IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 53

WCC No. 9607-7579

STEPHEN T. GARCIA

Petitioner

vs.

UNINSURED EMPLOYERS' FUND/JULIE MANIACI

Respondent/Insurer for

PROFESSIONAL HEALTH PLANNING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: An employer challenged the determination of the Uninsured Employers' Fund that an office manager injured in an automobile accident over the lunch hour was acting within the course and scope of employment. Employee claimed she was running an errand specifically authorized by the employer.

Held: After carefully considering the conflicting testimony of the employee and employer, the WCC is unable to make the subjective judgment whether one was more credible than the other. The Court thus turned to the question of burden of proof, finding that where an uninsured employer files a petition to challenge a UEF determination, the petition is in the nature of an action for declaratory judgment. The burden of proof is thus properly placed on the UEF, which would bear that burden if it commenced its own action to obtain reimbursement from the employer. Thus, the WCC held the UEF is not entitled to indemnification from the employer.

Topics:

> **Proof: Burden of Proof: Generally.** Where an uninsured employer files a petition in the WCC to challenge the UEF's determination that a claimant is entitled to benefits and that it must reimburse the UEF, the action is in the nature of an action for declaratory judgment and the burden of proof is properly with the UEF, which would have that burden if it sought to collect reimbursement from petitioner. [Note: Although the WCC decision was affirmed on appeal in *Garcia v. Uninsured*

Employers' Fund, 1999 MT 35N, an unpublished, nonciteable opinion, the Supreme Court did not reach the issue of burden of proof.]

Witnesses: Credibility. After carefully considering the conflicting testimony of two witnesses, the WCC was unable to make the subjective judgment whether one was more credible than the other and decided the case based on its determination of the burden of proof.

¶1 This matter was tried on April 23, 1998 in Bozeman, Montana. The petitioner, Stephen T. Garcia, was present and was represented by Mr. William Dean Blackaby. The Uninsured Employers' Fund was represented by Mr. Robert J. Campbell. Ms Julie Maniaci Brennan was present and represented herself.

¶2 Exhibits: Exhibits 1 through 18 were admitted without objection.

¶3 Witnesses: Stephen T. Garcia, Julie Maniaci Brennan, Charles Edquest and Bernadette Rice testified at trial. The parties also submitted depositions of Charles Edquest, Julie Maniaci, Bernadette Rice, Merle Bouma, D.C., and Curt Kurtz, M.D. for the Court's consideration.

¶4 Issues: The parties state the issues as follows:

1. Was the claimant acting in the course and scope of her employment when she was involved in a motor vehicle accident on November 10, 1995?

2. Has the UEF met its obligation under 39-71-502 and 39-71-503(1) by paying only "proper" benefits, managing medical and indemnity benefits appropriately and operated in "good faith" in managing the claim?

(Pre-trial Order at 3.)

* * * * *

¶5 Having considered the testimony at trial, the demeanor and credibility of the witnesses, the exhibits, the depositions submitted for the Court's consideration, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Stephen T. Garcia (Garcia) is an independent agent for group health benefits plans. Since 1991 he has based his business in Bozeman, Montana.

¶7 On November 1, 1995, Julie Maniaci (Maniaci) began working for Garcia. (Maniaci has since remarried and changed her last name to Brennan. She is also referred to as Julie T. Murphy and Julie Foster in the exhibits. Her changes of name are the result of remarriages.)

¶8 Maniaci's job title was office manager and her duties included answering the telephones, filing, bookkeeping, and general management of the office. She worked 8:00 a.m. to 5:00 p.m., with one hour for lunch. She was paid for 40 hours a week, so she was not paid during her lunch hour.

¶9 On Friday, November 10, 1995, Maniaci left Garcia's office at approximately noon. She drove to Wendy's and had lunch. Lunch consumed approximately half an hour. Maniaci then reentered her car and within two blocks of Wendy's was involved in a car accident.

¶10 Although she did not immediately seek medical care, claimant was shaken up in the accident. She returned to Garcia's office to work the afternoon but left work a half hour early.

¶11 On Monday, November 13, 1995, Maniaci sought medical care from her family physician, Dr. Curt Kurtz. (Ex. 10 at 2.) She reported the accident to him and complained of left-side pain in the neck and thoracic region with radiating pain into her left shoulder. Dr. Kurtz diagnosed cervical and thoracic strain. (*Id*.)

