Dow, Danny

SANCTIONS

Discovery

Sanctions are mandatory under CR 26(g) where counsel failed to make a reasonable inquiry by asking his client for the material or deliberately withheld discoverable material. **….*In re Danny Dow*, BIIA Dec., 08 14859 (2011)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DANNY C. DOW	)	**DOCKET NO. 08 14859**
	)	
CLAIM NO. AA-92084	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Danny C. Dow, by
Law Office of William D. Hochberg, per
William D. Hochberg

Employer, Bussing Construction & Development, by
Building Industry Association of Washington,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Scott Wessel-Estes and Brian L. Dew, Assistants

The claimant, Danny C. Dow, filed an appeal with the Board of Industrial Insurance Appeals on May 15, 2008, from a Department letter dated May 7, 2008, directed to William T. Edwards, M.D., from the Department of Labor and Industries. In this letter, the Department advised Dr. Edwards that Mr. Dow did not meet the Department's criteria for a spinal cord stimulator because his claim was allowed for a right inguinal hernia, not a back injury, and that further criteria must be met as set forth in Provider Bulletin 05-03, a copy of which was attached. The claimant's appeal is **DISMISSED** and his motion for sanctions is **GRANTED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on January 4, 2011, in which the industrial appeals judge granted the claimant's motion to dismiss his appeal and denied his motion for sanctions.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

In June 2005, Mr. Dow filed a claim for a right groin injury. The claim was allowed, closed in November 2005, and reopened effective February 6, 2006. By letter dated May 7, 2008, the Department informed Mr. Dow's physician of its decision to deny his request for a spinal cord stimulator.

Spinal cord stimulators (SCS) are implanted devices that are used to treat pain, including chronic low back and neck pain, chronic regional pain syndrome and ischemic pain. The Department has long grappled with the effectiveness of those devices, has conducted studies and heard from constituent groups, both for and against their use, and at the time of this appeal, had established a policy that SCS are not a covered treatment.

Mr. Dow appealed the decision to deny him that treatment, but he has moved to dismiss his appeal because of the cost involved in litigation, and because he believes that too much time had passed for a spinal cord stimulator to effectively treat his condition.

What remains for us to decide is the claimant's motion for the imposition of sanctions against the Office of the Attorney General, counsel for the Department, for violation of the rules of discovery.

We agree with the statement of our industrial appeals judge that the record is replete with evidence that the Department and/or the Attorney General failed to act within the spirit and the purpose of the discovery rules; we disagree with her determination that under the unique circumstances of this case, sanctions should not be imposed and attorney fees should not be awarded. In making that determination, we look to the purpose of the discovery rules; the obligation of the parties to comply with the rules; whether the discovery that was provided by the Department was sufficient in light of material requested and the material that was in the possession of the Department; and the mandatory nature of sanctions against a party who has violated the rules.

Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299 (1993), is the seminal case in defining the purpose of the discovery rules and in setting the standard for imposition of sanctions if there is a violation of the rules of discovery. In *Fisons,* our Supreme Court adopted the reasoning from the 1983 federal advisory committee notes that described the discovery process and problems that led to the enactment of Fed. R. Civ. P. 26(g). Washington's Civil Rule 26(g) was identical to the Federal rule when it was enacted.

Discovery is a mechanism for making relevant information available to litigants in the least costly and least time consuming way, and places an affirmative duty on the parties to engage in discovery in a manner that is consistent with the spirit and the purpose of the rule. Civil Rule 26(g) is designed to curb discovery abuses by explicitly encouraging the imposition of sanctions. Sanctions are most effective if they are diligently applied to penalize those whose conduct warrants sanctions, and to deter those who are tempted to engage in such behavior. See, *Fisons* and

quoting in part from the *Amendments to the Federal Rules of Civil Procedure* advisory committee note, 97 F.R.D. 166, 216-19 (1983).

CR 26(g) was added to our civil court rules after the decision in *Gammon v. Clark Equip. Co*., 38 Wn. App. 274 (1984), *aff'd,* 104 Wn.2d 613 (1985), was issued. *Gammon* reflects the "concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Fisons*, 342.

