The judge incorporated this order into the
17 Proposed Decision and Order and sustained an objection made during Dr. Van Gerpen's deposition
18 based on the protective order.

19 We note that protective orders are mentioned in the civil rules in relation to discovery under
20 CR 26(c) and they are issued on the motion of a party against a person from whom discovery is
21 sought. This was not the case here. There were no requests for discovery from any of the other
22 named employers, and none of the employers who filed appearances and appeared at the hearing
23 on May 17, 2010, moved for a protective order.

24 It appears that the judge was attempting to sanction Garco for failing to proceed with a
25 motion or offer of proof. The employer never made a motion and stated it did not want any other
26 employers joined in the case. A protective order is not appropriate, and there was no reason for
27 Garco to be sanctioned under these facts. The Order Granting Protective Order issued by the
28 industrial appeals judge is vacated. The objection at page 15, lines 19-20 in Dr. Van Gerpen's
29 deposition is overruled, and the question on page 15, lines 15-18 and the answer on page 16,
30 lines 2-17 are made a part of the record.

31 **FINDINGS OF FACT**

- 32 1. The claimant, Charles W. Montee, filed an Application for Benefits with the Department of Labor and Industries on June 30, 2008, in which he

1 alleged he sustained an industrial injury on June 12, 2008, during the
2 course of his employment with Garco Construction, Inc. (Garco).

3 The Department issued an order on July 8, 2008, in which it allowed
4 the claim. The employer protested this order on July 17, 2008, and
5 the Department affirmed the order on August 18, 2008. The employer
6 filed a Notice of Appeal from this order on October 1, 2008, with
7 the Board of Industrial Insurance Appeals. The Board issued an
8 order on October 31, 2008, in which it granted the appeal under Docket
9 No. 08 19218, and agreed to hear the appeal.

- 10 2. On June 12, 2008, Charles W. Montee sustained an industrial injury
11 during the course of his employment with Garco, when he was working
12 overhead and experienced a sharp pain in his right shoulder, radiating
13 down to his fingers. The industrial injury was the proximate cause of
14 Mr. Montee's cervical condition.
- 15 3. Charles W. Montee's cervical condition did not arise naturally and
16 proximately out of the distinctive conditions of his employment, but was
17 the result of the industrial injury that occurred on June 12, 2008.

18 **CONCLUSIONS OF LAW**

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction over the
20 parties to and the subject matter of this appeal.
- 21 2. On June 12, 2008, Charles W. Montee did sustain an industrial injury
22 during the course of his employment with Garco, within the meaning of
23 RCW 51.08.100.
- 24 3. On June 12, 2008, Charles W. Montee did not incur an occupational
25 disease within the meaning of RCW 51.08.140.
- 26 4. The order of the Department of Labor and Industries dated August 18,
27 2008, is correct and is affirmed.

28 DATED: December 20, 2010.

29 BOARD OF INDUSTRIAL INSURANCE APPEALS

30 /s/ _____
31 DAVID E. THREEDY Chairperson

32 /s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
LARRY DITTMAN Member