¶12 On November 13, 1995, Maniaci also obtained massage therapy for "lumbar & cervical discomfort - for sprain." (Ex. 12.) She received additional massage therapy on November 15, 1995.

¶13 Maniaci did not work Monday or Tuesday, November 13 and 14, 1995. She returned to work November 15 and worked for approximately another month. She was then off work for more than a year and a half.

¶14 One or two weeks after the auto accident, Maniaci decided to pursue a workers' compensation claim with regard to her accident. She learned that Garcia did not have workers' compensation insurance and filed a claim with the UEF. The UEF accepted liability for the claim.

¶15 The UEF paid Maniaci temporary total disability benefits from December 19, 1995 through June 8, 1997. On June 8, 1997, claimant returned to work with another employer.

¶16 Since the accident, claimant has been treated by Dr. Kurtz, two chiropractors, a massage therapist and an acupuncturist.

¶17 In petitioning the Court, Garcia seeks a determination that he is not liable to reimburse the UEF for the benefits it has paid, or may in the future pay to Maniaci. He disputes Maniaci's claim and UEF's acceptance of it. He denies that claimant was acting in the course and scope of her employment at the time of the accident.

¶18 Garcia's and Maniaci's testimony concerning the scope and course issue is conflicting and irreconcilable.

¶19 Maniaci testified that at the time of the accident she was on her way to the Internal Revenue Service office to pick up W4 and I-90 forms which are supposed to be completed within 3 days of the employee's first day of employment. The forms were needed for herself since she was a new employee of Garcia.

¶20 Maniaci testified that she searched for but was unable to find the forms in Garcia's office. She further testified that she attempted to telephone the IRS to request that the forms be mailed to her but that she was unable to get through.

¶21 According to Maniaci, she reported the problem to Garcia on Thursday evening and he specifically authorized her to go to the Bozeman IRS office to obtain the forms. She testified that Garcia had also authorized three other out-of-office errands.

¶22 Garcia denied that he ever discussed the IRS forms with Maniaci. He denied that he gave her permission to run any out-of-office errands. He also testified that the forms needed by Maniaci were at his office, thus there was no need for her to obtain them.

¶23 This is one of those rare cases in which the Court is unable to determine which party is the more credible. After listening to Maniaci'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 Maniaci is telling the truth, and vice versa.

¶24 Garcia argues that the UEF should not have accepted Maniaci's claim in the first place and presented expert testimony of Charles Edquest (Edquest) supporting his contention. However, in light of the Court's legal ruling that the acceptance is not binding on Garcia in any claim for indemnity, it is unnecessary to consider the contention or the evidence supporting it.

¶25 Garcia also challenges the management of the claim, alleging that poor claim management resulted in excessive compensation. Maniaci's medical bills were paid by another insurer (Safeco), however, since July of 1997 the UEF has paid for some of her medications. Garcia requests, in the event he is held liable to indemnify the UEF, that his liability be vitiated or at least reduced on account of poor claim management.

¶26 Garcia presented expert testimony supporting his assertion. Edquest, who is an experienced claims adjuster and supervisor, testified that the UEF's adjuster failed to heed several significant "flags" in the management of the case. He testified that the medical records furnished the UEF showed that claimant suffered soft tissue injuries which in 95% to 99% of cases resolve within two months. He was surprised that Maniaci was unable to work and that she suffered any wage loss at all. He further testified that only 18 to 24 chiropractic treatments over six to eight weeks were, at a maximum, appropriate. He testified that when Maniaci's condition did not improve within a short time, the adjuster should have hired a medical manager and a vocational rehabilitation provider. Finally he

testified that Maniaci should have been referred to an orthopaedic surgeon or physiatrist within a month or two of total disability.

¶27 Garcia testified that had he been requested he would have attempted to modify Maniaci's position.

¶28 Garcia ultimately arranged for an IME of claimant at his own expense. The IME was done on January 21, 1997 by Dr. John A. Vallin, a physiatrist. Dr. Vallin's lengthy report, Ex. 4, records that claimant complained of headaches and widespread pain in her neck, head, upper back, low back, groin, and thighs. Upon examination he found no "gross spasm" and found "mild tenderness in numerous spots." He recorded, "Virtually everywhere I palpated Ms. Maniaci's cervical, thoracic, and lumbar spine she described subjective pain." (*Id*. at 3.)

