

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 9A

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.

ORDER AMENDING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

Summary: The Uninsured Employers' Fund moved for amendment to the Findings of Fact, Conclusions of Law and Judgment to resolve Issue 5, which the Court concluded was moot in light of the resolution of Issues 1 through 4. The final pretrial order listed Issue 5 as "Whether Kilpatrick owed a duty of coverage to Hopkins." The UEF requests the Court amend its Findings of Fact, Conclusions of Law and Judgment "to determine that under Issue 5, Kilpatrick owed a duty of coverage to Hopkins, and to point out that Kilpatrick must indemnify the UEF for all benefits it pays to Hopkins."

Held: There is no legal authority for a judicial "point out" as the UEF requests. However, the UEF's motion has merit even if its argument does not. In *Hand v.*

Uninsured Employers' Fund – a case the UEF inexplicably failed to cite in its motion or brief – this Court held that since the UEF's defense had been raised in the pretrial order contentions, the petitioner could not claim surprise that the Court considered it in reaching its decision. In the present case, the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order. However, the UEF set forth its position regarding indemnification in its contentions. Therefore, it is proper to consider the indemnification issue. The uninsured employer's obligation to indemnify the UEF arises under § 39-71-504(1)(b), MCA. Based on the Court's previous findings and conclusions, Kilpatrick must indemnify the UEF for any benefits paid or payable by the UEF to Hopkins.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.344. Where the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order, but listed the indemnification issue in its contentions, the employer had no basis to claim surprise and the Court may consider the indemnification issue.

Procedure: Issues. Where the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order, but listed the indemnification issue in its contentions, the employer had no basis to claim surprise and the Court may consider the indemnification issue.

Procedure: Pretrial Order. Where the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order, but listed the indemnification issue in its contentions, the employer had no basis to claim surprise and the Court may consider the indemnification issue.

Procedure: Post-Trial Proceedings: Amendments to Findings. Where the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order, but listed the indemnification issue in its contentions, the employer had no basis to claim surprise and the Court may consider the indemnification issue.

¶1 On May 4, 2010, this Court entered its Findings of Fact, Conclusions of Law and Judgment in this case. The Court decided the following disputed issues as set forth in the final pretrial order:¹

Issue 1: Whether Brock Hopkins (Hopkins) was employed by Russell A. Kilpatrick (Kilpatrick) at the time of Hopkins' injury on November 2, 2007.

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

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

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

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

¶2 Regarding Issues 1 through 4, I concluded:

(1) Hopkins was employed by Kilpatrick at the time of Hopkins' injury;

(2) Hopkins was acting in the course and scope of his employment at the time of his injury;

(3) Nonprescription drug use was not the major contributing cause of Hopkins' injuries;

(4) Hopkins was not performing services in return for aid and sustenance only.

¶3 I concluded Issue 5 was moot in light of my resolution of Issues 1–4.² I did not elaborate on my conclusion that Issue 5 was moot because it was self-evident that Kilpatrick owed a duty of coverage to Hopkins in light of my resolution of the previous issues.

¶4 On May 11, 2010, the Uninsured Employers' Fund (UEF) filed a motion entitled, "Rule 60(a), M. R. Civ. P. Motion to Amend Judgment to Correct Clerical Mistake." The purported "clerical mistake" was the Court's omission in its Findings of Fact,

¹ Final pretrial order at 4.

² *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC, 9 ¶¶ 30-39.

