

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 19

WCC No. 2017-3958

BART CRABTREE d/b/a LODESTAR BUILDERS

Appellant

vs.

DEPARTMENT OF LABOR & INDUSTRY, UNINSURED EMPLOYERS' FUND

Appellee.

ORDER AFFIRMING PENALTY UNDER § 39-71-504(1)(a), MCA

Summary: Employer Appellant appeals from a decision of agency Appellee ordering him to pay to the Uninsured Employers' Fund a penalty under § 39-71-504(1)(a), MCA, in the amount of \$28,259.82. Appellant argues the penalty is not supported by sufficient evidence in the record.

Held: There is sufficient evidence in the record to support Appellee's imposition of a \$28,259.82 penalty under § 39-71-504(1)(a), MCA. Appellee's final agency order imposing the penalty is affirmed.

¶ 1 Appellant Bart Crabtree, d/b/a Lodestar Builders (Crabtree), appeals from a decision of Appellee Department of Labor & Industry (Department) ordering him to pay a penalty of \$28,259.82 to the Uninsured Employers' Fund (UEF).

FACTS AND PROCEDURAL HISTORY

¶ 2 On January 26, 2016, the UEF notified Crabtree that it received information he employed workers in his construction business without carrying the requisite workers' compensation insurance coverage for them. The UEF notified Crabtree that he could be assessed a penalty for such non-compliance and initiated a workers' compensation audit. On February 25, 2016, the UEF sent Crabtree a second notice.

¶ 3 On March 18, 2016, the UEF Investigator Sarah Elledge, in connection with the audit, issued a *subpoena duces tecum* to Crabtree requesting he produce business and employee records. The *subpoena duces tecum* was served on Crabtree March 30, 2016. Crabtree did not comply with the subpoena.

¶ 4 On April 25, 2016, Elledge notified Crabtree of the UEF's penalty calculation of \$28,259.82, based on an estimated payroll of \$81,688.01. Elledge notified Crabtree that if he disagreed with the penalty, he would need to comply with the audit of his business books and records. Crabtree failed to produce all of the documentation requested for the audit.

¶ 5 On May 18, 2016, an official penalty determination was assessed against Crabtree in the amount of \$28,259.82 for not providing workers' compensation coverage for its employees from October 1, 2014, to March 31, 2016. Crabtree requested an administrative review on June 17, 2016.

¶ 6 On June 20, 2016, the UEF issued a redetermination that Crabtree owed a penalty of \$28,259.82. On July 20, 2016, Crabtree filed an appeal of the Redetermination and requested a contested case hearing. A Notice of Hearing was issued July 26, 2016.

¶ 7 On August 4, 2016, the Department served Crabtree with its first discovery requests, which included Requests for Admission, Requests for Production, and Interrogatories.

¶ 8 On August 8, 2016, the Office of Administrative Hearings (OAH) issued a Scheduling Order informing the parties that "[a] party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, imposition of liability or other appropriate sanctions."

¶ 9 Crabtree did not respond to the discovery requests and did not appear at a scheduled telephone conference. The Department filed a Motion to Compel on September 13, 2016. The Brief Supporting UEF Motion to Compel noted that a failure to respond to Requests for Admission deemed them admitted. Crabtree did not respond to the motion.

¶ 10 Hearing Officer David Evans issued an order on October 11, 2016, compelling Crabtree to respond to the Department's Requests, no later than October 24, 2016. The order noted that Crabtree had "not respond[ed] to OAH staff's request."

¶ 11 On October 24, 2016, Crabtree provided responses, but failed to produce all of the requested records, including his tax returns, and failed to explain the basis for his denials of the Department's Requests for Admission.

¶ 12 On November 10, 2016, the Department moved for default, based on Crabtree's deemed admissions,¹ deficient discovery responses, and his failure to obey the Hearing Officer's order. Crabtree filed a Motion to Dismiss.

¹ The Requests for Admissions were deemed admitted pursuant to Rule 36(a)(3), M.R.Civ.P.

¶ 13 On December 29, 2016, Hearing Officer David A. Scrimm denied Crabtree's motion and granted the Department's Motion for Default on the basis Crabtree failed to comply with Hearing Officer Evans' order and that Crabtree's late discovery responses were evasive, incomplete, and otherwise deficient.

¶ 14 Specifically, Hearing Officer Scrimm faulted Crabtree for failing to list or identify the individuals he employed, the services they performed, and the time period they worked for him. Hearing Officer Scrimm noted that the Department's Requests for Admission were admitted based on Crabtree's failure to respond timely, his failure to move to set the admissions aside, and his failure to explain the basis for his late denials.

