IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 70

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 TO AMEND SEPTEMBER 13TH ORDER

Summary of Case: The Court previously permitted respondent employers to submit employee information to enable the Uninsured Employers' Fund (UEF) to recalculate penalties. A prior extension was granted requiring all records be submitted by October 12, 2000, and specifying the form of the records. On October 13th, the Court received a motion to amend the Order to allow less complete records to be provided. Actual records were later provided to the Court on November 8, 2000, and to UEF on November 13, 2000, more than a month late.

Held: The motion is untimely; moreover the information tendered is incomplete, inadequate, and late. The motion is therefore denied. Since respondents failed to comply with the Court's prior Order, the UEF is relieved from its agreement to recompute the penalties.

Topics:

> **Procedure: Reconsideration.** Motions to reconsider must be filed within 20 days. Rule 24.5.337.

Penalties: Uninsured Employers. Respondent employers failed to comply with the Order which permitted them to submit employee records so the UEF could recompute penalties; therefore, the UEF is relieved its agreement to recompute the penalties. The order allowing recomputation was a matter of grace since the penalties were upheld by the Court.

¶1 In my June 26, 2000 decision and order on appeal, 2000 MTWCC 39, at paragraph 85, I affirmed the Uninsured Employers' Fund's (UEF) computation of penalties against the respondent Montana employers (the Human Dynamics Corporation's (HDC) client companies), noting that the alleged deficiencies in computing the penalties were "due to the actions of HDC and the client companies, which refused to produce the [employee] records in Montana where Department [of Labor and Industry] employees work." (¶ 85.) Nonetheless, I recognized that the penalties might be more precisely calculated upon production of "wage records and classification information." (2000 MTWCC 39, ¶ 86) I then made the following determination:

> Unless the UEF objects, I will grant the client companies 30 days in which to provide the UEF with the information necessary for more accurate calculations. If that information is satisfactory, then I will order that the penalties be recalculated based on the information.

(*Id*.) UEF responded three days later, stating:

> The UEF has no objection to recalculating the penalties assessed against the Montana client companies . . . based upon the timely submission of employee wage records pursuant to the order of this Court.

(APPELLANT'S NOTICE OF NON-OBJECTION TO ORDER AND REQUEST FOR CONDITIONS IN EVENT OF APPEAL at 2.)

¶2 On July 21, 2000, some three and a half weeks after my initial Order, counsel for respondents (Mr. Utick), requested a telephone conference with the Court to discuss deadlines and procedures for recomputing the penalties. (ORDER VACATING FINAL CERTIFICATIONAND AMENDING DECISION AND ORDER ON APPEAL at ¶ 3.) A telephone conference was held among myself, Mr. Utick and Mr. Daniel B. McGregor, attorney for the UEF. Mr. Peter J. Stockstad, who represented one of the other parties, was inadvertently left out of the telephone conference. Mr. Stockstad was later informed of the conference and the agreement reached by counsel and the Court, and he agreed with the resolution.

¶3 During the conference, counsel and I agreed to amendment of paragraphs 93 and 94. The amendment to paragraph 94 provided that the decision in this case shall not become final until the post-trial motions are resolved **and**

> the penalties are recalculated and the time for objections for the recalculation has either expired without objections or the Court has ruled on the objections, or the client companies fail to submit the employee records necessary for recalculation to the Department by August 24, 2000.

(ORDER VACATING FINAL CERTIFICATION AND AMENDING DECISION AND ORDER ON APPEAL at ¶ 3.) Paragraph 93 was amended to provide until August 24, 2000, for submission of employee records. (*Id.*) The Order issued July 25, 2000.

