

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 71

WCC No. 9901-8140

EMPLOYMENT RELATIONS DIVISION, UNINSURED EMPLOYERS' FUND

Appellant

vs.

TOTAL MECHANICAL HEATING & AIR CONDITIONING, et al.

Respondents/Cross Appellants

and

HUMAN DYNAMICS CORPORATION

and

HRC/HRC ARMCO, INCORPORATED

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER ON APPEAL AND
CERTIFYING THE JUDGMENT AS FINAL

AFFIRMED 3/26/02 [2002 MT 55](#)

Summary of Case: Respondents move for reconsideration of the Court's decision reversing a Department Order finding that respondent Montana employers were insured and reinstating penalties against the employers. Alternatively, they moved for a new trial, to amend the decision, or to reopen the evidence.

Held: The motion to present additional evidence is untimely and in most instances the additional evidence would not aid respondents' arguments. The respondents burden of proof argument is rejected; the burden was not shifted as they argue. Their argument that the Court substituted its judgment for that of the Department is also rejected. The findings below were clearly erroneous and unsupported by the law. WCC Decision affirmed in [Total Mechanical Heating & Air Condition, et al. v. ERD/UEF](#), 2002 MT 55.

Topics:

Judicial Review: Additional Evidence. A request to present additional evidence must be presented no later than the time set for the last brief on appeal or the day before oral argument if argument is requested. Rule 24.5.350(5). Untimely requests will not be considered. See also § 32-4-703, MCA. WCC Decision affirmed in *Total Mechanical Heating & Air Condition, et al. v. ERD/UEF*, 2002 MT 55.

ARM 24.5.350(5). A request to present additional evidence must be presented no later than the time set for the last brief on appeal or the day before oral argument if argument is requested. Rule 24.5.350(5). Untimely requests will not be considered. See also § 32-4-703, MCA.

Judicial Review: Standard of Review/Clearly Erroneous. Court does not improperly substitute its judgment for the judgment of an agency where the agency decision is clearly erroneous.

Judicial Review: Standard of Review/Clearly Erroneous. Court does not improperly substitute its judgment for the judgment of an agency where the agency decision is based on an error of law.

Employers: Insurance. Lack of contemporaneous insurance coverage not cured by retroactive policy secured at a later date. Employer in such case is uninsured and liable for a penalty.

Proof: Burden of Proof/Generally. Evaluation of one item of evidence does not amount to shifting the burden of proof where the ultimate burden is not shifted.

¶1 Respondents in this matter have filed a motion for reconsideration of the Court's decision and order on appeal, alternatively requesting a new trial, reopening of the evidence, or amendment of the decision. In conjunction with their motion, respondents requested oral argument. That request is denied and the Court now considers the motion.

I.

¶2 Respondents initially request an opportunity to present additional evidence concerning a settlement agreement reached between Human Dynamics Corporation (HDC) and Credit General Insurance Company (Credit General) with respect to a district court action regarding insurance coverage. The agreement was reached after the Department issued the decision which is the subject of the present appeal. It provides:

1. In the event that the decision of the Montana Department of Labor and Industry [in this case] is reversed upon appeal to a higher tribunal and that reversal becomes final, and HDC makes written request therefor, Credit General agrees to issue a **retroactive insurance policy**, in a form acceptable to the Montana Department of Labor and Industry and other applicable law and regulations, that will provide **retroactive workers' compensation insurance coverage** for the employee

workers of HDC in Montana that HDC leased to its Montana client companies, both at the inception of employment and during all phases of the work performed during the time period from January 1, 1994 through November 15, 1994. [Emphasis added.]

(RESPONDENT'S COMBINED MOTION FOR RECONSIDERATION, PETITION FOR NEW TRIAL, MOTION TO REOPEN THE EVIDENCE, OR REQUEST FOR AMENDMENT TO THE DECISION, Ex. A at 2.)