> The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear for the parties to obtain the fullest possible knowledge of the issues and facts before trial. This system obviously cannot succeed without the full cooperation of the parties.
>
> . . .
>
> Accordingly, the drafters wisely included a provision authorizing the trial court to impose sanctions for unjustified or unexplained resistance to discovery."

Gammon, 280.

Fisons articulated the standard to be applied by trial courts which are asked to impose sanctions for discovery abuse. Civil Rule 26(g) requires:

> an attorney signing a discovery response to certify that the attorney has read the response and after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy and the importance of the issues at stake in the litigation.

Fisions, 343.

If a violation of the certification rule has occurred, sanctions are mandated.

"Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules." *Fisons*, 343. The responses must be consistent with the letter, spirit and purpose of the rules. Intent to violate the rule need not be shown nor is a motion to compel compliance with the rules a prerequisite to a sanctions motion. *Fisons*, 344-345. Counsel and parties may not unilaterally decide to withhold properly requested information on the ground that it is not relevant or admissible. *In re Firestorm 1991*, 129 Wn.2d, 130 (1996). "[T]he discovery rules do not require a party to produce only what it agreed to produce or what it was ordered to produce. The rules are clear that a party must **fully** answer all interrogatories and all requests for production, unless a

specific and clear objection is made." *Fisons*, 353-354. In that case, it is the responsibility of the responding party to move for a protective order.

We turn to the events in this proceeding.

On November 17, 2008, claimant's counsel, William D. Hochberg, served the Department with interrogatories and requests for production. When the Department failed to file a response in the time required by the rule, Mr. Hochberg initiated contact with opposing counsel, and agreed to extend the deadline for the Department response. The Department again failed to respond by the deadline, and so a second contact was initiated and another extension agreed to. When the third deadline, March 13, 2009, passed with no response from the Department, the claimant filed his first motion to compel.

By the time the claimant's motion to compel was heard on April 2, 2009, the Department had filed a response to the interrogatories. A claims consultant verified the responses; the attorney verification was signed by Assistant Attorney General Scott Wessel-Estes, attorney for the Department.

Interrogatory No. 3 asked, in relevant part, for the names of all expert witnesses who would be called at hearing; the subject matter of their expected testimony; the substance of facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; and a list of all documents, reports, memoranda, records, studies, articles, notes, data sheets, test results, and any other written recorded, transcribed, punched, taped, filmed, photographed, or graphic material, however produced or reproduced, that would be the basis of a witness' testimony or be considered in the formation of opinions under Evidence Rule 703. The Department responded by naming Gary Franklin, M.D., the medical director for the Department, as their expert. The subject matter upon which he was expected to testify and the grounds for his opinion were said to be found in his curriculum vitae. With regard to the requested list of documents, the Department promised a supplemental response in accordance with CR 33(c).

The transcript of the April 2, 2009 proceeding indicates that an off-the-record discussion occurred between the parties. Apparently, based on that discussion, the industrial appeals judge determined that "there have been answers provided (that) do not appear to be inadequate." Tr. 4/2/09, pg. 3, line 11. She declined to issue an order to compel and went on to say that in her opinion, it would be more efficient for Mr. Dow to take a discovery deposition rather than to rely on interrogatories. Mr. Hochberg objected, pointing out that the Department had failed to answer interrogatory 3b and 3c, which asks for the substance of facts and opinions to which the expert is

expected to testify and the summary of the grounds for the opinion. Mr. Hochberg indicated that he needed that information before taking a deposition.

We disagree with the failure to issue an order to compel. The answers provided in response to interrogatories were clearly inadequate on their face. It is apparent that the subject matter of Dr. Franklin's testimony and the basis of his opinions are not to be found in his curriculum vitae. The response failed to provide the requested summary of Dr. Franklin's opinion. The claimant was entitled to a timely response to his discovery request answers, and to an order on his motion to compel.

