

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 4

WCC No. 2004-1208

MMN CATTLE COMPANY, LLC

Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRY and
UNINSURED EMPLOYERS' FUND

Respondent.

ORDER AND JUDGMENT DISMISSING PETITION

Summary: This is an appeal of an employer from a Department of Labor and Industry order imposing a penalty under section 39-71-504(1), MCA (2003), for its failure to maintain workers' compensation insurance coverage during the penalty period.

Held: The appeal is dismissed since the sole ground of error alleged by the employer is that its workers' compensation insurer negligently cancelled its policy, a ground over which neither the Department of Labor and Industry nor this Court has jurisdiction. *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. Thus the appellant fails to state a claim upon which relief may be granted.

Topics:

Procedure: Judgment on the Pleadings. Judgment on the pleadings will not be granted unless the allegations of the petition, taken as true and construed in a light most favorable to the appellant, demonstrate that the appellant in a judicial review proceeding is not entitled to relief.

Penalties: Uninsured Employers. The appeal of an employer from a Department of Labor and Industry assessment of a civil penalty on account of the employer's failure to have workers' compensation insurance during the penalty period is dismissed where the employer does not contend that there was a policy of insurance in effect during the penalty period but rather

asserts that its policy had been improperly and negligently cancelled. The Supreme Court's decision in *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193, precludes consideration of the contention.

¶1 Appellant requests judicial review of an order of the Montana Department of Labor and Industry/Uninsured Employers' Fund (Department/UEF) which found that the appellant was an uninsured employer for the period between January 25, 2004, and May 14, 2004, and assessed a penalty. (Petition, ¶ 1.) Relying on *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193, the Department moves to dismiss the appeal on the ground that it fails to state a claim upon which relief may be granted.

Discussion

¶2 The motion to dismiss in this case is more properly considered a motion for judgment on the pleadings since the petition is one for judicial review of the decision of a state agency; the issue presented on appeal is whether the agency decision was erroneous. Except in extraordinary circumstances, § 2-4-704(1), MCA (2003),¹ judicial review is limited to the record below. Such review must be undertaken unless the petition for judicial review on its face demonstrates that the decision below was correct, or at least that the grounds of error alleged in the petition fail to provide a legal basis for reversal.

¶3 As with a motion to dismiss, the party moving for judgment on the pleadings "must establish that no material issue of fact remains and that the movant is entitled to judgment as a matter of law." *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 17, 321 Mont. 364, 91 P.3d 569. Similarly, the petition must "be construed in the light most favorable to the nonmoving party, whose allegations are taken as true." *Id.*

¶4 In the present case, the Department asserts that the petition suffers from the same defect as in *Auto Parts*. In that case, the employer had maintained a policy of workers' compensation insurance with the Montana State Fund (State Fund) but the State Fund cancelled the policy. Notified of the lapse of coverage, the Department sought a civil penalty

¹Section 2-4-704(1), MCA (2003), provides:

(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.

under section 39-71-504(1), MCA.² The matter went to a hearing at which the employer argued that the cancellation was improper, thereby vitiating any penalty. The Department rejected the argument, holding that it lacked jurisdiction to determine the propriety of the cancellation. On appeal to this Court, I held that the Department did have jurisdiction to consider the contention and that it should have considered whether the State Fund's cancellation was improper. On further appeal, the Supreme Court held that the Department was correct in the first instance in concluding it did not have jurisdiction to determine the propriety of the cancellation. The Court characterized the dispute as a contractual one between the employer and the State Fund, a dispute over which district courts have jurisdiction. It further held that the UEF sustained its burden of proof with respect to the penalty by showing, as a matter of record, that the employer's policy had been cancelled and had not been reinstated during the penalty period.

¶5 The present case presents an almost identical situation as did *Auto Parts*. The petition filed herein does not allege that the Department erroneously determined that appellant was uninsured. Appellant concedes in paragraph 6 of the petition that the State Fund cancelled its policy on January 25, 2004, but then contends that the State Fund was negligent in effecting the cancellation and that its negligence should therefore vitiate the penalty. (Petition, ¶¶ 6-9.) Thus, as in *Auto Parts*, the appellant's quarrel is with the State Fund and is a contract dispute over which the district court, not the Department or this Court, has jurisdiction. Thus, the petition fails to allege any ground upon which the Court might reverse or modify the decision below. Accordingly, judgment on the pleadings is appropriate.

²Section 39-71-504(1), MCA (2003), provides in relevant part:

(1) (a) The department may require that the uninsured employer pay to the fund a penalty of either up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or \$200, whichever is greater. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment based on how much premium would have been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

Auto Parts involved the 1995 version of the subsection, however, that version was identical to the current one except for minor, nonsubstantive changes.

ORDER AND JUDGMENT

¶6 The motion to dismiss is **granted** and judgment is hereby entered **dismissing the petition with prejudice**.

¶7 This JUDGMENT is certified as final for purposes of appeal.

¶8 Any party to this dispute may have twenty days in which to request a rehearing from this Order and Judgment Dismissing Petition.

DATED in Helena, Montana, this 18th day of January, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Sean Morris
Mr. Joseph R. Nevin
Submitted: January 6, 2005