

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
2003 MTWCC 32
WCC No. 2003-0755

LANDIS BJORGEN
Petitioner
vs.
MELOTZ TRUCKING, INCORPORATED
Uninsured Employer
UNINSURED EMPLOYERS' FUND
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleged that he suffered an industrial injury while working for an uninsured employer. The Uninsured Employers' Fund (UEF) denied liability based on an independent contractor exemption issued to the claimant and also questioned whether claimant had injured himself at work.

Held: The claimant injured himself at work. Claimant was hired as an employee and there was no reliance on his exemption. Moreover, the job for which he was hired was outside the scope of the exemption. He is therefore entitled to benefits from the UEF.

Topics:

Independent Contractor: Independent Contractor Exemption. An independent contractor exemption only applies to the specific occupation or work encompassed by the exemption.

Independent Contractor: Independent Contractor Exemption. An independent contractor exemption for "truck driver - owner/operator" applies only to truck driving as an owner/operator. It does not apply to employment as a truck driver driving the employer's trucks.

¶1 The trial in this matter was held on April 10, 2003, in Missoula, Montana. Petitioner, Landis Bjorgen, was present and represented by Mr. Steven S. Carey. Respondent, Uninsured Employers' Fund, was represented by Mr. Daniel B. McGregor.

¶2 Exhibits: Exhibits 1 through 12 were admitted without objection.

¶3 Witnesses and Depositions: Landis Bjorgen and Mark Melotz testified. In addition, the parties submitted depositions of Landis Bjorgen, Ron Dixon, Jennye Jackman, and Mark Melotz for the Court's consideration.

¶4 Issues Presented: The issues are rephrased by the Court as follows:

¶4a Was the claimant an employee of Melotz Trucking, Incorporated at the time of his alleged injury?

¶4b If so, is his claim for compensation barred by his independent contractor exemption?

¶4c If his claim is not barred, did he suffer a compensable industrial accident on or about August 31, 2002?

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Melotz Trucking, Incorporated (Melotz Trucking) is a Montana corporation doing business in Missoula, Montana. (Ex. 3.) Its president is Mark Melotz . (Trial Test.)

¶7 Melotz Trucking owns, leases, and operates a fleet of trucks and trailers. Its fleet consists primarily of tankers and trailers for hauling machinery.

¶8 In approximately August 2002, Melotz Trucking hired claimant as a truck driver. Mark Melotz testified that he hired claimant as an employee and treated him as an employee, withholding income and social security taxes. At the time he hired claimant, he was unaware of the existence of any independent contractor exemption for claimant.

¶9 In fact, at the time of his hire, and continuing through the date of his alleged industrial accident, the claimant had an independent contractor exemption issued by the Montana Department of Labor and Industry (Department). He applied for the exemption on March 2, 2001. (Ex. 5.) At that time he and a partner were purchasing a truck and going into their own trucking business. They actually went into business as D&L Trucking and operated the truck until the end of May 2002, when they discontinued the business. His partner kept the truck.

¶10 On claimant's application for an exemption he listed his profession as "Owner Operator Truck Driver." (*Id.*)

¶11 The Department issued an exemption effective from March 2, 2001 to March 2, 2004. The exemption was for "Truck Driver - Owner/Operator." The exemption did not cover **all** work as a truck driver, only work driving a truck as an owner/operator. Owner/operators are a subset of truck drivers, being those truck drivers who both own and drive their own trucks, thus the exemption on its face applied only to claimant's work as an owner/operator.

¶12 Claimant did not contract with Melotz Trucking as an owner/operator. As noted before, he was hired as an employee and drove trucks owned or leased by Melotz Trucking. The exemption was inapplicable to that work.

¶13 Claimant alleges that he injured his knee on August 31, 2002, while unloading a Melotz truck. In his written claim for compensation, dated September 17, 2002, he wrote that he hit his "right knee on the outside metal rail of the trailer" and that it swelled up

over the weekend. (Ex. 1.) August 31, 2002, was the Saturday before Labor Day and claimant had that Sunday and Monday off. (Bjorgen Dep. at 19.)

¶14 On Tuesday, September 3, 2002, claimant reported his injury to Melotz Trucking.

¶15 On September 10, 2002, claimant saw Dr. Ed Vizcarra about his knee. Dr. Vizcarra restricted claimant from "climbing, crawling, kneeling, or crouching." (Ex. 10 at 1.)