Conclusions of Law and Judgment, of a determination as to whether Kilpatrick was obligated to indemnify the UEF for benefits paid or payable to Hopkins. On May 21, 2010, I initiated a conference call to address several post-trial motions. During this conference call, I denied the UEF's motion. On May 24, 2010, I followed up my oral ruling with a written order.³ In my written order, I stated that contrary to the UEF's characterization, the Court's omission of whether Kilpatrick was obligated to indemnify the UEF was not a "clerical mistake."⁴ I explained that I did not determine the indemnification issue because the issue was not presented as an issue to be determined in the final pretrial order.⁵ I concluded by noting that I made no assessment as to whether the UEF may have a legitimate basis for asking the Court to amend the judgment to include the indemnification issue but "characterizing the omission of this issue as a 'clerical mistake' while failing to even acknowledge that the issue was not presented in the final pretrial order does not provide that basis."⁶

¶5 On May 24, 2010, the UEF filed a motion entitled, "Mont. Admin. R. 24.5.344 Request for Amendment to Findings of Fact and Conclusions of Law." In its second motion to amend, the UEF acknowledges that its "motion to amend a clerical error was itself erroneous."⁷ The UEF's most recent motion asks the Court to correct the ostensible error committed at ¶ 39 of its Findings of Fact, Conclusions of Law and Judgment: "In light of my conclusions to issues 1-4, issue 5 is moot."⁸ The UEF asserts: "The UEF respectfully suggests in light of the Court's conclusions to Issues 1-4, that Kilpatrick clearly owed a duty of coverage to Hopkins, and that Issue 5 was not moot."⁹ The UEF's argument in this regard is without merit.

¶6 The UEF's assertion "that Kilpatrick clearly owed a duty of coverage to Hopkins" in light of the Court's resolution of Issues 1 through 4 is correct. The UEF's assertion that this means Issue 5 was **not** moot, is incorrect. Issue 5 sought the Court's determination as to "[w]hether Kilpatrick owed a duty of coverage to Hopkins." As the UEF acknowledges, the Court's resolution of Issues 1 through 4 clearly resolved that issue. Since Kilpatrick's duty of coverage to Hopkins had been clearly established by the resolution of Issues 1 through 4, resolving Issue 5 would only have been reiterating that which had already been established. This is precisely **why** Issue 5 was moot.

³ *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 12.

⁴ *Id.*, ¶ 5.

⁵ *Id.*

⁶ *Id.*, ¶6.

⁷ Mont. Admin. R. 24.5.344 Request for Amendment to Findings of Fact and Conclusions of Law at 2.

⁸ *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 9, ¶ 39.

⁹ Mont. Admin. R. 24.5.344 Request for Amendment to Findings of Fact and Conclusions of Law at 2.

¶7 More to the point, I fail to appreciate how reiterating the already clearly established point that Kilpatrick owed a duty of coverage to Hopkins would have any bearing on whether Kilpatrick must indemnify the UEF, which is the actual relief the UEF seeks. In its prayer for relief, the UEF requests that “the Court amend its Findings of Fact, Conclusions of Law and Judgment to determine that under Issue 5, Kilpatrick owed a duty of coverage to Hopkins, and to point out that Kilpatrick must indemnify the UEF for all benefits it pays to Hopkins.”¹⁰ The UEF cites no statute, rule, or case law in support of its request for a judicial “point out,” nor is it apparent what legal authority a “point out” would carry. Moreover, according to the UEF’s brief, it seems the requested “point out” is unnecessary. In its current motion to amend, the UEF contends: “Once the Court has determined that Kilpatrick owed Hopkins a duty of coverage, indemnification of the UEF is **automatic**, not another issue to be decided.”¹¹ Since, as the UEF contends, the Court’s resolution of Issues 1 through 4 established “that Kilpatrick clearly owed a duty of coverage to Hopkins,”¹² and indemnification of the UEF is “automatic” once that determination was made, why is it necessary to point out anything? If, as the UEF contends, indemnification is “not another issue to be decided,” then the UEF’s multiple motions to amend are pointless.

