**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2004 MTWCC 79**

**WCC No. 2002-0705**

---

**UNINSURED EMPLOYERS' FUND**

**Petitioner**

**vs.**

**GREGORY M. GOULD and AIMEE V. HACHIGIAN-GOULD**

**d/b/a SEVEN BAR HEART & CATTLE COMPANY**

**Respondents.**

---

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** UEF seeks reimbursement from an uninsured employer for the benefits it paid to a claimant who was injured on March 22, 1997.

**Held:** The claimant's injuries did not occur in the course and scope of employment, therefore he was not entitled to workers' compensation benefits and the UEF is not entitled to reimbursement for the benefits it paid.

**Topics:**

> **Uninsured Employers' Fund: Indemnification.** The Uninsured Employers' Fund is entitled to indemnification from an uninsured employer only if it was in fact liable to pay benefits to the claimant. Where it has paid benefits to a claimant who was not in fact injured in the course and scope of employment, the Uninsured Employers' Fund is not entitled to indemnification from the uninsured employer.
>
> **Employment: Course and Scope: Compensation.** Services provided by a volunteer without expectation or agreement for compensation are not within the course and scope of employment.

¶1 The trial in this matter was held in Great Falls, Montana, on September 14, 2004. The petitioner was represented by Ms. Julia W. Swingley. The respondents were represented by Mr. L.D. Nybo.

¶2 Exhibits: There were numerous objections to proposed exhibits. The following reflects the actions taken by the Court concerning the exhibits:

Exhibit 1: Admitted for purposes of showing the claim was filed but not for purposes of showing that the claimant was in fact injured in the course and scope of employment.

Exhibits 2-7: Admitted without objection.

Exhibit 8: Pages one through three were admitted. Page four was admitted for limited purposes as reflected in the trial transcript.

Exhibit 9: Admitted without objection.

Exhibits 10-13: Refused. Exhibit 12 was returned to the petitioner.

Exhibit 14: Admitted over objection.

Exhibit 15: Bank checks in the exhibit were admitted, the remaining pages were refused.

Exhibits 16-17: Admitted without objection.

Exhibit 18: Pages seven and eight admitted. The remaining pages were refused.

Exhibits 19-24: Admitted without objection.

¶3 Witnesses and Deposition: Gregory M. Gould, Aimee V. Hachigian-Gould, James M. Spurzem, Patrick L. Paul, and Bernadette M. Rice testified at trial. In addition, the parties submitted the deposition of Robert Williams to the Court for its consideration.

¶4 Issues Presented: The Court restates the issues as follows:

¶4a Whether Allen E. Williams' accident on March 22, 1997, occurred in the course and scope of employment with Gregory M. Gould and Aimee V. Hachigian-Gould, who were doing business as the 7 Bar Heart Cattle Company.

¶4b If so, whether the Uninsured Employers' Fund is entitled to reimbursement and indemnification with respect to benefits it has paid on account of the accident.

¶4c If the Uninsured Employers' Fund is entitled to indemnification for benefits it paid on account of Allen E. Williams' March 22, 1997 accident, whether it properly calculated the amount of his indemnity benefits.

¶5 Pretrial Motions: Both parties filed pretrial motions concerning the admissibility of statements made by Allen E. Williams prior to his death. The Uninsured Employers' Fund asked the Court to admit and consider Mr. Williams' hearsay statements. (Memorandum on Exception to Hearsay, filed 8/11/04.) The respondents moved to exclude the hearsay statements. (Motion *In Limine* and Supporting Brief, filed 8/19/04.) At trial I ruled that hearsay statements of the decedent were inadmissible. Even though Mr. Williams is deceased and is therefore unavailable to testify, hearsay statements of a decedent are not

one of the recognized exceptions to the general rule excluding hearsay. Rule 804, Mont. R. Evid. and *see Heisler v. Boule,* 226 Mont 332, 735 P.2d 516 (1987). However, some of the exhibits the respondents sought to exclude were admissible and not excludable as hearsay. Rulings on exhibits are reflected in paragraph 2.

¶6 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 The present action involves a claim for workers' compensation benefits by Allen E. Williams (Al or Al Williams or claimant). He suffered a broken pelvis on March 22, 1997, when bucked by his horse while helping move cattle out to pasture on the 7 Bar Heart Cattle Company ranch (7 Bar Heart Ranch).

¶8 The 7 Bar Heart Ranch is owned by Gregory M. Gould (Greg) and Aimee V. Hachigian-Gould (Aimee), who are husband and wife (Goulds). Aimee is not only a partner in the ranch, she is also an orthopedic surgeon.

¶9 Both Greg and Aimee testified at trial. Both were credible witnesses. James M. Spurzem (Jim), who also testified, corroborated their testimony concerning events on the day of Al's accident. He was also a credible witness.

¶10 The 7 Bar Heart Ranch is located near Ulm, Montana. The Goulds breed and raise their own cattle on the ranch. They also provide pasture for cattle owned by others.