The promised supplemented response to Request for Production No. 2 and Request for Production No. 3, dated April 2, 2009, were identical and consisted of reports of several studies on the use of spinal cord stimulators for injured workers, one dated September 30, 2008, and one dated October 2008, a review of an article or study on the use of spinal cord stimulation for chronic pain, what appear to be four news paper articles and a number of one page summaries of articles printed from the internet. The supplemental response was signed by Assistant Attorney General Scott Wessel-Estes.

On April 20, 2009, Mr. Hochberg asked Mr. Wessel-Estes to supply additional responses to Interrogatory No. 11 and Requests for Production Nos. 3 and 4, believing there had been correspondence between Medtronics, the manufacturer of the SCS, and the Department. On May 8, 2009, Mr. Wessel-Estes, agreed to make further inquires of the Office of the Medical Director. On May 18, 2009, Mr. Wessel-Estes left a voice mail for Mr. Hochberg, confirming that the requested information had not been provided and relaying a question from the Medical Director's office as to why the information needed to be disclosed. As of May 19, 2009, the claimant had not received additional information from the Department. (See the May 19, 2009 Declaration of William D. Hochberg.)

On May 26, 2009, two days before the claimant's second motion to compel was heard, Assistant Attorney General Brian L. Dew substituted as counsel of record for Mr. Wessel-Estes. At the May 28, 2009 hearing, the claimant noted the lack of any correspondence between Medtronic Corporation, a manufacturer of the spinal cord stimulator, and the Department, and argued that such documents would contain information regarding the effectiveness of the spinal cord stimulator and was therefore relevant to its decisions to approve or deny the device.

Mr. Dew responded he was new to the case, expressed his belief that material related to this "particular claim and their case" had been provided but if it had not, it would be. He stated that

the Department was willing to provide to the claimant "anything that we provide for him [presumably the expert] to look at or anything that he has looked at upon which his opinion is based." Mr. Dew argued that to force the Department to dig through years and years of correspondence that has nothing to do with this claimant did not seem right. In later proceedings, Mr. Dew acknowledged that at no time did he confer with Mr. Wessel-Estes or review the Department file to assure himself that the Department had complied with its obligation to respond to the claimant's discovery request.

The industrial appeals judge denied the claimant's second motion to compel. The motion was denied, not because the material sought was not discoverable or because the Department had complied with discovery, but because "the most efficient way to resolve this is to have the claimant just depose Dr. Glass and get all your questions answered so that it doesn't get delayed any longer." 5/28/09 Tr. at 7. The claimant's interlocutory appeal for that ruling was denied on procedural grounds

The claimant's third motion to compel was heard on August 6, 2009. Mr. Hochberg had previously requested, by letter, all discoverable information regarding Power Point slides, computer presentations, presentation notes by Drs. Franklin and Glass or other persons at the Medical Director's office regarding spinal cord stimulators. Mr. Hochberg argued that any correspondence between a manufacturer of spinal cord stimulators, as well as information that Drs. Franklin or Glass or the Medical Director's office has in regard to spinal cord stimulators, is discoverable. Mr. Hochberg declared that the Department was aware that they had such information and had specifically not provided it.

The industrial appeals judge asked Mr. Dew if he knew whether correspondence between Medtronics, the manufacturer of the SCS, and Drs. Franklin or Glass, the associate medical director for the Department, or anyone in the medical director's office having to do with the efficacy of the spinal cord stimulator existed, he stated he did not know. When she asked if he had made any attempt to find out, he stated "No. After the motion was denied, I left it at that." 8/6/09 Tr. at 10. She further inquired about the existence of Power Point slides, computer presentations and the presentation notes by any of the doctors in the medical director's office but again, Mr. Dew responded that he did not know and that he had not inquired because he understood the last order required the claimant to take a discovery deposition. Mr. Dew went on to argue that the Medtronics "stuff" is not contemplated by any of the discovery requests, the requests that were the subject of this motion were the same requests that had been made and ruled on earlier, and if the claimant wanted more information, he should take a discovery deposition. Mr. Dew then argued that the

information that was actually responsive to the discovery requests had in fact been provided, a fact that he could not state with assurance because by his own admission, he had not made the necessary inquiries.