¶8 The reality is that the UEF’s indemnification claim is another issue to be decided and there is a point to the UEF’s motion although the UEF does its best to avoid getting to it. There is a straightforward, meritorious argument for amending the Court’s judgment to include the indemnification issue which the UEF might have stumbled across had it opted to do a modicum of research instead of expending its efforts trying to mischaracterize its own oversight as errors committed by the Court: In *Hand v. Uninsured Employers’ Fund*,¹³ the petitioner (Hand) moved this Court for rehearing and amendment of the findings of fact, conclusions of law, and judgment. Hand argued that the Court improperly considered the UEF’s release defense when the defense was not listed as one of the issues in the pretrial order. This Court noted that although the UEF did not set forth its defense in the issues section of the pretrial order, it was set forth in the pretrial order as one of the UEF’s contentions. The Court held that since the UEF raised the defense in the contentions, Hand could not claim surprise that the Court considered it in reaching its decision.¹⁴ The Court quoted from the Montana Supreme Court’s decision of *King v. Zimmerman*:¹⁵

¹⁰ *Id.* at 3.

¹¹ *Id.* at 2. (Emphasis added; internal capitalization omitted.)

¹² *Id.*

¹³ *Hand*, 2003 MTWCC 9 (reversed on other grounds).

¹⁴ *Hand*, ¶ 5.

¹⁵ *King*, 266 Mont. 54, 878 P.2d 895 (1994).

The purpose of pretrial orders is to prevent surprise, simplify the issues, and permit counsel to prepare their case for trial on the basis of the pretrial order . . . after reviewing the pretrial order, we find the defendants' arguments without merit. The pretrial order adequately sets forth all of King's contentions as contained in the initial pleadings. Furthermore, no theories were advanced at trial which had not already been well established in the pleadings. There is no basis for the defendants to claim that they were "surprised" by the issues raised and had not been able to prepare for trial.¹⁶

¶9 In the final pretrial order in this case, the UEF listed the following contention:

The UEF contends that if Kilpatrick was an uninsured employer on November 2, 2007, Kilpatrick is obligated, pursuant to Section 39-71-504, MCA, to indemnify the UEF for any benefits paid or payable by the UEF to Hopkins.¹⁷

¶10 Kilpatrick opposes the UEF's motion to amend. However, he has no basis to claim surprise regarding the indemnification issue. Although the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order, the UEF set forth its position in its contentions in the final pretrial order. Indeed, Kilpatrick appeared in this case as a Third-Party Respondent pursuant to the UEF's third-party petition for indemnification. Therefore, the Court may consider the indemnification issue notwithstanding the UEF's failure to present it as a disputed issue in the final pretrial order.

¶11 In my findings and conclusions, I concluded that Hopkins was Kilpatrick's employee when he was injured in the course and scope of his employment. It is undisputed that Kilpatrick did not carry workers' compensation insurance at the time of Hopkins' injury. Kilpatrick testified to this fact at trial. Therefore, Kilpatrick was an uninsured employer at the time of Hopkins' injury. Pursuant to § 39-71-504(1)(b), MCA, Kilpatrick is obligated to indemnify the UEF for any benefits paid or payable by the UEF to Hopkins.

¹⁶ *King* at 66, 878 P.2d at 895.

¹⁷ Final pretrial order at 3.

Conclusion

¶12 I find it inexcusable that the UEF failed to locate or cite cases directly on point in either of its two motions to amend, particularly since one of those cases involved the UEF. In the order denying the UEF's first motion to amend, I noted: "[T]he UEF may have a legitimate basis for requesting the Court to amend its judgment to include the indemnification issue."¹⁸ It might have been reasonable to expect the UEF to argue that legitimate basis in its second motion to amend. Notwithstanding the UEF's failure to do so, its motion has merit, even if its arguments do not.

ORDER

¶13 The UEF's request to amend the Findings of Fact, Conclusions of Law and Judgment is **GRANTED**.

¶14 The Judgment¹⁹ is amended to add an additional ¶43a, which reads as follows:

¶43a Pursuant to § 39-71-504, MCA, Kilpatrick shall indemnify the UEF for funds in an amount equal to all benefits paid or to be paid from the fund to or on behalf of Hopkins.

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 9, 2010

¹⁸ *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 12, ¶ 6.

¹⁹ *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 9.