¶16 Dr. Vizcarra referred claimant to Dr. Christopher Price, an orthopedic surgeon, who noted "degenerative changes of his right knee with superimposed mechanical symptoms that developed along with swelling and locking episodes after his work injury." (*Id.* at 2.) Dr. Vizcarra's physical examination noted, among other things, trace "effusion," which is swelling, and tenderness of the knee. He limited claimant to sedentary work and recommended an MRI. (*Id.*)

¶17 Melotz Trucking questions the injury because claimant did not appear to be limping following the alleged injury. However, the medical records indicate claimant has a genuine problem with his knee. As of September 26, 2002, he still had some swelling of the knee. He made a prompt report of the August 31, 2002 incident. While he had had prior knee problems, there is no indication of any recent problems prior to the August 31st incident. The lack of a limp, or the failure of others to notice any limp, does not mean he was not injured or that he did not have knee pain. I find no sufficient basis to disbelieve his claim, therefore, I find that he injured his knee on August 31, 2002, as alleged.

¶18 At the time of claimant's injury, Melotz Trucking was uninsured. His claim for compensation was therefore submitted to the Uninsured Employers' Fund, which denied liability for the claim.

CONCLUSIONS OF LAW

¶19 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶20 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶21 Initially, the claimant has satisfied his burden of proving he suffered an industrial injury as defined in section 39-71-119, MCA (2001), which provides in relevant part:

39-71-119. Injury and accident defined. 1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

.....

- (2) An injury is caused by an accident. An accident is:
- (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and
 - (d) caused by a specific event on a single day or during a single work shift.

All of the criteria are met.

¶22 It is also conceded by Melotz Trucking that claimant was an employee. Therefore, the sole remaining question is whether the claimant's independent contractor exemption bars his claim.

¶23 Section 39-71-401(3), MCA, governs the exemption, providing:

(3)(a) A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers' Compensation Act.

(b) The application must be made in accordance with the rules adopted by the department. There is a \$25 fee for the initial application. Any subsequent application renewal must be accompanied by a \$25 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.

(c) When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

In previous cases, I have held that the exemption is "absolute" (at least where fraud is not involved) and bars post-injury inquiry into whether the claimant was in fact an employee or independent contractor. *Bouldin v. Uninsured Employers' Fund*, WCC No. 9704-7742, Decision and Judgment (October 22, 1997); *Matthews v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 6, ¶ 3 (on appeal to the Montana Supreme Court); *Wild v. State Compensation Insurance Fund*, 2002 MTWCC 9, ¶ 17 (on appeal to the Montana Supreme Court). However, in each of those cases, the exemption was presented to the putative employer and encompassed the work which the claimant was to perform. In none of those cases was the scope of the exemption questioned.

¶24 The present case presents a different situation. The employer did not rely on the exemption, indeed it did not know of its existence. Moreover, the scope of the exemption is at issue.

¶25 The plain purpose of the exemption is to protect persons and businesses hiring workers who hold themselves out as independent contractors from later workers' compensation claims by such workers. The exemption does not encompass work which is outside the scope of the exemption and which is not performed as an independent contractor; if it did, an exemption for a cement worker operating a cement business during the day would preclude the worker from seeking workers' compensation benefits if injured at an evening job as a fast food worker for McDonald's restaurant.

¶26 The fact situation in the present case is not quite as clear as the McDonald's example, nonetheless it is analogous. At the time of his application, claimant was a working member of a partnership and chose to apply for an exemption rather than secure workers' compensation insurance coverage. However, the exemption applied for and issued was for truck driving as an "owner/operator," thus it was limited to his partnership business. When hired by Melotz Trucking, claimant was hired as an employee, not as an owner/operator. At the time of his hire, his business had been dissolved. He did not represent himself as an independent contractor to either Melotz Trucking or to the public generally. I therefore conclude that the exemption did not apply to his employment by Melotz Trucking and that his claim for workers' compensation is not barred by the exemption.

¶27 Since Melotz Trucking was uninsured at the time of the claimant's industrial injury, the Uninsured Employers' Fund is liable for his the injury. § 39-71-503, MCA.

JUDGMENT

¶28 On August 31, 2002, the claimant suffered a compensable industrial injury to his right knee. Since his employer was uninsured at the time of his injury, the Uninsured Employers' Fund is liable for the injury.

¶29 The parties have not requested the Court to determine the amounts of any specific benefits due claimant. If they cannot determine the specific benefits and amounts due claimant, they may further petition the Court to make the determination.

¶30 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

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

¶32 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 24th day of April, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Steven S. Carey
Mr. Daniel B. McGregor
Submitted: April 30, 2003