¶29 Dr. Vallin diagnosed claimant as suffering from "mild strains to her cervical, thoracic and lumbar spine as a result of said MVA [motor vehicle accident.]" (Ex. 4 at 5.) He found further chiropractic care inappropriate other than a visit or two for instruction in stretching exercises. (*Id*. at 6.) He found no objective symptoms for her symptoms and commented, "Ms. Maniaci appears to have some evidence of behavioral overreaction to the physical exam as noted by her diffuse pain virtually everywhere I touched her, despite applying only mild manual pressure . . . in addition to her complaints of patchy, nondermatomal sensory loss in both upper and lower extremities." (*Id*.) He found "that as of ***today's date***, Ms. Maniaci is at MMI." (*Id*. at 7; emphasis added.) Finally, he found Maniaci physically capable of resuming "full unrestricted duties" in her old job, which he presumed was a sedentary position. (*Id.* at 8.) He opined that she was capable of "performing sedentary to light labor activities" involving "lifting up to 25 pounds occasionally or up to 10 pounds frequently." (*Id*.)

¶30 The IME report was forwarded to the UEF's adjuster, who scheduled a medical panel examination for May 15, 1997 but continued total disability benefits. Due to settlement negotiations, the panel examination slipped to June 24, 1997.

¶31 The UEF adjuster felt that a panel examination was necessary because she had three different medical opinions concerning claimant's condition, one from chiropractor Bouma, one from Dr. Kurtz, and the one from Dr. Vallin. She did not give any greater weight to Dr. Vallin's opinions despite his specialty and greater expertise than either the chiropractor or Dr. Kurtz. She apparently did not feel it was significant that Dr. Kurtz involvement in treatment was spotty and that his records were short and failed to reflect the sort of full work-up done by Dr. Vallin.

¶32 Dr. Kurtz saw claimant on November 13 and 20, 1995. (Ex. 10 at 2.) Thereafter he did not see her again until October 3, 1996, and on that date only saw her at the specific request of Safeco, which was paying her medical bills. (*Id.* at 3-4.) He then saw her again on January 21, 1997, following Dr. Vallin's evaluation. On that visit he wrote:

> There is no debate here that she probably doesn't have any neurological injuries. My contention is that the patient has gone on the road at this time to a classical case of fibromyalgia with fybromyositis secondary to the last injury she was involved in. She has been getting Workman's Comp. payments because she hasn't been able to return to work because her upper shoulders and arms and lower back are still giving her problems. She really hasn't had any treatment of therapy other than the chiropractor. My suggestion is she speak with the people in the physical therapy department in Liviingston and also here to see if she could get into a back strengthening program because I think this is basically what she needs to get involved in. She needs to get back to some sense of normalcy and get back to work.

(*Id*. at 4.)

¶33 I am persuaded that the adjuster's management of this case was insufficient in the light of the nature of the injury (soft tissue), the lack of significant improvement despite repeated and multiple chiropractic treatments, and the extended period of disability from performing even a sedentary job. I am persuaded by Mr. Edquest's opinion that a prudent adjuster would have requested medical management, an IME and a vocational consultant early on in this claim.

¶34 While the evidence presented "suggests" that the payments made to claimant by the UEF might have been reduced by more aggressive medical and vocational management, that suggestion is not supported by a preponderance of evidence. Dr. Vallin's opinion that Maniaci had reached maximum medical improvement (MMI) was as of the date of his examination. He was very specific in saying that Maniaci had reached MMI "as of today's date." (Ex. 4 at 7.) His report does not support a finding that Maniaci reached MMI, or was able to return to work, at any earlier date. His report does not refute the chiropractor's and Dr. Kurtz's earlier opinions precluding claimant from a return to work. Dr. Vallin also did not address whether Maniaci could have returned to a modified position, even on a part-time basis. *See* §§ 39-71-703, -712, MCA (1995). Moreover, the cost of medical management, an IME, and vocational assistance would have increased the cost of adjusting the claim, a cost which would have been passed on to Garcia. Garcia failed to persuade me that the ultimate cost of the claim would have been decreased by more aggressive adjusting.

CONCLUSIONS OF LAW

I.

¶35 The Workers' Compensation Court has jurisdiction in this matter since it is based on a dispute regarding benefits payable to a claimant. § 39-71-2905 and -2401, MCA; *State ex rel. Uninsured Emp. Fund, Division of Workers' Compensation v. Hunt,* 191 Mont. 514, 625 P.2d 539 (1981). The Court has jurisdiction over indemnity claims arising out of the

payment of benefits. *See EBI/Orion Group v. State Compensation Ins. Fund.,* 240 Mont. 99, 782 P. 2d 1276 (1989).

