

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 9

WCC No. 2008-2152

BROCK HOPKINS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

UNINSURED EMPLOYERS' FUND

Third-Party Petitioner

vs.

RUSSELL A. KILPATRICK

Third-Party Respondent

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED TO MONTANA SUPREME COURT 08/23/10

AFFIRMED 03/22/11

Summary: Petitioner was injured in a grizzly bear attack at a private bear park in West Glacier, Montana. Petitioner petitioned the Court for a determination that he was an employee of the alleged employer, Russell Kilpatrick, at the time of the attack. Petitioner contended that he was performing duties in the course and scope of his employment. Kilpatrick responded that Petitioner worked as a volunteer at the bear park. Kilpatrick and the Uninsured Employers' Fund contended that Petitioner was not acting in the course and scope of his employment. Kilpatrick and the UEF further argued that Petitioner's use of marijuana was the major contributing cause of the accident.

Held: Kilpatrick employed Petitioner at the bear park. Kilpatrick controlled the details of Petitioner's work and paid him cash daily for the services he performed. Petitioner acted in the course and scope of his employment when he was attacked as he entered the bear pen to feed the bears. Petitioner fed the bears at Kilpatrick's request and Kilpatrick benefitted from services Petitioner performed at the bear park. Petitioner's marijuana use was not the major contributing cause of the accident. No evidence was presented regarding Hopkins' level of impairment on the day of the attack. Although Petitioner admitted to smoking marijuana before arriving at work on the morning of the attack, it is difficult for the Court to conclude that the *major* contributing cause of the grizzly bear attack was anything other than the grizzly. Petitioner was not attacked when he inexplicably wandered into the grizzly pen. Petitioner was attacked while performing a job Kilpatrick had paid him to do – feeding grizzly bears.

Topics:

Credibility. The Court found the alleged employer's testimony that he did not have any employees at the bear park incredible where Petitioner's and another worker's testimony regarding cash payments was corroborated by one of the worker's copious and contemporaneous notes about the cash he received, the alleged employer testified he was paying a worker who was formerly his attorney for outstanding legal bills at a rate of \$80 to \$140 per day, and the alleged employer testified he gave Petitioner money on multiple occasions "out of my heart" coincidentally while Petitioner was performing "favors."

Witnesses: Credibility. The Court found the alleged employer's testimony that he did not have any employees at the bear park incredible where Petitioner's and another worker's testimony regarding cash payments was corroborated by one of the worker's copious and contemporaneous notes about the cash he received, the alleged employer testified he was paying a worker who was formerly his attorney for outstanding legal bills at a rate of \$80 to \$140 per day, and the alleged employer testified he gave Petitioner money on multiple occasions "out of my heart" coincidentally while Petitioner was performing "favors."

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-118. Volunteers are generally not considered employees under the WCA, and therefore not entitled to workers' compensation coverage. A "volunteer" means a person who performs services on behalf of an employer but who does not receive wages. Where the alleged employer testified he gave Petitioner money on multiple

occasions, “out of my heart” coincidentally while Petitioner was performing “favors” the Court concluded that Petitioner was not a volunteer.

Employment: Course and Scope: Generally. Where Petitioner worked around the bear park at the alleged employer’s request on multiple occasions over the course of several years, Petitioner entered the bears’ pen to feed the bears at the alleged employer’s request on the date of the accident, and the alleged employer benefitted from the care and feeding of the bears, based on the four *Courser* factors, the Court concluded that Petitioner was performing duties in the course and scope of his employment at the time of the bear attack.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Although Petitioner admitted smoking marijuana before arriving at work on the morning of the bear attack, the Court concluded that nonprescription drug use was not the major contributing cause of the incident. When it comes to attacking humans, bears are equal opportunity maulers, attacking without regard to race, creed, ethnicity, or marijuana usage.