¶ 15 The Admissions deemed admitted were: 1) that he was an uninsured employer for all times between October 1, 2014, and March 31, 2016; and 2) that he employed employees between October 1, 2014, and March 31, 2016.

¶ 16 A hearing was held January 12, 2017, to determine whether the Department's assessed penalty of \$28,259.82 was correct. Based on the testimony and evidence presented, Hearing Officer Scrimm issued an order dated January 23, 2017, determining that the penalty was properly calculated and entering judgment against Crabtree in the amount of \$28,259.82.

¶ 17 Hearing Officer Scrimm noted in his order that:

The UEF tried at least five times to get Crabtree to fully respond to its audit. He did not, so the statutory penalty was assessed based on doubling the amount of premium for fiscal years 2015 and 2016 to reach the penalty amount ($\$7,204.88 + \$6,825.03 = \$14,029.91 \times 2 = \$28,059.82$). The \$200.00 penalty was assessed pursuant to Mont. Code Ann. 39-71-504(1)(c).

¶ 18 Crabtree timely appealed to this Court from the January 23, 2017, final agency decision, pursuant to § 39-71-2401(3), MCA.

¶ 19 On appeal, Crabtree disputes the basis for the Department's penalty calculation, arguing that there was insufficient evidence in the record to establish the underlying data, such as the number of people he employed, the time period they worked for him, and the applicable wages he paid them.

¶ 20 The Department responds that since Crabtree failed to engage in meaningful discovery by providing his business and employee records, failed to establish error in the Department's penalty calculation, and failed to appeal the default entered against him, the final agency decision should be affirmed.

ANALYSIS AND RESOLUTION

¶ 21 Judicial review of a final agency decision in a contested case is governed by the Montana Administrative Procedure Act. Section 2-4-704, MCA, limits this Court's review. It provides, in relevant part:

(1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

- (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (b) findings of fact, upon issues essential to the decision, were not made although requested.

¶ 22 “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance.”²

¶ 23 As indicated by § 2-4-704(2), MCA, this Court may not substitute its judgment for the Department's as to the weight of the evidence on issues of fact. It may reverse or modify the Department's findings if they are clearly erroneous in light of the entire record. It may also reverse or modify the Department's decision if it is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

¶ 24 After reviewing the record, this Court is not convinced that reversal is justified. Crabtree has not met his appellate burden under § 2-4-704(2), MCA. None of the Findings of Fact are clearly erroneous. Nor can this Court say that any findings or

² *Blaine County v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159 (quoting *State Pers. Div. v. Child Support Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305).

conclusions are arbitrary, capricious, or otherwise characterized by an abuse of discretion.

¶ 25 Crabtree has not appealed the Hearing Examiner's Entry of Default or challenged the validity of his deemed admissions. It matters not, however, as this Court finds no abuse of discretion with regard to these discovery sanctions. They were justified by Crabtree's dilatory and deficient responses to the Department's discovery requests and his failure to abide by the provisions of the Scheduling Order. As such, Crabtree cannot dispute that he is an uninsured employer as defined in § 39-71-501, MCA, for the audit period of October 1, 2014, through March 31, 2016.

¶ 26 As to the penalty, this Court finds no error in its calculation. The amount was calculated pursuant to the correct statutory method and is supported by credible evidence in the record which Crabtree did not dispute with any of his own evidence. While Crabtree disputes the underlying data informing the UEF's calculations, he has not challenged the applicable statutory rate or submitted any documentation or evidence to the UEF or Department supporting his position that he had less than four employees and/or paid them less than the State Fund classification code/rate for construction workers.

¶ 27 An employer's failure to produce the necessary records to justify a different penalty calculation is a sufficient basis to affirm the UEF's penalty calculation.³

¶ 28 For these reasons, this Court denies Crabtree's appeal and affirms the final agency decision of the Department imposing on him a penalty of \$28,259.82 for failing to maintain workers' compensation insurance for his employees for the audit period.

ORDER

¶ 29 The Judgment entered by the Department on January 23, 2017, ordering Appellant Crabtree to pay a penalty to the UEF of \$28,259.82 is **AFFIRMED**.

¶ 30 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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³ *Total Mech. Heating & Air Conditioning v. Emp't Relations Div.*, 2002 MT 55, ¶ 59, 309 Mont. 84, 50 P.3d 108.

DATED this 3rd day of November, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Bart Crabtree
Quinlan L. O'Connor

Submitted: April 4, 2017

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