

No. 98-501

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 35N

STEPHEN T. GARCIA,

Petitioner and Respondent,

v.

UNINSURED EMPLOYERS' FUND, JULIE MANIACI,

Respondents and Appellants.

PROFESSIONAL HEALTH PLANNING,

Employer.

APPEAL FROM:

Workers' Compensation Court For the State of Montana

The Honorable Mike McCarter, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Robert J. Campbell, Department of Labor and Industry, Helena, Montana

For Respondent: Stephen T. Garcia, Bozeman, Montana (pro se)

Submitted on Briefs: January 18, 1999

Decided: February 25, 1999

Filed:

Clerk

Justice James C. Nelson delivered the Opinion of the Court.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, **the following decision shall not be cited as precedent** but shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

This is an appeal by the Uninsured Employer's Fund (UEF), Department of Labor and Industry (DOL), from the June 16, 1998 Findings of Fact, Conclusions of Law and Judgment of the Workers' Compensation Court determining that the UEF is not entitled to indemnification from the petitioner, Stephen T. Garcia (Garcia), for payments which the UEF made to and on behalf of Julie Maniaci Brennan (Brennan) on account of injuries which she sustained in an automobile accident on November 10, 1995. We affirm.

Background

Garcia, based in Bozeman, is an independent agent for group health plans. On November 1, 1995, Brennan began working for Garcia with duties including managing his office, answering telephones, filing and bookkeeping. On November 10, 1995, while on her lunch break, Brennan was injured in an automobile accident. Brennan claimed that at the time of her accident she was on her way to the Bozeman IRS office to pick up W4 and I-90 forms which she needed to complete as a new employee of Garcia. Brennan testified that she was unable to locate the forms at Garcia's office and could not get through to the IRS to have the forms mailed to her. She also testified that, having reported the problem to Garcia the evening before, he specifically authorized her to go to the IRS office to obtain the forms.

Garcia adamantly denied that he discussed the matter of the forms with Brennan or gave her permission to obtain the forms by traveling to the IRS office. He also stated that the forms were in his office, thus obviating any need for Brennan to get the forms elsewhere.

In any event, when Brennan sought workers' compensation for her injuries, she learned that Garcia did not carry workers' compensation coverage. Accordingly, she filed her claim with UEF. UEF accepted the claim and paid medical and disability benefits on Brennan's behalf. UEF then sought reimbursement from Garcia under $\text{MCA (1995), } \text{\textcircled{0}} \text{ 39-71-504(2)}$, which provides:

The fund shall receive from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

Garcia petitioned the Workers' Compensation Court seeking a determination that he is not liable to reimburse UEF for the benefits it paid or may pay in the future on behalf of Brennan. Garcia disputed that Brennan was injured within the course and scope of her employment and contended that UEF erred in accepting her claim for benefits in the first instance and in managing the claim.

As a result of the trial which followed, the Workers' Compensation Court made several findings of fact and legal conclusions which are at the heart of the issues raised on appeal. Among other things, the court found that Garcia's testimony and Brennan's testimony concerning the scope and course issue was "conflicting and irreconcilable" but was "evenly balanced." The court stated:

This is one of those rare cases in which the Court is unable to determine which party is the more credible. After listening to [Brennan's] and Garcia's testimony, I am simply unable to determine which party is telling the truth. I was troubled by portions of testimony of each party. I find it equally likely that Garcia is telling the truth as [Brennan] is telling the truth, and visa versa.

The court then concluded that, under these circumstances, liability must be determined on the basis of which party had the burden of persuasion. In this regard, after a lengthy analysis, the court decided that the burden properly belonged on UEF and that since it failed to sustain its burden, Garcia was entitled to a declaratory judgment finding that he is not liable for payments made by the UEF to and on behalf of Brennan. On entry of this judgment, UEF appealed.

Issues

UEF frames two issues: (1) whether the Workers' Compensation Court erred in refusing to rule on the credibility issue, and (2) whether it erred in adopting a declaratory judgment analysis which created a new burden of persuasion on UEF.

Discussion

These are questions of law. Our review of the Workers' Compensation Court's conclusions of law is plenary; we simply determine whether its legal conclusions are correct. *Liberty v. State Fund*, 1998 MT 169, 7, ___ Mont. ___, 7, 962 P.2d 1167, 7 (citations omitted).