Defenses: Intoxication. Although Petitioner admitted smoking marijuana before arriving at work on the morning of the bear attack, the Court concluded that nonprescription drug use was not the major contributing cause of the incident. When it comes to attacking humans, bears are equal opportunity maulers, attacking without regard to race, creed, ethnicity, or marijuana usage.

Employment: Course and Scope: Intoxication. Although Petitioner admitted smoking marijuana before arriving at work on the morning of the bear attack, the Court concluded that nonprescription drug use was not the major contributing cause of the incident. When it comes to attacking humans, bears are equal opportunity maulers, attacking without regard to race, creed, ethnicity, or marijuana usage.

¶1 The trial in this matter was held on March 2, 2010, in Kalispell, Montana, and on March 10, 2010, in Helena, Montana. Petitioner Brock Hopkins (Hopkins) was present and represented by Jeffrey D. Ellingson. The Uninsured Employers’ Fund was represented by Joseph R. Nevin and Mark E. Cadwallader. Russell A. Kilpatrick (Kilpatrick) was represented by Bryce R. Floch.

¶2 Exhibits: Exhibits 1 and 3 through 18 were admitted without objection. Exhibit 2 was admitted over Kilpatrick's objections of timely disclosure, foundation, and relevance.

¶3 Witnesses and Depositions: The depositions of Hopkins, Kilpatrick, and Scott Wurster (Wurster) were taken and submitted to the Court. Hopkins, Kilpatrick, Wurster, Christine Brown (Brown), Steven K. LaVoie (LaVoie), and Bernadette Rice (Rice) were sworn and testified at trial.

¶4 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 4a Whether Hopkins was employed by Kilpatrick at the time of Hopkins' injury on November 2, 2007.

¶ 4b Whether Hopkins was in the course of his employment at the time of his injury.

¶ 4c Whether non-prescription drug use is the major contributing cause of the injuries Hopkins sustained on November 2, 2007.

¶ 4d Whether Hopkins was performing services for Kilpatrick in return for aid and sustenance only.

¶ 4e Whether Kilpatrick owed a duty of coverage to Hopkins.¹

FINDINGS OF FACT

¶5 I found the trial testimony of Hopkins, Wurster, Brown, LaVoie, and Rice to be credible. As will be discussed in detail below, I did not find Kilpatrick to be a credible witness.

¶6 Great Bear Adventures (the bear park) was located near West Glacier, Montana, on property owned by Kilpatrick. The bear park contained grizzly and black bears. Customers observed the bears from their cars while driving through the bear park. Kilpatrick's residence is located next to the bear park.²

¹ Pretrial Order at 4.

² Trial Test.

¶7 On November 2, 2007, Hopkins was attacked and injured by a grizzly bear within the bear park.³

¶8 Hopkins met Kilpatrick through Kilpatrick's son, Jake Hopkins (Jake). In the summer of 2002, Hopkins helped Jake perform duties around the bear park. During the summer of 2003, Hopkins regularly performed maintenance and other tasks around the bear park. In 2004 and 2005, Hopkins worked inside the bear park, feeding the bears.⁴

¶9 Scott Wurster testified at trial. Wurster is a former attorney. In 2004, he represented Kilpatrick in a lawsuit involving the bear park and the Montana Department of Fish, Wildlife and Parks. Wurster has not practiced law since 2004.⁵

¶10 Wurster worked at the bear park beginning in 2005. Wurster and Hopkins worked together at the bear park between 2005 and 2007.⁶ Wurster worked primarily with the black bears. Wurster's duties included collecting money from customers at the bear park, feeding the black bears, and performing maintenance duties around the bear park. Wurster testified that Kilpatrick provided him with instruction on the work he was to perform in and around the bear park.⁷

¶11 Wurster and Hopkins testified that Kilpatrick paid them in cash daily. They observed Kilpatrick make cash payments to other workers at the bear park. Wurster kept contemporaneous records of the cash payments he received in a notebook. Wurster testified that his daily cash payments ranged between \$80 and \$160.⁸ Wurster's notebook reflects that Kilpatrick paid him \$5,633 for work he performed in April, May, and June of 2007.⁹ Hopkins did not record the cash payments he received from Kilpatrick. Hopkins testified that he was paid approximately \$140 per day in 2006 and \$160 per day in 2007.¹⁰

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

⁶ Trial Test.