By order dated August 17, 2009, the industrial appeals judge granted the claimant's motion and required the Department to provide the claimant with all correspondence between Medtronics and Dr. Gary Franklin, Dr. Lee Glass or other medical doctor from the Office of the Medical Director, Department of Labor and Industries, regarding the effectiveness of spinal cord stimulators, pursuant to Interrogatory No. 3d and Request for Production No. 2, as well as any computer based presentation in Power Point format, prepared by Dr. Franklin, Dr. Glass, or other medical doctor from the Office of the Medical Director, regarding the effectiveness of spinal cord stimulators, pursuant to Request for Production No. 2. She declined to require the Department to provide presentation notes prepared by Dr. Franklin, Dr. Glass or other medical doctor from the Office of the Medical Director or to impose attorney fees.

Both the Department and the claimant asked for an interlocutory review of the order compelling discovery but denying sanctions. The Department argued that two earlier requests had been denied; that review of those decisions was also denied; and that the Department should not be required to expend resources to produce documents when the requests had previously been denied. On September 10, 2009, the order of the industrial appeals judge was affirmed. The Department was directed to produced the specified documents or certify their non-existence no later than September 15, 2009.

On September 16, 2009, the claimant filed his fourth motion to compel, declaring that the Department had provided Power Point slides but none of the other material as directed.

On October 14, 2009, counsel for the claimant directed a letter to Assistant Chief Industrial Appeals Judge Lynn Hendrickson in which he referred to "a discovery conference last week" where Mr. Dew certified that all the information had been supplied to the claimant. (Our file does not contain a transcript of that conference.) Mr. Hochberg said the purpose of the letter was to request the imposition of discovery sanctions based on the information that he had uncovered that demonstrated the certification was untrue. Mr. Hochberg had received an e-mail from Mr. Dew dated September 15, 2009, 4:33 p.m., stating that the attachment to the e-mail was the Department's discovery request pursuant to the orders August 17, 2009, and September 10, 2009. The single document that was attached to the e-mail was a letter dated September 20, 2002, on Department letterhead directed to a Carol Barnett, Vice President and General Manager, Global

Pain Management-Neurological, Medtronic, Inc., from Grace Wang, MPH, Medical Program Specialist. The letter referenced Ms. Barnett's letter dated September 6, 2002, and generally discussed the Department's priority on the use of scientific evidence in providing effective health care, and the assurance that the Department would continue to review literature regarding the efficacy of implantable neurostimulators as it became available.

However, also attached to Mr. Hochberg's memorandum were certain documents from the Department file that the Department had not provided to him but that that Mr. Hochberg had uncovered on his own. Those documents are described as:

1. Letter dated February 28, 2008, to Judy Schurke from four named medical doctors from a newly formed 501c(4) coalition of the Washington Society of Interventional Pain Physicians (WSIPP) and the Neuromodulation Therapy Access Coalition (NTAC), regarding a study on the use of spinal cord stimulators that had been commissioned by the Department. The authors requested a meeting with the director.
2. Letter dated May 30, 2008, to Judy Schurke, Re: Washington State DLI Study *Spinal Cord stimulators (SCS) for injured workers with chronic low back and leg pain after lumbar surgery – A prospective study to describe costs, complications, and patient outcomes.* Hollingworth W., Turner J, Comstock BA, Deyo R. 30th April 2007, from Eric Hauth. [1]The letter is lengthy, refers to issues that the author wishes the Department to consider and attaches an appendix of supporting literature.
3. Letter dated June 27, 2008, to Eric Hauth, Executive Director, Neuromodulation Therapy Access Coalition and to N. William Fehrenbach, Medtronic Neurological, from Judy Schurke, Director, Department of Labor and Industries with a copy to Gary Franklin, M.D., Medical Director. The letter was in response to a letter from Mr. Hauth and Mr. Fehrenbach dated May 30, 2008, which outlined concerns about the Department's Spinal Cord Stimulator (SCS) Study. Ms. Schurke's letter discussed various aspects of the study.
4. Letter dated October 14, 2008, to Judy Schurke, the study referenced in paragraph 5 from Eric Hauth, expressing concern with the study, noting that the study had been completed and one of the authors was scheduled to present the findings at an upcoming meeting of the Industrial Insurance Medical Advisory Committee (IIMAC). Mr. Hauth requested that his letter be shared with the IIMAC chair and committee members.
5. Letter dated February 6, 2009, to Judy Schurke, from Eric Hauth, which refers to the findings from SCS study which Mr. Hauth suggests are at odds with the decision by the Department to affirm its existing non-coverage policy.
6. Letter dated March 4, 2009, to Eric Hauth from Judy Schurke, with a copy to Gary Franklin, M.D., which was in response to Mr. Hauth's letter dated February 6, 2009, regarding the Department's Spinal Cord Stimulatory policy and the January 23, 2009 meeting. Ms. Schurke's letter discussed various aspects of a University of Washington study of the spinal cord stimulator.

[1] A copy of the study was provided by the Department to the claimant on April 9, 2009.

7. Letter dated April 10, 2009, to Judy Schurke from Eric Hauth, responding to Ms. Shurke's letter dated March 4, 2009, expressing significant concerns about the Department's interpretation of the University of Washington study.

8. Letter dated July 24, 2009, to Eric Hauth from Judy Schurke, with a copy to Gary Franklin, M.D., which was in response to Mr. Hauth's April 10, 2009 letter regarding the non-coverage policy for the spinal cord stimulator.

We do not find it credible that the director of the Department of Labor and Industries would engage in or be involved in a study of the spinal cord stimulator and make policy decision regarding coverage for injured workers without the involvement of the Office of the Medical Director. Correspondence to and from the Director for the Department of Labor and Industries regarding the effectiveness of the SCS is within the contemplation of the discovery demands.

Hearings on the claimant's motion for sanctions were held on June 25, 2010, and again on October 15, 2010.[2] By that time, in addition to the documents referenced above, Mr. Hochberg had obtained approximately 1400 pages of material from the Department in response to a discovery request for documents that addressed the effectiveness of SCS in another matter, (*In re David R. Hollcraft*, Dckt. No. 09 14007), and that had not been provided in this matter.

The material included letters between the Department and the Neuromodulation Therapy Access Coalition (NTAC), a coalition of physician societies and medical device manufacturers, bulletins updating coverage decisions for SCS, SCS timeline studies, correspondences between the Office of the Medical Director and several states and insurance company regarding their coverage of SCS, and articles from scientific and trade journals.

We have reviewed those documents, as well as the documents enumerated above, and find that they are of the type contemplated by the claimant's interrogatories and requests for production. Most of the documents obtained from the *Hollcraft* matter had been created by the time the interrogatories were served and with few exceptions, all the documents were in the possession of the Department when the first response was filed and when claimant's counsel requested, repeatedly, that the Department supplement its answers.

Those documents demonstrate that in the case before us, the Department's responses were not consistent with the letter, spirit and purpose of the discovery rules. Counsel for the Department either failed to make a reasonable inquiry by asking his client for the material or deliberately withheld discoverable material. We cannot know whether the outcome of this case would have been different if the Department had provided timely and adequate responses to the discovery, but

[2] Hearings were delayed due to procedural matters that are not relevant to this decision.

the litigant who engages in misconduct is not entitled to rely on speculation that it would not have mattered. See, *Gammon,* 282. Mr. Dow is entitled to know the basis for the Department's policy to deny spinal cord stimulators and he is entitled to know what other information the Department had that mediated against that policy.

We summarize the Department's arguments in opposition to the imposition of sanctions as follows:

1. There is no legislative grant of authority to impose sanctions;
2. The basis for the motion is unclear;
3. Sanctions cannot be imposed for a motion to compel that was denied.
4. The 1400 pages of discovery from the *Hollcraft* case is not a part of this case and is therefore an inappropriate basis for sanctions because the cases are completely different.
5. The 11 documents that were attached to the claimant's motion were not responsive to and therefore not required by the September 17, 2009 order issued by Judge Lynn Hendrickson, which the Department had complied with.
6. The duty to supplement discovery is limited and does not apply here.