As to UEF's first argument, the agency maintains that since credibility determinations are within the province of the fact finder--here the Workers' Compensation Court--the court erred in failing to determine who was more credible as between Garcia and Brennan. Whether UEF expects this Court to make that determination or, alternatively, to order the trial court to decide is not clear in its one page argument. Suffice it to say that neither

approach is appropriate. The cases are legion that in non-jury trials the credibility of witnesses and the weight to be afforded their testimony is a matter left to the sound discretion of the trial court. It is not the role of this Court to substitute [our] evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses." Matter of J.M.W.E.H., 1998 MT 18, 34, 287 Mont. 239, 34, 954 P.2d 26, 34 (citations omitted). Moreover, credibility determinations being within the sound discretion of the trial court, we will not find an abuse of that discretion where, as here, the record shows that the court carefully considered the conflicting testimony of the witnesses but was unable, nevertheless, to make the subjective judgment as to whether one witness was more credible than another. Furthermore, whatever its position, we also note that UEF fails to cite any authority whatsoever supporting its brief argument on this issue. That failure, as we next discuss, precludes our further analysis on this question.

That brings us to the second and more substantive question raised by UEF--did the trial court correctly place the burden of persuasion where the conflicting testimony was evenly balanced and where neither witness was more nor less credible than the other?

As noted by the Workers' Compensation Court, Sec. 26-1-402, MCA, places the burden of persuasion on the party asserting a claim or defense.

Who has the burden of persuasion. Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.

Section 26-1-402, MCA. The court first observed that this statute would appear to require Garcia to shoulder the burden of persuasion since he is the petitioner and is asserting that he should not be liable to the UEF. The court then went further. It reasoned that if Garcia had ignored the UEF's indemnity claim and had forced UEF to sue him, then UEF would have borne the burden of persuasion on its indemnity claim. From there, noting that there are no Montana cases on point, the court analogized this case to one for a declaratory judgment in which the insurer seeks a determination that it is not liable to its insured with respect to a particular claim. Specifically, the court cited to Preferred Accident Ins. Co. of N.Y. v. Grasso (2d Cir. 1951), 186 F.2d 987. There, in discussing the burden of persuasion in an indemnity action against the insurer the court considered whether the burden should be shifted to the insurer because it had brought a declaratory action seeking immunity. The court concluded the insurer's claim of immunity is in reality negatively defensive and that the burden should be exactly where it would have been had suit been brought on the policy-- i.e. on the insured. Preferred, 186 F.2d at 991.

As to this issue, UEF's brief is of absolutely no help. UEF cites not one authority for its one-page criticism of the trial court's approach. This failure is fatal and, without more, is a sufficient basis for us to reject UEF's argument. Rule 23(a)(4), M.R.App.P., requires that the arguments of the parties be supported with citation to the authorities and statutes relied upon. And, we have repeatedly held that it is not this Court's obligation to locate authorities or formulate arguments for the parties in support of their positions on appeal. See *Johansen v. State, Dept. of Natural Resources*, 1998 MT 51, 24, 288 Mont. 39, 24, 955 P.2d 653, 24 "[the appellant] must cite authority for the position he advances. Rule 23, M.R.App.P. It is not this Court's job to conduct legal research on his behalf, to guess as to his precise position, or to develop legal analysis that may lend support to that position" (citing *State v. Carter* (1997), 285 Mont. 449, 461, 948 P.2d 1173, 1180; *State v. Fina* (1995), 273 Mont. 171, 181, 183, 902 P.2d 30, 36, 38); *The Duck Inn, Inc. v. Montana State Univ.* (1997), 285 Mont. 519, 523, 949 P.2d 1179, 1181 ("[a]n appellant bears the burden of establishing error by the trial court and Rule 23, M.R.App.P., requires an appellant to cite to authority for the position being advanced on appeal"). See also *Small v. Good* (1997), 284 Mont. 159, 943 P.2d 1258; *In re Marriage of Lee* (1997), 282 Mont. 410, 938 P.2d 650; *State v. Sol* (1997), 282 Mont. 69, 936 P.2d 307; *Rieman v. Anderson* (1997), 282 Mont. 139, 935 P.2d 1122.

UEF having failed to cite to any authority demonstrating why the Workers' Compensation Court's approach or legal analysis in this case was in error, we decline to review this issue further.

Affirmed.

/S/ JAMES C. NELSON

We Concur:

/S/ J. A. TURNAGE

/S/ JIM REGNIER

/S/ WILLIAM E. HUNT, SR.

/S/ KARLA M. GRAY