¶13 The receipt of additional evidence is governed by Rule 24.5.350(5), which provides:

(5) A motion for leave to present additional evidence must be filed no later than the time set for the last brief or, if oral argument is timely requested, then no later than the day before the argument. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the department, then the court may remand the matter to the department and order that the additional evidence be taken before the department upon conditions determined by the court. The department may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

The rule is consistent with the Montana Administrative Procedure Act, which makes similar provision in section 2-4-703, MCA.⁽⁴⁾ The agreement in question was executed June 1, 1999, more than a year prior to this Court's decision on appeal and five months prior to the last brief filed by respondents. The request is untimely.

¶14 Moreover, the proffered agreement does not aid respondents' case. As held in paragraph 74 of the decision and order on appeal, retroactive coverage does not satisfy Montana Workers' Compensation insurance coverage requirements. The request to present additional evidence of the settlement is **denied**.

II.

¶15 Respondents next request they be permitted to "present evidence concerning the reasons that Credit General defended the declaratory judgment action that HDC filed against it." (RESPONDENTS' COMBINED MOTION FOR RECONSIDERATION, PETITION FOR NEW TRIAL, MOTION TO REOPEN THE EVIDENCE, OR REQUEST FOR AMENDMENT TO THE DECISION at 6.) According to respondents, the additional evidence will rebut the Court's "inference" that by defending the district court action brought against it, Credit General denied that coverage existed. (*Id.*)

¶16 As with the first request to present additional evidence, this request is untimely. Moreover, Credit General's defense of the district court action was not the linchpin of my

determination. I suggest that the respondents reread my original decision, particularly paragraphs 74 through 79 and, especially, 82, which I repeat here:

Finally, I note that from around February 9, 1995, until the filing of the lawsuit against Credit General in November of 1996, HDC ceased arguing that HRC [Human Resources Company] had in fact already purchased retroactive policies. Rather, HDC dropped this angle of defense and began proposing other means to satisfy the UEF's investigation. This included the proposal that HDC be deemed self-insured, that it post a bond to cover any claims, and, amazingly enough, **that HDC purchase a retroactive insurance policy to cover the period at issue.** (UEF [Uninsured Employers' Fund] Ex. J at 24-25; Tr. at 63.) As the UEF aptly asks in its brief on appeal:

[I]f HDC already had bona-fide coverage under Credit General Policy No. SWC100-060-00 why didn't it stress this position during the meeting with the Department on May 10, 1995? Why would HDC offer to post a security bond if it was already insured? Why would HDC request that it be deemed self-insured if it already had plan No. 2 coverage? Why would HDC incur the expense of securing a retroactive policy if coverage already existed? Why is the record of hearing devoid of any HDC exhibit from Credit General confirming that HDC was a named insured under the policy? Why didn't HDC simply secure a representation from Credit General (its purported insurer) that it was a named insured?

(DECISION AND ORDER ON APPEAL at 32; UEF'S INITIAL BRIEF at 12.) The request is **denied**.

III.

¶7 Next, respondents challenge the Court's finding in paragraph 80 that HDC's conduct in adjusting and paying claims is irreconcilable with its claim that retroactive insurance coverage existed. It requests an opportunity to present evidence that the policies it purports to have been in effect had a \$250,000 deductible. Again, the evidence is late. It is also unpersuasive. Even if there were a deductible, it is reasonable to infer that the insurer would still adjust the claims, billing its insured for the deductible. More importantly, as previously stated retroactive coverage does not comply with laws requiring contemporaneous coverage. Finally, the argument ignores other facts which contradict it. I suggest that the respondents read, once more, paragraphs 74 through 79 and, especially, paragraph 82. The request is **denied**.

IV.