¶4 On August 24, 2000, nearly **two months** after my original Order, and the day set by my second Order for production of employee records, the respondents moved for additional time to produce the records. They represented that HDC maintained 1994 employee records in electronic form on a MacIntosh computer but the computer system had been replaced January 1, 1995, and thereafter crashed. HDC further represented that it had attempted to recover the computer data but had been unable to do so and was therefore compiling "paper records covering the employee data." (SUBMISSION, MOTION FOR ADDITIONAL TIME, AND MEMORANDUMIN SUPPORT OF MOTION FOR ADDITIONAL TIME at 2.) It requested an additional 30 days to compile the information. (*Id.*) In connection with the motion, the respondents submitted materials showing all Montana employees and wages through September 30, 1994, but pointed out it had not yet been able to "come up with a breakdown of these employees by client company and has been unable to fully document the job class code for each employee." (*Id.* at 3.)

¶5 The UEF opposed the requested extension, pointing out that the information which was provided was inadequate and that HDC had several years to compile the documents. As an alternative to denying the extension, the UEF requested that:

> the Court clearly set forth a final date for the submission of this documentation. Moreover, the UEF specifically requests that the Court direct that the submitted documentation be arranged to clearly show the name of the Montana client company, the names of its employees, the total wages earned by each employee of up to the date of the HRC's contract with the Montana client company, and the proper employee class code attributable to each employee.

(UNINSURED EMPLOYERS' FUND'S RESPONSE TO MOTIONFOR ADDITIONAL TIME FILED BY HUMAN DYNAMICS CORPORATION at 3.)

¶6 The UEF's response was filed and served August 28, 2000. No reply was filed by respondents and on September 13, 2000, after the time for response had lapsed, I issued yet another Order extending time and directing that HDC produce the information requested by the UEF. I extended the time for production of employee wage records to October 12, 2000, because of the plight of the client companies, but I also stated in clear

and unequivocal terms that the extension would be the last one. The Order read in relevant part:

> The UEF objects to the motions, stating that HDC has had years to compile and produce the information. While the UEF is correct and I am sympathetic to its position, I am also sympathetic to the plight of the individual companies upon whom the penalties are visited. As set forth in my original decision, these companies have been victimized by HDC. 2000 MTWCC 39 at ¶ 83. But I too have limited patience.
>
> I am therefore extending the time for submission of the documentation until October 12, 2000. That is longer than the extension of 30 days originally sought. But this is a final deadline: **There will be no further extensions. Further, the information provided must be complete. For each client company, HDC shall provide the names of the employees assigned to the client company, the total wages earned by each employee during the entire period of the penalty (up to the date of the client company's contract with HRC), and the employee's proper class code. Should HDC fail to provide records for the full periods of the penalties in the form specified by October 12, 2000, the judgment in this case will be certified as final and the UEF will be relieved of its agreement to recalculate the penalties**.

(ORDER GRANTING EXTENSION AND TO COMPEL, ¶¶ 2 and 3.)

¶7 On October 13, 2000, **the day after the last deadline**, the Court received yet another motion, this time to amend the September 13, 2000 Order to allow respondents to submit information in a different form than specified in the Order. (MOTION TOAMEND ORDER, MEMORANDUM IN SUPPORT OF MOTION TO AMEND ORDER, AND SUBMISSION.) In the motion, filed by Mr. Utick, respondents requested that the September 13th Order be amended to allow respondents to furnish "total payroll for each employer for the entire penalty period; and the payroll for each employer, broken down by class code, without the necessity of designating the class code for each employee individually." (*Id*. at 2.) Respondents at that time did not supply the Court with the documents they claimed to have compiled. The documents were provided for the first time on November 8, 2000, when a boxful of documents were delivered to the Court. At my direction, Court personnel contacted counsel for UEF and ascertained that UEF received a similar box by mail on November 13th, 2000, although the box was postmarked November 8th. Thus, it appears that even as to the documents respondents compiled, they were almost a month late in furnishing them to the UEF.

¶8 The UEF objects to the respondents' latest motion on both procedural and substantive grounds. Initially, it points out that the motion is properly characterized as a motion for

reconsideration of the September 13th Order and therefore governed by Rule 24.5.337 which provides:

> 24.5.337 MOTION FOR RECONSIDERATION (1) Any party may move for reconsideration of any order or decision of the workers' compensation court. The motion shall be filed within 20 days after the order or decision is served. The opposing party shall have 10 days thereafter to respond unless the court orders an earlier response. Upon receipt of the response, or the expiration of the time for such response, the motion will be deemed submitted for decision unless the court requests oral argument.
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> (2) Within 20 days of the issuance of any order or final decision, the court may, on its own motion and for good cause, reconsider the order or decision.
>
> (3) If the motion requests reconsideration of an appealable order or judgment, the original order or judgment shall not be final until and unless the court denies the motion.

