IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 16

WCC No. 2001-0370

TROY D. BORGLUM (Deceased)

by HEATHER LANDER (Spouse and Heir)

Petitioner

vs.

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Respondent/Insurer for

MARTEL CONSTRUCTION, INCORPORATED

Employer.

DECISION AND JUDGMENT

Summary: The decedent in this matter was killed in a motorcycle accident while traveling to work at Big Sky, Montana. The parties agree that his travel was "necessitated by and on behalf of the employer as an integral part or condition of employment," and that he was paid $20 additional per day by his employer on account of his travel. The insurer, however, denies that he was in the course and scope of employment, as provided in section 39-71-407(3)(a), MCA (1999), because the $20 was too insubstantial to constitute travel pay.

Held: Section 39-71-407(3)(a), MCA (1999), does not require that travel reimbursement be either substantial or adequate and the Court is prohibited from writing in such a requirement. Since claimant was paid for travel, the section is satisfied. The claimant was in the course and scope of employment and his widow is entitled to death benefits.

Topics:

> **Employment: Course and Scope: Travel.** Under legislation adopted in 1987, § 39-71-407(3)(a), MCA, travel to and from work is deemed in the course and scope of employment where the travel is required by the employer and the employer reimburses claimant for costs of travel. Since the section does not contain any requirement for a minimum amount of reimbursement or any requirement that the reimbursement be substantial or adequate, the section is satisfied by any reimbursement for the travel.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-407(3)(a), MCA (1987-1989). Under legislation adopted in 1987, § 39-71-407(3)(a), MCA, travel to and from work is deemed in the course and scope of employment where the travel is required by the employer and the employer reimburses claimant for costs of travel. Since the section does not contain any requirement for a minimum amount of reimbursement or any requirement that the reimbursement be substantial or adequate, the section is satisfied by any reimbursement for the travel.

¶1 Troy D. Borglum (Borglum) was killed in a motorcycle accident on his way to work on a construction job in Big Sky, Montana. His widow seeks death benefits. The insurer denies liability for benefits, alleging that claimant was not in the course and scope of his employment at the time of the accident.

¶2 Pursuant to the agreement of both parties, the case is presented for decision based upon stipulated facts and answers to written discovery. (Stipulated Statement of Facts and Submission of the Issue of Law; November 6, 2001 Minute Entry; October 31, 2001 Minute Entry.) The parties agree that claimant was traveling to work and that his travel was "necessitated by and on behalf of the employer as an integral part or condition of employment," however, the insurer argues that claimant was not reimbursed for travel within the meaning of section 39-71-407(3)(a)(i), MCA (1999), which provides:

> (3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
>
> (a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement;
>
> . . . .

The issue, as stated by the parties, is:

> Whether Troy Borglum received reimbursement from the employer for costs of travel, gas, oil or lodging as a part of the employee's benefits or employment agreement within the meaning of MCA § 38 [sic]-71-407(3)(a)(i), such that the accidental death which occurred on June 22, 2000, was within the course and scope of his employment?

(Stipulated Statement of Facts and Submission of the Issue of Law at 3.)

Agreed Facts

¶3 The agreed facts, as set forth in the Stipulated Statement of Facts and Submission of the Issue of Law, are as follows:

¶3a On June 22, 2000, Borglum was working for Martel Construction, Incorporated (Martel), as a laborer at the Moonlight Basin Project near Big Sky, Madison County, Montana. At that time, the employer was enrolled under Compensation Plan No. 2 of the Workers' Compensation Act and insured by the Respondent/Insurer, Hartford Insurance Company of the Midwest (Hartford).

¶3b The employer's job site at Moonlight Basin is beyond the Big Sky resort and approximately 70 miles from Borglum's home in Bozeman, Montana. The nearest population center to the Moonlight Basin project is Bozeman, Montana.

¶3c Borglum had to travel, either in his own vehicle, or by carpool, from Bozeman to the Moonlight Basin Project in order to perform the work required of him by the employer. This was the only job site Borglum had been assigned to by the employer during the time period in question. Martel did not provide transportation to Borglum.

¶3d Borglum was injured in, and died as a result of a motor vehicle accident which occurred June 22, 2000, on Montana State Highway 191, after Borglum left the employer's job site in his own vehicle and was on his way home to Bozeman.

¶3e Highway 191 is the only route between the employer's job site at Moonlight Basin and Borglum's home. He did not deviate from that route prior to the accident. Borglum had not been drinking at the time of his death.

¶3f At the time of his death, Borglum was paid $12.19 per hour by the employer Martel Construction for his work. Borglum was a full-time employee and generally worked five eight-hour days per week. Borglum was not paid for his travel time.

¶3g At the time of his death, Borglum also received additional compensation, which could be used for travel, gas, or lodging, at the employee's discretion. The additional compensation was $20 per day, based upon an eight-hour day. On the one day during his employment when Borglum worked half a day or less, this additional compensation was reduced to $10.

¶3h The employer's records reference Borglum's compensation as a "per diem" or as "travel." Borglum's pay stubs reference the compensation as "other pay" with the description "travel." All of the payroll records single out the additional compensation per day as separate from Borglum's regular hourly wages.

¶3i The employer did not withhold taxes from the additional compensation; nor did it contribute the employer's share of FICA, FUTA, or other Federal or State taxes and assessments on the additional compensation. Borglum was not required by Martel or tax authorities to maintain or provide receipts for any travel expenses he incurred.

¶3j The employer paid the additional compensation as an incentive to Borglum to make the 140 mile round trip from his home to the job site.

¶3k Exhibits 1 through 13 are genuine, authentic, and admissible. The deposition testimony of Brian Bertsch is also admissible, subject to the specific objections therein raised and the Court's rulings on those objections.

¶3l Heather Lander has been determined by the Montana Eighth Judicial District Court to be the common-law-wife of Troy Borglum and is therefore his surviving spouse and beneficiary as provided by law in the event that claims based upon his injury and death are covered by the Workers' Compensation Act.

¶3m Hartford has denied any workers' compensation benefits to the petitioner.

¶3n The mediation provision set forth in section 39-71-2411, MCA, has been complied with and the parties have freely exchanged available pertinent medical records pursuant to ARM 24.5.317 and will continue to do so.

¶4 I find it unnecessary to refer to exhibits, depositions, or written discovery which accompany the stipulated facts. The stipulated facts are sufficient and conclusive to decide the issue presented.

Discussion

¶5 Under section 39-71-407(3)(a), MCA (1999), an employee is deemed to be within the course and scope of employment when traveling if two conditions are met. The second of the two conditions is that "(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment." The parties agree that this condition was met. The first, as applicable to this case, is that the claimant was receiving "reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of . . . [his] benefits."

¶6 Citing *Gordon v. H.C. Smith Construction Co.,* 188 Mont. 166, 612 P.2d 668 (1980), Hartford argues that the first requirement was not met despite the fact that claimant was reimbursed $20 daily for his travel to Big Sky, $10 each way. Hartford asserts that in *Gordon* the Supreme Court adopted a rule requiring that travel reimbursement be substantial. It urges that the reimbursement in this case was not substantial, hence section 39-71-407(3)(a)(i), MCA, is not satisfied. Specifically, it says:

> In holding that payment of this allowance constituted an exception to the "going and coming" rule, the Court cites Professor Larsen's [sic] treatise on workers compensation law, citing Larsen's [sic] observation that, in cases "involving *deliberate and substantial payment* for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment." 188 Mont. at 171, citing 1 Larsen [sic], Workers Compensation Law, § 16.30.

(Respondent/Insurer's Trial Brief at 4.)

¶7 *Gordon* was decided before the 1987 legislature inserted the travel provision at issue here. While the statute requires that travel reimbursement be paid, it sets no minimum amount of reimbursement, nor does it require that the reimbursement be substantial or that it cover actual travel costs. The Court is prohibited from writing in any additional terms or qualifications. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA; *accord Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994).

¶8 Moreover, even though the Supreme Court quoted from a section of Larson which referred to "deliberate and substantial payment for the expense of travel" in both the *Gordon* decision and in *McMillen v. McKee & Co.,* 166 Mont. 400, 533 P.2d. 1095, 1098 (1975), the citation to Larson was in support of the Court's determination that there are exceptions to the general rule of no coverage in going to and from work cases. The Court did not adopt any "substantial payment" test and its discussion in those cases indicates that the amount of reimbursement was not a factor in determining coverage. In *Gordon* the Supreme Court specifically stated that the key factor in determining coverage is the fact that the employment agreement "singles out for special consideration a travel allowance and it is paid as an incentive to get men onto jobs . . . ." 188 Mont. at 171, 612 P.2d at 671.

¶9 In *Ellingson v. Crick Co.,* 166 Mont. 431, 533 P.2d 1100 (1975), the Supreme Court expressly rejected an argument that compensation for travel at a flat rate is not covered. Discussing *McMillen*, the Court said:

> In *McMillen* the Court adopted the general rule that:
>
> > '* * * **a workman is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job.**'
>
> Appellant would have us either distinguish or overrule McMillen here. The argument advanced for distinguishing this case from McMillen is the acknowledged differences in the contractual methods of computing the respective travel allowances. In McMillen, the computation was predicated upon the miles actually traveled by the individual employee, while here it is based on the distance from the job site to the nearest county courthouse. The disparity results in McMillen employees receiving varying amounts of compensation depending on the distance traveled, while the employees here all received a uniform amount.
>
> We cannot see where that distinction varies the applicability of the test enunciated in McMillen. The fact that the travel allowance here was based on a distance other than mileage between residence and jobsite is not important. **The union contract singled out transportation as the subject of a specific allowance. When**

> **transportation is thus singled out in the employment contract, the travel to and from work is brought within the course of employment. Injuries sustained enroute are therefore compensable.** McMillen, supra; 1 Larsen [sic], Workmen's Compensation Law, s 16.30.

166 Mont. at 433-34, 533 P.2d at 1101-102 (emphasis added).

¶10 Since claimant received reimbursement for his travel, section 39-71-407(3)(a)(i), MCA, is satisfied. Accordingly, he was in the course and scope of his employment at the time of the accident and his widow is entitled to death benefits.

JUDGMENT

¶11 Troy D. Borglum was in the course and scope of his employment when killed in a motorcycle accident on June 22, 2000. Therefore his widow, Heather Lander, is entitled to death benefits pursuant to sections 39-71-721, -116(5)(a), MCA (1999).

¶12 Petitioner is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

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

¶14 Any party to this dispute has 20 days in which to request reconsideration from this Decision and Judgment.

DATED in Helena, Montana, this 12th day of March, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Timothy B. Strauch
Mr. Michael W. Cotter
Mr. William O. Bronson
Submitted: November 7, 2001