¶11 In addition to the 7 Bar Heart Ranch, the Goulds operate a feedlot located approximately one and one-half miles from the 7 Bar Heart Ranch. The Goulds operate the feedlot through O Bar M, Incorporated. O Bar M, Incorporated leases the feedlot facilities from Harold Polich (Harold).

¶12 Al Williams lived in a house on land adjacent to the feedlot. Al's land included thirteen acres of irrigated hay fields.

¶13 Al and Greg were friends. At least by 1996, Al had fallen on hard times and Greg extended a hand to help his friend. He began advancing monies to Al. Al agreed to repay the advances by doing work for the 7 Bar Heart Ranch. Greg also agreed to provide Al with work to earn additional money.

¶14 The work arrangement was informal. Greg testified, and I find, that he tried to limit the outstanding advances to Al to $1,000. Similarly, he paid Al whenever Al had accumulated 100 hours of work. No formal records were ever maintained of the hours worked by Al. Both men kept the hours in their heads and compared their recollections in determining Al's pay.

Some payments for Al's work were via "barter," which means that Al was paid in kind rather than in dollars. There is no record of the in-kind payments.

¶15 An example of an advance made by the 7 Bar Heart Ranch to Al is a $1,000 check to Al in November of 1996. The check was for Al to purchase an engine for his jeep. Wages for hours worked thereafter by Al at the 7 Bar Heart Ranch were then credited against the advance.

¶16 One of the jobs assigned to Al was feeding livestock at the feedlot. Initially, he was paid for his work at a rate of $5 an hour. His wage was increased to $6 an hour approximately one month prior to his accident. His wages were paid by the 7 Bar Heart Ranch even though the feedlot was owned by O Bar M, Incorporated. One reason for that arrangement may have been because the Goulds fed some of their 7 Bar Heart Ranch cattle at the feedlot.

¶17 Al also did other jobs for the Goulds and the 7 Bar Heart Ranch, including helping Greg move cattle during the fall of 1996. The two men moved the cattle using horses. Al rode one of Greg's horses.

¶18 In addition to the employment relationship, Greg, Al, and a third individual were partners in a haying business. It was a small operation. No formal partnership documents were ever prepared and the three partners simply used their own equipment and provided their own labor in the operation, helping one another in harvesting their own hay and splitting the proceeds when cutting and putting up hay for others.

¶19 Al typically fed the cattle at the feedlot in the morning and the evening, taking about an hour on each occasion.

¶20 On the morning of March 22, 1997, the Goulds, as well as Al, were at the feedlot helping a veterinarian fertility test yearling bulls. Bulls owned by the feedlot owner, Harold, were also tested. Harold had his own hired hand, Jim, assist them. Jim was paid for his time by Harold.

¶21 After completing the fertility testing, the Goulds returned to the 7 Bar Heart Ranch to vaccinate new calves. Jim and Al accompanied them. Jim assisted Greg and Aimee in the actual vaccination while Al watched and played with the Gould's children. A total of thirty-seven calves were vaccinated.

¶22 Following the vaccinations, the group had lunch. Al was drinking alcoholic beverages before and/or during lunch. Both Greg and Aimee were aware he had been drinking but were not overly concerned and did not believe he was intoxicated. The evidence of drinking was offered because Al did not drink while working, thus the evidence indicates that after completing the fertility testing at the feedlot, Al did not reasonably believe he was working.

¶23 After lunch, Aimee decided to herd the calf-cow pairs (seventy total cattle) back to ranch pastures and to do so on horses. While the Goulds testified that they could have

merely opened the corral gates and let the cattle drift back into the pastures, they in fact herded them on horseback. Aimee testified that she enjoyed riding and therefore chose to drive them to pasture rather than letting them drift out.

¶24 Both Jim and Al saddled up to help. Al saddled and rode his own horse, a Tennessee Walker he had acquired the previous fall. Al kept his horse pastured at the Goulds.

¶25 The Goulds were concerned about Al riding the horse as it was spirited and difficult to ride and Al was not an accomplished horseman. They counseled Al against riding. Al said that he wanted to ride the horse to make sure it was okay for his grandchildren to ride. When Al insisted on riding, the Goulds told him he was "on his own time."

¶26 As the three riders proceeded to herd the cows out of the corral and towards the pasture, some calves turned back and Al went after them on horseback. His horse began bucking. He was not thrown from the horse but was thrown up and came down hard on the saddle horn, breaking his pelvis.

¶27 Al initially refused medical care and went home. However, later that evening the Goulds stopped by his home and found him in significant distress. Aimee called for a helicopter evacuation and he was taken to a hospital in Great Falls.

¶28 Jim was paid for his time helping the Goulds, including his time helping herd the cattle back to pasture. He was paid by his own employer, Harold, and loaned to the Goulds in return for their help that morning in fertility testing some of Harold's bulls.

¶29 On May 27, 1997, Al filed a workers' compensation claim. At the time of the accident, the Goulds did not have workers' compensation insurance; the claim was therefore routed to the Uninsured Employers Fund (UEF).

¶30 The UEF initially denied the claim. However, following mediation it accepted the claim. It notified the Goulds of its acceptance on February 4, 1998, and of their right to petition the Workers' Compensation Court in the event they disagreed with the UEF's determination. (Ex. 16.)

¶31 On February 4, 1998, the UEF notified Al that it had determined his average weekly wage to be $239.68, resulting in a total disability rate of $159.78. It notified Al of his right to contest its determination by seeking mediation within ninety days. The Goulds, however, were not notified of any right to contest the wage or indemnity benefits calculations.

¶32 Between February 4, 1998, and July 17, 2002, the UEF paid medical benefits in the total sum of $39,780.89 and indemnity benefits of $30,061.50.

¶33 The UEF commenced the present action on December 2, 2002, seeking reimbursement for the amounts it has paid. The Goulds contest liability, alleging that Al was not employed at the time of his accident. They also contest the wage determination

and benefits rates. On the latter issue, they presented persuasive evidence that some of the checks paid to Al which the UEF used in its computation were not for wages. On the other hand, the UEF did not include services that were paid for in kind.

¶34 The checks identified by Greg as payment for services were:

1074 6/27/96 $1,189.00
1127 6/3/97 $1,000.00
1186 11/96 $1,000.00

In addition, a bill for $2,913.92 for Aimee's orthopedic services performed on Al was paid off by Al's work. The UEF included all of these amounts in its wage calculations. It also included other checks payable to him totaling $6,400. Of those checks, Greg testified that $500 was for hay and $400 antedated Al's work. The reasons for the other checks were not explained, although the memos on two checks for $2,000 each carry the notation "Hay."

## RESOLUTION

¶35 The question to be resolved in this case is whether, as a matter of fact, Al was in the course and scope of employment with the Goulds when he was injured on March 22, 1997. The fact that he was employed by the Goulds at other times is not dispositive. The question is whether he was engaged as an employee at that particular time.

¶36 Answering the question is difficult because the employment relationship between the Goulds and Al was a loose one. Al was paid by the Goulds not only to feed cattle at the feedlot but also to help with other things on their ranch. He was most certainly on the clock and working as an employee on the morning of March 22, 1997. He had also previously helped Greg herd cattle.

¶37 But, on the afternoon of March 22nd, did he provide help herding cattle in the reasonable expectation that he would be paid for his efforts or did he volunteer to help for personal reasons without any expectation of pay? After considering that question, I find that the latter was the case. His drinking indicated he did not expect to work that afternoon. His express motivation for helping drive the cows to pasture was his desire to ride his horse and make sure it was safe for his grandchildren to ride. When he was counseled against riding but insisted on doing so, he was told he was on his own time. I am persuaded that the Goulds did not engage his services on that afternoon and did not intend to pay him for his help. I am similarly persuaded that Al did not reasonably expect to be paid for his help and acted as a volunteer.

## CONCLUSIONS OF LAW

¶38 This case is governed by the 1995 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Al's accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶39 The petitioner in this case is the UEF, which accepted liability for Al's claim and paid both medical and indemnity benefits. It now seeks indemnification from the Goulds for its payments. It does so pursuant to section 39-71-504(2), MCA (1995), which provides:

(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.

¶40 However, the mere fact that the UEF has paid benefits does not automatically entitle it to reimbursement from the uninsured employer. The uninsured employer is liable only if the UEF was legally obligated to pay the benefits. As a matter of basic due process, an uninsured employer must be provided with an opportunity to contest the UEF's decision to accept liability, as well as its payment of specific benefits. The UEF does not dispute the Goulds' standing to contest liability in the present litigation.

¶41 The employer bears the burden of persuasion when contesting the UEF's actions. Uninsured Employers' Fund v. Grant, 2004 MTWCC 38. In this case, they have satisfied their burden.

¶42 To be compensable, an injury must occur in the course and scope of employment. To be in the course and scope of employment, there must be an agreement or "contract of hire" with respect to the services to be performed, *see* § 39-71-118(1)(a), MCA (1995). A "contract of hire" requires that the services be performed in exchange for some sort of remuneration. I have found as a matter of fact that Al volunteered to assist in herding cattle for personal reasons and without any agreement or expectation that he would be paid for his help. Therefore, he was not in the course and scope of employment and was not entitled to workers' compensation benefits. Accordingly, the Goulds are not liable to reimburse the UEF for the benefits it paid.

## JUDGMENT

¶43 The claimant was not injured in the course and scope of employment. Therefore, he was not entitled to workers' compensation benefits with respect to his March 22, 1997 injury. That being the case, the respondents are not liable to reimburse the UEF for the benefits it paid to the claimant. The petition of the UEF is dismissed with prejudice.

¶44 This JUDGMENT is certified as final for purposes of appeal.

¶45 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 6th day of December, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Julia W. Swingley
Mr. L. D. Nybo
Mr. Patrick Paul
Submitted: September 14, 2004