II.

¶36 The injury at issue in this case occurred on November 10, 1995. The law applicable at that time was the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

III.

¶37 An uninsured employer is liable to the UEF for benefits the UEF pays to the injured worker. Section 39-71-504, MCA (1995), specifically states:

> **Funding of fund -- option for agreement between department and injured employee.** The fund is funded in the following manner:
>
> . . . .
>
> (2) 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.

¶38 While the section requires the uninsured employer to indemnify the UEF for benefits paid to an injured worker, the employer must indemnify the UEF only if the UEF is in fact liable for the claim. *See EBI/Orion*, 240 Mont. at 104-105, 782 P.2d at 1279-80.

¶39 Similarly, the section is not a license for the UEF to arbitrarily pay benefits and charge them back to the employer. The UEF must exercise the same care in adjusting claims as do private insurers, self-insurers and the State Fund. It can charge back only those costs that are reasonable. *Cf. Daily Express v. Northern Neck Transfer Corp*., 490 F. Supp. 1304, 1307 (M.D. Penn. 1980).

IV.

¶40 A worker is entitled to benefits only for an injury suffered in the course and scope of employment. Section 39-71-407(1), MCA (1995), provides:

> **Liability of insurers -- limitations.** (1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury **arising out of and in the course of employment** or, in the case of death from the injury, to the employee's beneficiaries, if any. [Emphasis added.]

Section 39-71-407, MCA, goes on to make specific provision for employee travel, providing in subsection (3):

(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(a)(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) the travel is required by the employer as part of the employee's job duties.

The subsection applies to this case. *Carrillo v. Liberty Northwest Ins.,* 278 Mont. 1, 922 P.2d 1189 (1996) is distinguishable. *Carrillo* involved an employee on break who was hit by a car while walking near her place of employment. The Supreme Court held that she was not "traveling," therefore the travel doctrine did not apply. In this case, the claimant alleged that she was on an errand for her employer which required her use of a car.

V.

¶41 There is no evidence that Garcia agreed to pay for Maniaci's trip to the IRS office. Subsection (1) of section 39-71-406, MCA (1995), is therefore inapplicable. Thus, Garcia's liability must be based on subsection (b), which provides coverage if Maniaci's travel was required by Garcia. If Garcia authorized Maniaci to travel to the IRS to obtain the forms, then her travel was required.

¶42 The evidence concerning Garcia's authorization is conflicting. Maniaci testified that Garcia authorized her go to the IRS office to get the forms and had authorized other out-of-office errands. Garcia vigorously denied that he ever authorized the IRS trip or any other errand.

¶43 I was unable to resolve the conflicting testimony. I have found it equally as likely that Maniaci is telling the truth as Garcia, and vice versa. The evidence concerning the course and scope issue is evenly balanced. Liability must therefore be determined based on the burden of persuasion.

VI.

¶44 Section 26-1-402, MCA, provides:

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.

The section 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. But if Garcia had

ignored the UEF's claim for indemnity, and forced the UEF to sue him, then the UEF would have borne the burden of persuasion. Section 26-1-402, MCA, also does not address what a claim for relief is. Is a declaratory judgment asking for a declaration that one is not liable for the other party's claim a claim within the meaning of the section?

¶45 So what gives? Whose claim is it? Why shouldn't the burden of persuasion be on the UEF, since if it were prosecuting its claim for indemnity it would bear the burden of persuasion. Those are the questions I asked, as judge, once I determined that the evidence is evenly balanced.

¶46 There are no cases on point in Montana. My subsequent legal research revealed that there is a split of authority on the matter. *See generally* 23 ALR 2d 1243; 26 CJS, Declaratory Judgments § 148; 22A Am Jur.2d, Declaratory Judgments § 231, 233. Some courts simply impose the burden of proof on the plaintiff seeking declaratory judgment. Others impose the burden on the party, plaintiff or defendant, who would have the burden of persuasion if seeking affirmative relief, such as damages or indemnity. I find the latter view the better reasoned and more persuasive.