¶8 Next, respondents request an opportunity to offer evidence of the settlement negotiations they had with the UEF. They tender the evidence to "clear up misconceptions

and erroneous inferences drawn by the Court." (RESPONDENTS' COMBINED MOTION FOR RECONSIDERATION, PETITION FOR NEW TRIAL, MOTION TO REOPEN THE EVIDENCE, OR REQUEST FOR AMENDMENT TO THE DECISION at 8.) As with the other evidence, this evidence is untimely. Moreover, despite the respondents' claim that they were blindsided by the Court's reliance on the positions they took in negotiations with the Department, the actions of the respondents, as found by the Court, do not require interpretation and fully support the Court's findings. It is also difficult to believe that in presenting their case to the Department the respondents failed to present the negotiations in a light most favorable to them. The request is **denied**.

V.

¶19 Respondents next argue that the Court shifted the burden of proof from UEF to respondents and that the Court should therefore grant a rehearing. UEF's argument is premised on one item of evidence cited by the Court in its decision in paragraph 77. In that paragraph I found proof that policy SWC 100-060-00 covered HDC was lacking. Far from shifting the burden of proof, the paragraph merely evaluates one piece of evidence. Moreover, the UEF presented proof that no coverage existed and the respondents' evidence of the policy merely fell short of rebutting that evidence. The Court also suggests that respondents read the last sentence of the finding, which holds that even if the policy was intended to cover HDC the conditions of coverage were never met. The request is **denied**.

VI.

¶10 Failing in the foregoing arguments, respondents urge that the Court should grant a rehearing "because it erred in substituting its judgment for that of the Department on questions of fact." (RESPONDENTS' COMBINED MOTION FOR RECONSIDERATION, PETITION FOR NEW TRIAL, MOTION TO REOPEN THE EVIDENCE, OR REQUEST FOR AMENDMENT TO THE DECISION at 10.) While the argument might support reconsideration, it does not support a rehearing. More importantly, I carefully considered the standard of review applicable to agency decisions and found the Department's decision was not supported by the evidence or the law. (See paragraphs 74 and 76.) The decision below was not only clearly erroneous as to the facts found, but also as to the law it applied. The request is **denied**.

VII.

¶11 Respondents next challenge the Court's comment in paragraph 83, which reads:

The result in this case is unfortunate and disquieting. The client companies relied on HDC to provide them with workers' compensation insurance coverage. HDC took an untenable position concerning its duty to comply with Montana workers' compensation statutes. Unfortunately, the statutes governing uninsured employers do not make provision for imposing penalties on HDC. The statutes are written such

that HDC's failure to provide insurance renders the client companies uninsured and subjects them to penalties. The client companies have not only been misled by HDC but victimized by its actions. However, whatever remedies they may have against HDC for the harm they have suffered are beyond the issues presented in this case.

(DECISION AND ORDER ON APPEAL AT 32.) Respondents argue that "these comments are totally uncalled for based on this record." (RESPONDENTS' COMBINED MOTION FOR RECONSIDERATION, PETITION FOR NEW TRIAL, MOTION TO REOPEN THE EVIDENCE, OR REQUEST FOR AMENDMENT TO THE DECISION at 15.) I stand by the paragraph. Moreover, I note here that respondents' motion was prepared and filed by the attorney for HDC, who has also been representing most of the client companies, and still continues to do so in a co-counsel capacity. The UEF has argued in its recent filings that representation of HDC and the client companies is a conflict of interest. I will not address the contention, however, it should be plain from paragraph 83 that the interests of the client companies at this point may be antagonistic to HDC's interests.

ORDER

¶12 The respondents' motions for reconsideration, to present new evidence, to amend, and for a new trial are all **denied**. Further, this matter is now certified as **final** for purposes of appeal and for all other purposes.

DATED in Helena, Montana, this 17th day of November, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Daniel B. McGregor

Mr. Peter J. Stokstad

Mr. Andrew J. Utick

Mr. Edward A. Murphy

Mr. Kirby S. Christian

Mr. Dennis E. Lind (Courtesy Copy)

Submitted: October 4, 2000

1. The section provides:

2-4-703. Receipt of additional evidence. If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and

decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.