Mr. Dew conceded that he had never discussed the Department's initial discovery responses with Mr. Wessel-Estes because after the motion to compel was denied, he saw no reason to inquire any further. Tr. 10/15/10, starting at line 6. And, when he was asked what if any inquiry he had made of his client following the issuance of Judge Hendrickson's order, he claimed attorney/client privilege although he acknowledged that he had been provided an electronic copy of the file from the medical directors office, that he did a word search for "Medrontics," reviewed every file that the search identified to see if it was responsive to the order. He found only one file, that being the letter from Ms. Wang. A review of the material now in the possession of the claimant demonstrates the inadequacy of the search and that there was even a letter dated August 19, 2002, from Dr. Gary Franklin to Ms. Barnett, the recipient of Ms. Wang's letter, submitting formal proposal to the Medtronic Corporation to conduct a population-based study of outcomes of spinal cord stimulation (SCS) for several specific diagnoses, including failed back surgery syndrome, including arachnoiditis, cauda equina syndrome and radiculopathy/sciatica and chronic regional pain syndrome II (reflex sympathetic dystrophy), that surely fell squarely within the August 17, 2009, and September 10, 2009 orders to produce.

We find the Department's arguments disingenuous in light both of the claimant's repeated requests for additional information that he suspected were in the possession of the Department and the documents that we now know existed when those requests are made. It is abundantly evident

that the discovery responses were inadequate. The industrial appeals judge's opinion that the responses were "not inadequate" was ill-advised and made without the inquiry required by *Fisons,* but importantly, the opinion was offered after certification from an assistant attorney general that discovery had been complied with. The motions to compel were denied, not because the material sought was not discoverable or because the discovery was complete but because the industrial appeals judge relied on the Department's certification and believed that "back and forth" interrogatories could be avoided if a deposition was taken where all the claimant's questions could be answered.[3] That is not a substantive ruling that a party can use to avoid its obligation to comply with discovery requests. Contrary to the Department's arguments, and with the exception of the provision in the orders dated August 17, 2009, and September 10, 2009, in which the industrial appeals judge declined to require the Department to produce certain presentation notes, there has not been a determination that any of the material at issue here was not discoverable.

The Department's opposition to the motion for sanctions is without merit.

A review of the history of this appeals lead us to the conclusion that the Department failed in its obligation to comply with the rules of discovery and therefore sanctions are mandated. The Department had material in its possession that was within the contemplation of the discovery requests which it failed to provide despite repeated requests by the claimant over a time span of more than one year. The Department resisted discovery either by failing to make the required inquiry by making a unilateral decision on what material was relevant and then withholding the material without disclosing its existence and without asking for a protective order. "The rules are clear that a party must **fully** answer all interrogatories and all requests for production of documents, unless a specific and clear objection is made. If [a party does] not agree with the scope of production or does not want to respond, then it is required to move for a protective order. Defendant and its counsel could not unilaterally decide what was relevant in a particular case, defendant's remedy was to seek a protective order, not to withhold discoverable material." *Fisons*, 353-354.

Request for Production No. 2 asks the Department to produce all reports, studies, articles and documents prepared by or pertaining to each expert identified in response to Interrogatories No. 3 and 4. Request for Production No. 3 asked the Department to "produce any and all other documents, records or any other type of writing relevant to the adjudication of this case and/or this

[3] CR 26 (b)(1) allows a court to limit discovery under certain circumstances, none of which have been met here.

claimant." That is a comprehensive request that seeks to gather all information available to the Department that addresses the effectiveness of spinal cord stimulation as a treatment for chronic pain.

The Department violated the rules of discovery when it failed to discover or to disclose the contents of its file to the claimant or to specifically object and obtain a protective order. Sanctions against the Department are mandatory.