¶47 In *Preferred Accident Ins. Co. of N.Y. v. Grasso*, 186 F.2d 987 (2d Cir. 1951), the second circuit of the United States Court of Appeals considered the matter. In that case an insurer commenced a declaratory judgment action seeking a determination that it was not liable to its insured with respect to a particular claim. In discussing the burden of persuasion, the Court noted that had the insured brought an indemnity action against the insurer, he would have borne the burden of persuasion of proving he was entitled to indemnification. The Court then considered whether the burden should be shifted to the insurer because it had brought a declaratory action:

> Does the fact that this is the insurer's action for a declaratory judgment change the principle? It would seem rather anomalous that so important a matter should depend on the chance of who first sues and the outstanding authority in the field argues against such a result. *Borchard*, Declaratory Judgments 404-409, 2d Ed. 1941. Thus, after first stating that "since as a rule the risk of non-persuasion is on the plaintiff, it is not surprising to find that the burden of proof in declaratory actions rests, in the vast majority of cases, on the moving party." Professor Borchard proceeds to point out that in cases such as the one we have here, "Inasmuch as the company's claim of immunity is in reality negatively defensive, there seems no impropriety in leaving the burden of proof exactly where it would have been had suit been brought on the policy, namely, on the insured or injured person." And he concludes that the burden of proof in such case is not automatically on the plaintiff, but on him who "without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence," or who asserts the affirmative of any issue, quoting *Reliance Life Ins. Co. v. Burgess*, 8 Cir., 112 F.2d 234, 237, 238,

> certiorari denied 311 U.S. 699, 61 S.Ct. 137, 85 L.Ed.453. This statement of the rule has been adopted by other courts: *Bauer v. Clark*, 7 Cir., 161 F.2d 397, 400, certiorari denied 332 U.S. 839, 68 S.Ct. 210, 92 L.Ed 411; *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp*., 9 Cir., 178 F.2d 541, 546, 547. While the first case awarding the burden of proof to the defendant in an action such as the one at bar, *Travelers Ins. Co. v. Greenough*, 88 N.H. 391, 190 A. 129, 109 A.L.R. 1096, was later questionably distinguished or limited, *Borchard*, op. cit. at 406, 407, we think the principles stated by Professor Borchard and the rule enunciated in *Reliance Life Ins. Co. v. Burgess*, supra, are correct.

Preferred, 186 F.2d 987, 991 (1951).

¶48 In this matter, the UEF contested Garcia's request that he be absolved of liability. It filed an amended response wherein it requested the Court to order Garcia to reimburse it for payments and to also assess a penalty against him.

¶49 The UEF bears the burden of persuasion. Since it failed to sustain its burden, Garcia is entitled to a declaratory judgment finding that he is not liable for payments made by the UEF with respect to Maniaci's claim.

VII.

¶50 The UEF, however, is entitled to a penalty pursuant to section 39-71-504(1), MCA (1995), which provides in relevant part:

> **Funding of fund -- option for agreement between department and injured employee.** The fund is funded in the following manner:
>
> (1) The department may require that the uninsured employer pay to the 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. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment based on how much premium would have been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

The penalty provision is not dependent on my finding Garcia liable to the UEF for the benefits paid Maniaci. It arises out of the fact that Garcia was uninsured, a fact that Garcia admitted.

¶51 However, the section is explicit in providing that the Department is to determine the amount of the penalty. While an appeal from such decision might lie with this Court, the Court does not have de novo jurisdiction to determine the amount of the penalty. The Court

is therefore presently without jurisdiction to adjudicate the Department's request for a penalty.

JUDGMENT

¶52 1. The Court has jurisdiction over the dispute concerning the UEF's entitlement to reimbursement for benefits it has paid to Julie Maniaci. § 39-71-2905, -2401, MCA; *State ex rel. Uninsured Emp. Fund, Division of Workers' Compensation v. Hunt,* 191 Mont. 514, 625 P.2d 539 (1981); *EBI/Orion Group v. State Compensation Ins. Fund.,* 240 Mont. 99, 782 P. 2d 1276 (1989). However, it presently lacks jurisdiction over the amount of penalty to be assessed against petitioner pursuant to section 39-71-504(1)(a), MCA. That amount must in the first instance be determined by the Department.

¶53 2. The Uninsured Employers' Fund is not entitled to indemnification from petitioner with respect to payments it has made to and on behalf of Julie Maniaci Brennan on account of injuries she suffered in an automobile accident on November 10, 1995.

¶54 3. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for all purposes of appeal.

¶54 4. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 16th day of June 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. William Dean Blackaby
Mr. Stephen T. Garcia - Certified Mail
Mr. Robert J. Campbell
Ms. Julie Maniaci Brennan - Certified Mail
Date Submitted: April 23, 1998