

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 18

WCC No. 2008-2152

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**BROCK HOPKINS**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**RUSSELL A. KILPATRICK**

**Third-Party Respondent.**

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ORDER DENYING MOTION FOR RECONSIDERATION

**Summary:** Third-Party Respondent moves the Court to reconsider its Findings of Fact, Conclusions of Law and Judgment. Specifically, Third-Party Respondent requests the Court reconsider two factual findings.

**Held:** Having considered Third-Party Respondent's arguments, the Court sees no reason to reconsider either factual finding. The motion for reconsideration is denied.

¶1 Third-Party Respondent Russell A. Kilpatrick (Kilpatrick) moves the Court to reconsider its Findings of Fact, Conclusions of Law and Judgment entered May 4, 2010. Kilpatrick requests the Court to reconsider two factual findings:

(1) On November 2, 2007, Kilpatrick requested Petitioner Brock Hopkins (Hopkins) to feed the grizzly bears.

(2) On November 2, 2007, Hopkins was acting in the course and scope of his employment.

For the reasons discussed below, Kilpatrick's motion for reconsideration is denied.

**(1) Did the Court erroneously find that on November 2, 2007, Kilpatrick requested Hopkins to feed the grizzly bears?**

¶2 Kilpatrick bases his argument that the Court erred in finding that he had requested Hopkins to feed the bears on November 2, 2007, on Hopkins' acknowledgment that he could not recall a specific conversation with Kilpatrick about feeding the bears on that day. Hopkins testified that it was standard procedure for him to feed the bears and that he fed them more often than Kilpatrick did when the bears were going into hibernation. Although Hopkins did not recall a specific conversation about feeding the bears on November 2, 2007, he testified that he would not have fed the bears on that day if Kilpatrick had told him not to.<sup>1</sup> Kilpatrick acknowledged that Hopkins regularly fed the bears. Kilpatrick testified that Hopkins always fed the bears at either Kilpatrick's or his son's direction, and other than on November 2, 2007, Kilpatrick was not aware of any instance where Hopkins fed the bears without Kilpatrick's or his son's express permission.<sup>2</sup>

¶3 I find it more probable than not that on November 2, 2007, Hopkins was feeding the bears at Kilpatrick's request as he had done numerous times before, either as part of the standard procedure or at Kilpatrick's express direction. I find it less probable that of the multiple occasions that Hopkins fed the bears during the years that he worked at the bear park, the day he was mauled was coincidentally the one occasion that he decided to freelance. I therefore see no reason to reconsider my finding that Hopkins entered the bears' pen to feed the grizzly bears at Kilpatrick's request on November 2, 2007.

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<sup>1</sup> Trial Test.

<sup>2</sup> Trial Test.

**(2) Did the Court erroneously find that on November 2, 2007, Hopkins was acting in the course and scope of his employment?**

¶4 Kilpatrick reiterates his argument that Hopkins was not an employee at the bear park, but rather was a volunteer. I addressed Kilpatrick’s “volunteer” argument in the Court’s Findings of Fact, Conclusions of Law and Judgment and I did not find it credible. Both Hopkins and Scott Wurster (Wurster) testified that Kilpatrick paid them in cash on a daily basis for their work at the bear park. Wurster observed Kilpatrick paying other bear park employees in cash. Although Hopkins did not keep records of the cash payments he received from Kilpatrick, Wurster kept detailed records of the cash payments he received. I found Kilpatrick’s testimony that his daily cash payments to Wurster were for outstanding legal fees for work performed in several previous years to be wholly incredible. I found it similarly incredible that Kilpatrick’s multiple cash payments to Hopkins were unrelated to the work Hopkins performed at the bear park.

¶5 Kilpatrick argues that Hopkins’ “own income tax statements do not reflect him ever being on [Kilpatrick’s] property during any month of Nov. at any time from 2002 thru 2007.”<sup>3</sup> Although it is not clear to which document Kilpatrick is referring, he attached as an exhibit to his motion, an earnings statement that Hopkins prepared. This statement was admitted and considered at trial.<sup>4</sup> It was established at trial that Hopkins was paid in cash and did not keep records of his payments. Hopkins testified that the earnings statement was a rough estimate of his earnings while working at the bear park that he prepared in 2008 for purposes of his workers’ compensation claim.<sup>5</sup>

¶6 Kilpatrick is correct that Hopkins’ earnings statement does not reflect Hopkins being on Kilpatrick’s property in the month of November from 2002 through 2007. It is unclear what Kilpatrick is trying to establish with this argument, however, since it is not disputed that Hopkins was, in fact, on Kilpatrick’s property on both November 1 and November 2, 2007, which is the time at issue. Kilpatrick acknowledged that on November 1, 2007, Hopkins was cutting firewood at the bear park. Kilpatrick acknowledged that on November 2, 2007 – the date of the injury – Hopkins worked on the bear park’s gates before feeding the grizzly bears. It is not disputed that the bear park’s operations were seasonal and shut down in the fall. Whether Hopkins worked in November in previous years is irrelevant to my finding that he was working on November 2, 2007.

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<sup>3</sup> Motion for Reconsideration [and] Briefs in Support at 2.

<sup>4</sup> Ex. 6 at 5.

<sup>5</sup> Trial Test.

¶7 Kilpatrick also does not dispute that he gave Hopkins \$300 in cash after Hopkins was released from the hospital in November 2007. Kilpatrick enlisted his son, Jake Kilpatrick (Jake), to deliver this money to Hopkins. Jake was neither deposed nor did he testify at trial. Kilpatrick testified that this money was not wages for Hopkins' work at the bear park but was intended to buy marijuana from Hopkins to confirm Kilpatrick's suspicion that Hopkins was selling marijuana. Hopkins denies selling marijuana. Kilpatrick testified that Jake returned with an ounce of marijuana and Kilpatrick threw it away. When asked what he did with the knowledge that Hopkins was selling marijuana, Kilpatrick testified that he did nothing; he just wanted to know what was going on. I find it more probable than not that the \$300 Kilpatrick gave to Hopkins shortly after the injury was payment for work at the bear park rather than for the alleged purchase of marijuana that was thrown away in order to gain knowledge for no discernable purpose.

¶8 Having considered Kilpatrick's arguments, I see no reason to reconsider my finding that on November 2, 2007, Hopkins was acting in the course and scope of his employment.

ORDER

¶9 Kilpatrick's motion for reconsideration is **DENIED**.

DATED in Helena, Montana, this 25th day of June, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Jeffrey Ellingson  
Joseph R. Nevin  
Russell A. Kilpatrick

Submitted: June 7, 2010