The purpose of CR 26(g) sanctions are to deter, to punish, to compensate and to educate. The least punitive sanction that can achieve the purpose of the sanction rules is to be imposed. *Fisons* at 355-356. Here, because the claimant has dismissed his appeal, only monetary sanctions are available. The claimant believed that the treatment would be ineffective because of the delay. We do not know whether the claimant's understanding is correct or even if he would have been found eligible for treatment but we do know that without the delays, an earlier resolution would have resulted. The Department engaged in a pattern of non-response, and missed many opportunities to comply with the claimant's discovery request. The claimant incurred attorney fees in excess of $10,000 for multiple proceedings to obtain the discovery that he was entitled to. Most of those fees could have been avoided if counsel for the Department had made the proper inquiries and had complied, in good faith, with the rules. The counsel for the Department should reimburse Mr. Dow for 75 percent of the attorney fees. In addition, to reimbursement of attorney fees, a $5,000 sanction is appropriate to penalize repeated behavior and to deter counsel for the Department from engaging in similar behavior in the future.

Accordingly, the Office of the Attorney General, counsel for the Department of Labor and Industries in this appeal, is ordered to reimburse Mr. Dow for reasonable attorney fees in the amount of $10,950, and to pay a sanction of $5,000.

FINDINGS OF FACT

1. On June 29, 2005, the claimant, Danny C. Dow, filed an Application for Benefits, with the Department of Labor and Industries, in which he alleged an industrial injury while in the course of his employment with Bussing Construction. The claim was allowed by Department order dated July 1, 2005, and closed by Department order dated November 1, 2005.

   On February 6, 2006, the claimant filed an Aggravation Application to reopen his claim. On July 17, 2006, the Department issued an order, in which the Department reopened the claim, effective February 6, 2006.

   By letter dated May 7, 2008, the Department informed William T. Edwards, M.D., that, that his request for Mr. Dow to undergo a spinal

cord stimulator trial was denied because Mr. Dow did not meet the Department's criteria for a spinal cord stimulator because his claim was not for a back injury and had been allowed for a right inguinal hernia.

On May 15, 2008, Mr. Dow filed a Notice of Appeal with the Board of Industrial Insurance Appeals, from the Department letter dated May 7, 2008. On May 27, 2008, the Board issued an Order Granting Appeal under Docket No. 08 14859, and agreed to hear the appeal.

2. On November 17, 2008, the claimant served the Department of Labor and Industries with interrogatories and requests for production. The Department did not file a response within 30 days as required by CR 33(a). The claimant initiated contact with the Department regarding the lack of response and a new deadline was agreed to by the parties. The Department again failed to serve its responses by the deadline and the claimant again initiated contact with the Department regarding the lack of response. A third deadline, March 13, 2009, was agreed to by the parties. The Department failed to file its responses by March 13, 2009.

3. On March 16, 2009, Mr. Dow filed a motion to compel discovery, which was heard on April 2, 2009. The Department filed responses to the claimant's discovery requests sometime after March 16, 2009, but prior to the April 2, 2009 hearing. The attorney verification of the response to the interrogatories and requests for production required by CR 26 was signed by Assistant Attorney General Scott Wessel-Estes. Mr. Wessel-Estes affirmed that he had read the interrogatories and requests for production and the responses and answers thereto and to the best of his knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made and thus complies with CR 26 and 33. Any objections made are consistent with the applicable rules of procedure and/or evidence and made in good faith pursuant to CR 26.

4. On April 2, 2009, Mr. Dow argued that the Department had not answered Interrogatory No. 3(a) and (b), which asked for a summary of the substance of the facts and opinions to which Dr. Franklin, the Medical Director for the Department of Labor and Industries, who was named in the response to the interrogatories as the Department's expert witness, was expected to testify and the grounds for his opinions. The industrial appeals judge ruled that the answers provided did not appear to be inadequate. She declined to issue an order compelling discovery, opining that it would be more efficient to take a deposition of the Department's expert witness rather than to rely on interrogatories.

5. On April 20, 2009, Mr. Dow asked the Department to provide additional answers to his interrogatories and requests for production because the previous responses did not include correspondence between the Department and Medtronics. On May 18, 2009, the assistant attorney

general confirmed that the requested information had not been provided and relayed the question from the medical director's office which was why the information needed to be disclosed.

6. On May 20, 2009, Mr. Dow filed a second motion to compel discovery. At the May 28, 2009 hearing on the motion, he renewed his argument that the Department responses to certain interrogatories were inadequate. The judge denied the motion to compel but she "authorized" Mr. Dow's counsel to depose the Department's expert to get his questions answered.

