

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 41

WCC No. 9309-6892

TOM HEBERT

Appellant

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

DECISION AND ORDER ON APPEAL

Petitioner, Tom Hebert (Hebert), appeals from Findings of Fact; Conclusions of Law; Order entered by the Montana Department of Labor and Industry (DLI) on August 12, 1993. The DLI's decision imposed a \$15,391.48 penalty on Hebert for failing to provide workers' compensation insurance coverage for his employees.

The basic facts are not in dispute. Hebert operates a carpet business in Bozeman and employs carpet layers. Prior to March 23, 1992, he provided workers' compensation insurance coverage for his employees. On March 23 his coverage lapsed on account of his failure to pay the insurance premium. The lapse continued until June 18, 1993. The premium he should have paid during the lapse was \$7,695.74. Acting pursuant to section 39-71-504, MCA, the Uninsured Employers' Fund (UEF) imposed a penalty of \$15,391.48, which is double the amount of the unpaid premium. Hebert appealed the initial penalty determination to a DLI hearing examiner, who conducted a contested case hearing. On August 12, 1993, the hearing examiner affirmed imposition of the penalty. Hebert then petitioned this Court for judicial review.

This case comes to the Court pursuant to section 39-71-204 (3), MCA, which generally provides for an appeal to the Workers' Compensation Judge from any order of the Department of Labor and Industry under title 39, part 71.⁽¹⁾ The scope of judicial review of a decision of an administrative agency is governed by section 2-4-704, MCA, which provides:

2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in

the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) because findings of fact, upon issues essential to the decision, were not made although requested.

The DLI's authority to assess a penalty of "up to double the premium amount the employer would have paid" is clear. Section 39-71-504 (1), MCA provides in relevant part:

(1) The department may require that the uninsured employer pay to the [uninsured employers'] fund a penalty of either *up to double the premium amount the employer would have paid* on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or \$200, *whichever is greater*. [Emphasis added.]

The amount appellant would have paid in premiums -- \$7,695.74 -- is undisputed. It is also undisputed that the actual penalty imposed was double the premium amount, and thus within the DLI's statutory authority.

However, in his Amended Notice of Appeal appellant suggests that the DLI abused its discretion, and argues that \$7,695.74 is a fair penalty. In Petitioner's Brief he argues:

It is obvious that Tom [Hebert] knew he was supposed to pay; it is obvious that he owes the money; it is equally obvious that if he had it he would pay it. What is not so obvious is the logic that follows, to-wit: since he doesn't have the money, he should be charged twice the amount.

Thus, the gist of his argument is that the hearing examiner's decision was "arbitrary or capricious or characterized by abuse of discretion."

In its response to the appeal the DLI argues that the amount of the penalty is not reviewable under an abuse of discretion standard. It cites language from **Steer, Inc. v. Department of Revenue**, 245 Mont. 470, 803 P.2d 601 (1990), which suggests that only procedural rulings are reviewable for abuse of discretion. In **Steer** the Supreme Court said:

Our standard of review relating to conclusions of law is not to be confused with our review of **discretionary trial court rulings**. This has been defined as "encompassing the power of choice among several courses of action, each of which is considered permissible." See Aldisert, *The Judicial Process*, 1976, page 759.

Such rulings are **usually trial administration issues, scope of cross-examination, post-trial motions, and similar rulings. The standard of abuse of discretion will be applied to these rulings.** [Emphasis added.]

Id. at 475: **but see Silva v. City of Columbia Falls**, 258 Mont. 329, 335 852 P.2d 671 (1992) (applying the arbitrary or capricious standard of review to a Police Commissioner's decision which fixed the date disability benefits were to commence). We need not labor over this issue, however, since the DLI's decision was **not** in any event arbitrary or capricious or an abuse of discretion.

The burden of establishing an abuse of discretion is on the appellant, who must show a "manifest abuse of discretion." **Henrichs v. Todd**, 245 Mont. 286, 291, 800 P.2d 710 (1990). Under an arbitrary or capricious standard, the appellant must show that the decision below was "random, unreasonable or seemingly unmotivated, based on the existing record." **Silva**, 258 Mont. at 335. As found by the hearing examiner, Mr. Hebert was fully aware of the requirement that he provide workers' compensation coverage for his employees and knowingly failed to do so. While Hebert claims that he could not successfully compete with other carpet businesses while paying for workers' compensation insurance, he deliberately violated the law requiring workers' compensation insurance. The penalty statute is plainly aimed at deterring such violations. The hearing examiner considered Mr. Hebert's justifications and his culpability. His decision was neither whimsical nor unfounded. It was not arbitrary or capricious or an abuse of discretion.

The Findings of Fact; Conclusions of Law; Order entered by the Department of Labor and Industry on August 12, 1993, is **affirmed**.

DATED in Helena, Montana, this 22nd day of April, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. William A. Bartlett

Mr. Kevin Braun

Ms. Melanie Symons

1. Section 39-71-204 (3) provides:

If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge.