IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 3

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 STAY OF EXECUTION AND DENYING WAIVER OF SUPERSEDEAS BOND

Summary of Case: The Court previously determined that the Montana client companies of HDC were uninsured and subject to penalties. HDC and its client companies have filed a notice of appeal to the Supreme Court and request a stay of judgment and waiver of the supersedeas bond requirement.

Held: The motion is denied. The supersedeas bond may be waived only with the consent of the opposing party or upon a showing that adequate security exists to pay any judgment. Here, the opposing party objects and the ground for seeking the waiver is that the companies cannot afford a bond; thus, adequate security appears to be lacking. On the other hand, the companies' claim that they will be denied an opportunity for appeal because they cannot afford a supersedeas bond and may go bankrupt is unsupported by any affidavit or sworn testimony; mere representations of counsel will not suffice.

Topics:

Appeals:Supersedeas Bond. Supersedeas bond may be waived only where the opposing party consents or the appealing party provides satisfactory evidence that

adequate security exists to pay the judgment. § 39-71-2910(2); Rule 7(b), Mont.R.App.P.; WCC Rule 24.5.346.

Appeals: Supersedeas Bond. Even if lack of adequate funds to purchase a supersedeas bond were a ground for waiving the bond requirement, proof of inadequate funds must be shown by affidavit or other sworn evidence. An attorney's representations are inadequate.

Montana Code Annotated: 39-71-2910(2). Supersedeas bond may be waived only where the opposing party consents or the appealing party provides satisfactory evidence that adequate security exists to pay the judgment.

WCC Rules: 24.5.346. Supersedeas bond may be waived only where the opposing party consents or the appealing party provides satisfactory evidence that adequate security exists to pay the judgment.

Appeals: Stay of Execution or Judgment. Stay of judgment may be granted only if a supersedeas bond is posted or the appealing party provides satisfactory evidence there is adequate security to pay the judgment.

¶1 The respondents/cross-appellants herein move for an order staying the judgment of this Court pending an appeal to the Supreme Court and waiving the requirement for a supersedeas bond. The motion is filed on behalf of all respondents by counsel for HDC, who is also at this point co-counsel for the individual Montana respondents.

¶2 In a supporting brief, counsel states that neither HDC nor the individual Montana companies can afford a supersedeas bond and that requiring a supersedeas bond may force them into bankruptcy. However, the representations are unsupported by any affidavit or other sworn verification.

¶3 The motion is governed by section 39-71-2910, MCA, which provides:

39-71-2910. Stay pending post trial motions and appeal.

. . . .

(2) The appellant may request of the workers' compensation judge or the supreme court, upon service of a notice of appeal, a stay of execution of the judgment or order pending resolution of the appeal. The appellant may request a stay by presenting a supersedeas bond to the workers' compensation judge and obtaining his approval of the bond. The bond must have two sufficient sureties or a corporate surety as authorized by law. A court granting a stay may waive the bond requirement. The procedure for requesting a stay and posting a supersedeas bond must be the same as the procedure in Rule 7(b), Montana Rules of Appellate Procedure.

¶4 Rule 7(b), Mont.R.App.P., which is referenced by section 39-71-2910, MCA, does not make provision for waiver of a supersedeas bond unless the requirement is waived by the opposing party. The rule provides:

> (b) Upon service of notice of appeal, if the appellant desires a stay of execution, **the appellant must, unless the requirement is waived by the opposing party, present to the district court and secure its approval of a supersedeas bond which shall have two sureties or a corporate surety as may be authorized by law.** The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision. [Emphasis added.]

The opposing party herein - the Uninsured Employer's Fund (UEF) - has already objected to any waiver of a supersedeas bond. (appellant's notice of non-objection to order and request for conditions in event of appeal (June 29, 2000).) The rule does permit the district court " for good cause" to fix a different amount than the amount of judgment or to order "security other than the bond." However, the purpose of the bond requirement is to "secure the rights of the judgment creditor during the appeal process," *Poulsen v. Treasure State Industries, Inc.,* 183 Mont. 439, 442, 600 P.2d 206, 208 (1979). The supersedeas bond or its substitute must be in an amount which adequately protects the judgment creditor. *Id.* *"*Waiver" of the bond does not protect the judgment creditor. Moreover, even if the Court may consider the respondents' ability to maintain an appeal absent waiver of the bond, *see Poulsen,* 183 Mont. at 442, 600 P.2d at 208, respondents -- individually and collectively -- have failed to prove their inability to post the bond. They have not submitted affidavits or other sworn evidence of their inability to post the bond. The unsupported representations of counsel are insufficient.

¶5 Section 39-71-2910, MCA, as quoted earlier, does make express provision for this Court to waive the bond requirement when granting a stay of judgment. Whether or not that requirement can be read in isolation of the subsequent sentence requiring the Court to follow Rule 7(b) and as enlarging this Court's authority, respondents' motion still fails. This Court's own Rule 24.5.346, which implements section 39-71-2910, MCA, provides:

> RULE 24.5.346 STAY OF JUDGMENT PENDING APPEAL (1) The party appealing a judgment of the workers' compensation judge may request a stay of execution of the judgment or order pending resolution of the appeal. A request for new trial and/or request for amendment to findings of fact and conclusions of law shall be deemed an automatic stay until the request is ruled upon. **If the parties stipulate that no bond shall be required, or if <u>it is shown to the satisfaction of the court that adequate security exists for payment of the judgment</u>, the court may waive the bond requirement.**

(2) Except as provided for herein, the procedure for requesting a stay and the procedure for posting a supersedeas bond will be the same as the procedure in Rule 7(a) and 7(b), respectively, of the Montana Rules of Appellate Procedure. [Emphasis added.]

Respondent's motion is premised upon their unsupported argument that they cannot provide adequate security. Lacking adequate security, they do not satisfy the conditions for a waiver of the bond.

¶6 The motion for a stay of judgment and to waive the requirement of a supersedeas bond is **denied**.

¶7 SO ORDERED.

DATED in Helena, Montana, this 23rd day of January, 2001.

(SEAL)

<u>/s/ Mike McCarter</u>
JUDGE

c: Mr. Daniel B. McGregor
Mr. Peter J. Stokstad
Mr. Andrew J. Utick
Mr. Edward A. Murphy
Mr. Kirby S. Christian
Mr. Jon G. Beal
Submitted: January 19, 2001