¶9 The Court agrees that the rule applies. However, respondents argue against application of the rule, claiming that the motion is timely under the Court's September 13th Order since that Order superceded the rule and allowed until October 12th for them to respond. The argument is ludicrous. The September 13th Order allowed respondents to produce the records by October 12th, nothing else. The motion is untimely.

¶10 The UEF also points out that the information furnished by the respondents is insufficient since it would preclude it from identifying individual employees to confirm employment information. It points to other deficiencies, including the failure of HDC to provide complete information. UEF is correct in this assertion. Attached to Mr. Utick's motion is an October 12, 2000 Affidavit of Thomas R. Lindsey, CEO of HDC. In that Affidavit, he says in relevant part:

> 2. I compiled a detailed accounting of all billing invoices that HDC has for its Montana clients for the year 1994 in compliance with the Order Granting Extension and to Compel filed September 13, 2000.
>
> 3. The accounting broke down the payroll of each Montana company by classification code.
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> 4. The accounting **then extrapolated the remaining balance of payroll invoices that cannot be found or retrieved, based on the payroll numbers provided by the State of Montana.**

(MOTION TO AMEND ORDER, MEMORANDUM IN SUPPORTOF MOTION TO AMEND ORDER, AND SUBMISSION, Exhibit D at 1.)

¶11 Further, other than the limited attachments to the respondents' October 13th motion, the documentation which was compiled by respondents was not furnished to the UEF by October 12th as required. The documentation was finally delivered to the Court on November 8th, nearly a month late, and to UEF on November 13th, more than a month late.

¶12 Mr. Utick has criticized the Court for specifying the specific records to be produced. He says:

[I]t seems that the Respondents should be allowed to submit the evidence in this case in the form that they determine best illustrates and the [sic] proves their point. **It is respectfully submitted that this Court should not be in the business of foreclosing parties from building a record as the party sees fit and should not be directing parties as to exactly how they have to present their evidence.** [Emphasis added.]

(MOTION TO AMEND ORDER, MEMORANDUM IN SUPPORTOF MOTION TO AMEND ORDER, AND SUBMISSION at 3.)

¶13 It is apparent that Mr. Utick does not understand the nature of the Court's orders or his and his clients' responsibilities. For years the respondents stymied the UEF's efforts to compute the penalty. They could have produced records and made their arguments concerning the proper computation of the penalties years ago. Second, when the UEF opposed Mr. Utick's August 24th request for an additional extension it asked in the alternative that the Court direct production of specific information. Mr. Utick had an opportunity to file a reply to that request: He did not do so. He could have filed a request for reconsideration within the time provided by the Court's rules: He did not do so.

¶14 Finally, and most importantly, the opportunity for recomputation of penalties that has been provided is a matter of grace, not a matter of entitlement. Mr. Utick seems to overlook the fact that I affirmed the penalties. Only out of my concern for fairness to the client companies did I provide an opportunity for recomputation. Even then, the Order was effective only if the UEF did not object, which it did not. I have now pushed the judicial envelope far enough. There is no legal basis for me to compel the UEF to recompute the penalty based upon what has been provided to date, especially since the grace period for allowing recomputation has expired.

¶15 The motion to amend is **denied**. Respondents have not complied with the Court's orders regarding the recomputation, therefore, the UEF is not required to recompute the penalty.

¶16 There is no reason for further delaying final resolution of this matter. Simultaneous with this Order, I am denying the respondents' other post-trial motions and certifying the June 26, 2000 decision and order on appeal as final.

¶17 Respondents' counsel, Mr. Utick, shall retrieve his clients' boxful of documents from the Court by November 22, 2000.

¶18 SO ORDERED.

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: November 9, 2000