7. Mr. Dow filed an interlocutory appeal of the industrial appeal judge's denial of his second motion to compel. An assistant chief industrial appeals judge denied the appeal, finding that it was not filed within five days of the hearing judge's oral ruling.

8. On May 26, 2009, Assistant Attorney General Brian L. Dew, substituted as counsel of record for the Department of Labor and Industries, in place of Assistant Attorney General Scott Wessel-Estes.

9. On June 15, 2009, Mr. Dow filed a third motion to compel because the Department had not produced Power Point slides, computer presentations, and presentation notes of Dr. Franklin and others in the medical director's office regarding spinal cord stimulators. On August 17, 2009, the industrial appeals judge granted Mr. Dow's motion and ordered the Department to provide Mr. Dow with (1) all correspondence between Medtronics and Dr. Gary Franklin, Dr. Lee Glass or other medical doctors from the office of the Department's medical director regarding the effectiveness of spinal cord stimulators, pursuant to Interrogatory No. 3(d), and Request for Production No. 2 and (2) any computer-based presentations in Power Point format, prepared by Dr. Franklin, Dr. Glass, or other medical doctor from the Office of the Medical Director regarding the effectiveness of spinal cord stimulators, pursuant to Request for Production No. 2. The industrial appeals judge denied Mr. Dow's request for sanctions. The interlocutory order was affirmed by an assistant chief industrial appeals judge on September 10, 2009. The response was required no later than September 15, 2009.

10. The Department provided a single document to the claimant in response to the August 17, 2009, and September 10, 2009 order, that being a copy of a letter on the letterhead of the Office of the Medical Director dated September 20, 2002, from Grace Wang, MPH, Medical Program Specialist, to Carol Barnett, Vice President and General Manager, Global Pain, Management-Neurological Medtronic Inc., which generally discussed the Department's priority on the use of scientific evidence in providing effective health care. The Department failed to provide the letter dated August 19, 2002, from Gary Franklin, M.D., to Medtrontics Corporation, regarding a spinal cord stimulator efficacy study.

11. On September 16, 2009, the claimant filed a fourth motion to compel alleging that the Department had not provided all of the material required by the orders dated September 10, 2009, and August 17, 2009. Attached to the motion were a number of documents that the claimant had obtained on his own that had not been provided by the Department that were of the type contemplated by his interrogatories and requests for discovery.

12. The fourth motion to compel was heard on June 25, 2010, and October 15, 2010. By June 25, 2010, the claimant's counsel had received approximately 1400 pages of discovery in a case that shared the issue of the efficacy of the spinal cord stimulator that had not been provided in this case and that were of the type contemplated by the interrogatories and requests for discovery and were relevant to the subject matter of this appeal.

13. The Department failed to provide material in its possession in response to the claimant's interrogatories and requests for production and failed to supplement responses when requested to do so by the claimant.

14. Counsel for the claimant initiated multiple contacts with counsel for the Department as well as multiple proceedings before the Board in an effort to obtain adequate responses to his discovery requests.

15. The claimant incurred attorney fees in the amount of $10,952 for services rendered between July 3, 2009, and October 8, 2010, in connection with his discovery requests that were necessary only because of the discovery violations.

16. Sanctions against the Office of the Attorney General, counsel for the Department, of $10,952 to reimburse the claimant for attorney fees and an additional $5,000 to deter similar behavior in the future, are appropriate.

17. In a letter dated December 2, 2009, the claimant moved to dismiss his appeal based on the cost of the appeal and because too much time had passed for a spinal cord stimulator to effectively treat his condition.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Office of the Attorney General violated the rules of discovery and are subject to mandatory sanctions, including attorney fees, pursuant to CR 26(g).

3. The Office of the Attorney General is directed to pay the claimant for reasonable attorney fees in the amount of $10,952 and an additional monetary sanction of $5,000, for its violation of the rules of discovery.

4. The claimant's appeal from the letter dated May 7, 2008, is dismissed.

Dated: March 31, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEDY Chairperson

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

/s/ _____
LARRY DITTMAN Member