⁷ Trial Test.

⁸ Trial Test.

⁹ Ex. 3 at 4.

¹⁰ Trial Test.

¶12 Kilpatrick contends that the bear park did not have any employees. He maintains that the bear park was operated by his family members and that anyone else that helped around the park was a volunteer. Kilpatrick acknowledges that he gave money to Wurster and Hopkins on several occasions. He contends, however, that the money he paid to Wurster was for outstanding legal fees and not for work performed around the bear park. Kilpatrick concedes that he gave some money to Hopkins for performing work around the bear park, but that the money was given randomly and “out of my heart.”¹¹

¶13 The bear park was operated as a cash-only business. It was generally open to customers between Memorial Day and Labor Day. The dates outside of these holidays were considered the “shoulder season.” Wurster testified that he mainly worked between Memorial Day and Labor Day, but did some work during the shoulder season at Kilpatrick’s request. Wurster testified that Hopkins and Jake worked more often than he did during the shoulder season because they had more experience with the bears.¹²

¶14 The bears went into hibernation in the fall during the shoulder season. The bears’ food intake was tapered down during this period in preparation for hibernation.¹³

¶15 On November 1, 2007, Hopkins and Kilpatrick cut firewood at the bear park. They delivered the wood to Brown, Kilpatrick’s neighbor, at her property located a few miles from the bear park. Hopkins testified that Kilpatrick paid him cash for his work on November 1, 2007. Hopkins contends that Kilpatrick asked him to return to the bear park on November 2, 2007.¹⁴

¶16 Several bear park workers smoked marijuana at the bear park, including Kilpatrick and Hopkins.¹⁵ Hopkins testified that he smoked marijuana on the morning of November 2, 2007, before arriving at the bear park. Upon arriving at the bear park, Hopkins placed the marijuana pipe in his back pants pocket.¹⁶

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Trial Test.

¶17 Hopkins arrived at the bear park on November 2, 2007, at approximately 10:00 a.m. Hopkins met Kilpatrick at Kilpatrick's residence and inquired about work duties for that day. Kilpatrick testified that he asked Hopkins to raise the boards on the bear park's gates to prevent the gates from freezing to the ground.¹⁷ Kilpatrick testified that he asked Hopkins to perform this work as a favor.

¶18 Brown testified that she called Kilpatrick to thank him for the firewood on November 2, 2007. While she was on the phone with Kilpatrick, Brown overheard Hopkins speaking to Kilpatrick. Brown recalls that Hopkins inquired about whether Kilpatrick was going to feed the bears. Brown heard Kilpatrick tell Hopkins that Kilpatrick was not going to feed the bears.¹⁸

¶19 Hopkins' work on the gates took him approximately two hours. After completing this task, Hopkins returned to Kilpatrick's house and observed Kilpatrick asleep on his couch. Hopkins mixed up the bears' food in the storage shed next to Kilpatrick's house and used Kilpatrick's truck to drive into the bear park.¹⁹

¶20 Hopkins does not recall a specific conversation with Kilpatrick about feeding the bears. Hopkins testified that if Kilpatrick had told him not to feed the bears on November 2, 2007, Hopkins would not have had a reason to enter the grizzly bear pen.²⁰

¶21 Before entering the bears' pen with a small food bucket, Hopkins placed the marijuana pipe in a storage shed outside the pen. Hopkins entered the bears' pen with food, and was attacked by one of the grizzly bears. Hopkins escaped the attack by crawling under the electrified fence on the side of the pen opposite the storage shed. Hopkins suffered severe injuries as a result of the bear attack.²¹

¶22 Kilpatrick eventually located Hopkins at the bear park. Kilpatrick helped Hopkins into the truck and sought medical attention. Hopkins was transported to the hospital by a medical helicopter. When Kilpatrick returned to the bear park, he found a small food bucket inside the grizzly bear pen.²²

¹⁷ Trial Test.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

²² Trial Test.

¶23 Kilpatrick contends that he did not ask Hopkins to work at the bear park on November 2, 2007. Kilpatrick admits that he instructed Hopkins to raise the boards on the gates at the bear park on that day, but contends that Hopkins performed this task as a favor, and not with any expectation that he would be paid for his efforts.²³

¶24 Kilpatrick gave Hopkins \$300 shortly after he was released from the hospital. Kilpatrick testified that this money was not wages but rather was given to determine whether Hopkins was dealing marijuana. Kilpatrick testified that Jake returned with one ounce of “skunk bud,” which Kilpatrick testified he threw away.²⁴

Dispositive Findings

¶25 I find that Kilpatrick paid Hopkins cash daily for the work he performed at the bear park. Kilpatrick’s testimony that he did not have any employees at the bear park is incredible in light of both Hopkins’ and Wurster’s testimony, corroborated by Wurster’s copious and contemporaneous notes about the cash wages he received. Kilpatrick’s testimony that he was paying Wurster for outstanding legal bills at the rate of \$80 to \$140 per day in cash is wholly incredible. Likewise, Kilpatrick’s testimony that he gave Hopkins money on multiple occasions, “out of my heart” coincidentally while Hopkins was performing “favors” for Kilpatrick at the bear park is not credible. There is a term of art used to describe the regular exchange of money for favors – it is called “employment.”

¶26 I find that Hopkins entered the bears’ pen to feed the grizzly bears at Kilpatrick’s request on November 2, 2007. Hopkins fed the grizzly bears at Kilpatrick’s request on multiple occasions prior to the date of his injury. Kilpatrick located a small food bucket in the bears’ pen after Hopkins was injured. Kilpatrick acknowledged Hopkins must have brought the food bucket into the pen on that day.²⁵ Hopkins testified that if Kilpatrick had instructed him not to feed the bears on that day, Hopkins would have had no reason to enter the grizzly bear pen. I found Hopkins’ testimony in this regard to be credible.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

CONCLUSIONS OF LAW

¶27 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Hopkins' industrial accident.²⁶

¶28 Hopkins bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²⁷

¶29 The central question in this case is whether Hopkins was an employee of Kilpatrick on November 2, 2007, and whether he was in the course and scope of his employment on that date.

Issue 1: Whether Hopkins was employed by Kilpatrick at the time of Hopkins' injury.

¶30 An employer means anyone who has a person in service under an appointment or contract of hire, expressed or implied, oral or written.²⁸ An individual is in the service of another when that other has the right to control the details of the individual's work.²⁹ In this case Kilpatrick unquestionably controlled the details of Hopkins' work at the bear park. Kilpatrick contends that Hopkins performed work at the bear park as a volunteer. Volunteers are generally not considered employees under the Workers' Compensation Act, and therefore are not entitled to workers' compensation coverage.³⁰ A "volunteer" means a person who performs services on behalf of an employer but who does not receive wages.³¹ Although Kilpatrick claims that he did not pay Hopkins wages for the services Hopkins performed for the bear park, as noted above at ¶ 25, I find that Kilpatrick paid Hopkins cash for services rendered. I conclude that Hopkins was employed by Kilpatrick.

²⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

²⁷ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

²⁸ § 39-71-117(1)(a), MCA.

²⁹ *In the Matter of Glover*, 2002 MTWCC 22, ¶ 49, citing *State ex rel. Ferguson v. District Court*, 164 Mont. 84, 88, 519 P.2d 151, 154 (1974).

³⁰ § 39-71-118(2), MCA.

³¹ § 39-71-118(2)(c), MCA.

Issue 2: Whether Hopkins was in the course and scope of his employment at the time of his injury.

¶31 To determine whether Hopkins was in the course and scope of his employment at the time of his injury, the Court must weigh four factors. These factors include:

(1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity.³²

¶32 The presence or absence of each factor may or may not be determinative and each factor must be considered based on the totality of the circumstances.³³ In this case, Hopkins worked around the bear park at Kilpatrick's request on multiple occasions over the course of several years. As noted above in ¶ 26, Hopkins entered the bears' pen to feed the bears at Kilpatrick's request on November 2, 2007. Kilpatrick benefitted from the care and feeding of the bears that Hopkins provided since presumably customers are unwilling to pay cash to see dead and emaciated bears. Based on the four *Courser* factors, I conclude that Hopkins was performing duties in the course and scope of his employment at the time of the grizzly bear attack.

Issue 3: Whether nonprescription drug use is the major contributing cause of the injuries Hopkins sustained on November 2, 2007.

¶33 Section 39-71-407(4), MCA, provides: "An employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident."

¶34 Section 39-71-407(13), MCA, defines "major contributing cause" as "a cause that is the leading cause contributing to the result when compared to all other contributing causes."

¶35 No evidence was presented regarding Hopkins' level of impairment on the day of the attack. Kilpatrick speculated that Hopkins may have been smoking marijuana inside the bear pen when the mauling occurred; however, there is no evidence to support this speculation and, in fact, all the evidence is to the contrary.

³² *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984).

³³ *Id.*

¶36 Although Hopkins admitted to smoking marijuana before arriving at work on the morning of the attack, I cannot conclude based on the evidence before me that the **major** contributing cause of the grizzly bear attack was anything other than the grizzly. It is not as if this attack occurred when Hopkins inexplicably wandered into the grizzly pen while searching for the nearest White Castle.³⁴ Hopkins was attacked while performing a job Kilpatrick had paid him to do – feeding grizzly bears. The fact that the grizzly attacked Hopkins while he was performing this job is not exactly a “man bites dog” event. When a grizzly bear is sighted on a trail in Glacier National Park, the trail is closed to **all** hikers, not just the hikers who may have recently smoked marijuana. Kilpatrick installed multiple electrified fence lines at the bear park to separate the grizzly bears from **all** customers, not just the customers who may have recently smoked marijuana. When it comes to attacking humans, grizzlies are equal opportunity maulers; attacking without regard to race, creed, ethnicity, or marijuana usage. Hopkins’ use of marijuana to kick off a day of working around grizzly bears was ill-advised to say the least and mind-bogglingly stupid to say the most. However, I have been presented with no evidence by which I can conclude that Hopkins’ marijuana use was the major contributing cause of the grizzly bear attack.

¶37 I conclude that nonprescription drug use was not the major contributing cause of the November 2, 2007, accident.

Issue 4: Whether Hopkins was performing services for Kilpatrick in exchange for aid and sustenance only.

¶38 As noted above in ¶ 25, I found that Kilpatrick paid Hopkins wages for the services he performed at the bear park. Therefore, I conclude Hopkins was not performing services in exchange for aid and sustenance only.

Issue 5: Whether Kilpatrick owed a duty of coverage to Hopkins.

¶39 In light of my conclusions to issues 1-4, issue 5 is moot.

JUDGMENT

¶40 Hopkins was employed by Kilpatrick at the time of Hopkins’ injury.

¶41 Hopkins was in the course and scope of his employment at the time of his injury.

¶42 Nonprescription drug use was not the major contributing cause of the accident and injuries Hopkins sustained on November 2, 2007.

³⁴ Reference, *Harold & Kumar Go To White Castle*, New Line Cinema, 2004.

¶43 Hopkins was not performing services for Kilpatrick in exchange for aid and sustenance only.

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

DATED in Helena, Montana, this 4th day of May, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jeffrey D. Ellingson
Joseph R. Nevin
Mark E. Cadwallader
Bryce R. Floch
Submitted: March 10, 2010