

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 80

WCC No. 9804-7967

MIKEL DUNNINGTON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CENTURY CONSTRUCTION COMPANY

and MOR-BERG, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Dispute involved calculation of claimant's time of injury wage for purposes of permanent partial disability benefits where he worked for a corporation closely linked to another corporation for which he had previously worked. Claimant wanted the Court to aggregate his wages from both companies to yield a higher wage rate. He had two theories: (1) that the two companies should be considered a single employer; and (2) that he was concurrently employed within the meaning of section 39-71-123(4), MCA (1995.)

Held: Under section 39-71-123(3), MCA (1995), the insurer is required to use the average actual earnings for the four pay periods immediately preceding injury unless the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer and good cause requires use of additional weeks up to one year. Contrary to claimant's argument, the two companies were not the same employer where they were separate corporations and separate legal entities, kept separate accounts, paid their employees out of separate accounts, had their own employees – most of whom were not shared – and provided different services. The fact of common ownership is not sufficient to disregard the corporate veil where there was no evidence that one company was the alter ego, instrumentality or agent of the other or that one corporate entity was a subterfuge. The fact that, after injury, claimant was employed by one entity in a job created to accommodate him, and infrequently did work for the other entity, does not prove commingling where pre-injury he had been laid off by one company prior to beginning

exclusive work for the other company. Similarly, claimant did not prove he had "concurrent employment" within section 39-71-123(4), MCA (1995) requiring the aggregation of wages where he was not actually employed by the other entity at the time of the injury.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-123(3), MCA (1995). Claimant was injured while working for company with close ties to second company for which claimant had previously worked. Claimant argued the insurer should aggregate his earnings from both companies when calculating wage rate for purposes of permanent partial disability benefits. The Court refused. Under section 39-71-123(3), MCA (1995), the insurer is required to use the average actual earnings for the four pay periods immediately preceding injury unless the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer and good cause requires use of additional weeks up to one year. Contrary to claimant's argument, the two companies were not the same employer where they were separate corporations and separate legal entities, kept separate accounts, paid their employees out of separate accounts, had their own employees – most of whom were not shared – and provided different services. The fact of common ownership is not sufficient to disregard the corporate veil where there was no evidence that one company was the alter ego, instrumentality or agent of the other or that one corporate entity was a subterfuge. The fact that, after injury, claimant was employed by one entity in a job created to accommodate him, and infrequently did work for the other entity, does not prove commingling where pre-injury he had been laid off by one company prior to beginning exclusive work for the other company.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-123(4), MCA (1995). Claimant did not prove he had "concurrent employment" within section 39-71-123(4), MCA (1995) requiring the aggregation of wages. Although the second company had close ties to the first, claimant's employment with the second company had terminated prior to his hire by the company where he was injured. Aggregation of wages is authorized under the statute only where a claimant is actually employed by another entity at the time of the injury.

Wages: Aggregation. Claimant was injured while working for company with close ties to second company for which claimant had previously worked. Claimant argued the insurer should aggregate his earnings from both companies when calculating wage rate for purposes of permanent partial disability benefits. The Court refused. Under section 39-71-123(3), MCA (1995), the insurer is required to use the average actual earnings for the four pay periods immediately preceding injury unless the use

of the last four pay periods does not accurately reflect the claimant's employment history with the employer and good cause requires use of additional weeks up to one year. Contrary to claimant's argument, the two companies were not the same employer where they were separate corporations and separate legal entities, kept separate accounts, paid their employees out of separate accounts, had their own employees – most of whom were not shared – and provided different services. The fact of common ownership is not sufficient to disregard the corporate veil where there was no evidence that one company was the alter ego, instrumentality or agent of the other or that one corporate entity was a subterfuge. The fact that, after injury, claimant was employed by one entity in a job created to accommodate him, and infrequently did work for the other entity, does not prove commingling where pre-injury he had been laid off by one company prior to beginning exclusive work for the other company.

Wages: Concurrent Employment. Claimant did not prove he had "concurrent employment" within section 39-71-123(4), MCA (1995) requiring the aggregation of wages. Although the second company had close ties to the first, claimant's employment with the second company had terminated prior to his hire by the company where he was injured. Aggregation of wages is authorized under the statute only where a claimant is actually employed by another entity at the time of the injury.

¶11 The trial in this matter was held on September 16, 1998, in Great Falls, Montana. Petitioner, Mikel Dunnington (claimant), was present and represented by Mr. Torger S. Oaas. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Thomas E. Martello. No transcript of the trial has been prepared.

¶12 Exhibits: Exhibits 1 through 15 were admitted without objection.

¶13 Witnesses and Depositions: Claimant and J.R. Killham were sworn and testified. In addition, the parties submitted the depositions of claimant and Jack K. Morgenstern for the Court's consideration.

¶14 Issue Presented: As set forth in the Pretrial Order, the following issue is presented for decision:

Whether the State Fund utilized petitioner's correct time of injury wage when determining petitioner's permanent partial disability benefits.

¶15 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

¶16 Claimant suffered an industrial accident on February 8, 1996, while steam cleaning a construction loader that was owned by Century Construction Company (Century).

¶17 At the time of his injury, claimant was employed by Mor-Berg, Incorporated (Mor-Berg) in a janitorial capacity.

¶18 Mor-Berg was insured by the State Fund, which accepted liability for the claim and paid temporary total disability benefits and medical expenses.

¶19 In computing and paying claimant benefits, the State Fund used claimant's Mor-Berg wages. Claimant alleges that the State Fund should also have included his wages from work he performed for Century. He tenders two theories for cumulating wages from the two companies. First, he argues that Mor-Berg and Century should be considered a single employer. Second, and alternatively, he argues that he was concurrently employed by Mor-Berg and Century and that his wages should be cumulated under the concurrent employment rule, § 39-71-123(4), MCA (1995).

I. Mor-Berg and Century

¶110 Mor-Berg and Century are separate corporations. Jack Morgenstern (Morgenstern) is the sole shareholder of Mor-Berg. He owns 95% of Century's stock. (Morgenstern Dep. at 6, 10.)

¶111 Century is a road construction contractor. Its primary business is heavy highway and asphalt paving.

¶112 Mor-Berg is a large equipment service company. It was incorporated to provide equipment maintenance services to Century and to other central Montana companies with heavy equipment. At one point, 50% of Mor-Berg's business was servicing Century equipment while the other 50% was servicing the equipment of other companies. (*Id.* at 12.) However, by February of 1996, when claimant was injured, Mor-Berg was primarily servicing Century equipment and had only three other clients. (*Id.* at 18.)

¶113 Most of Century's work is performed outside of Lewistown on construction sites around Montana. (*Id.* at 20.) Mor-Berg services equipment only in Lewistown. (Trial Test.)

¶114 Both Mor-Berg and Century are based in Lewistown, Montana. Century owns a maintenance shop, Mor-Berg a paint shop. The two shops are adjacent to each other.

¶115 Mor-Berg uses its own paint shop for painting equipment. It uses the Century shop for other equipment maintenance.

¶116 Century and Mor-Berg have a reciprocal arrangement for shop use. When painting Century vehicles in its paint shop, Mor-Berg bills Century for shop space rental. When using the Century shop for servicing non-Century equipment, Mor-Berg pays a rental fee to Century.

¶17 Although, both Mor-Berg and Century employ some of the same employees, most of the employees of each company work exclusively for one or the other. (Trial Test.; Morgenstern Dep. at 26.) The reason some employees work for both is that Century is a construction company whose employees work on a seasonal basis. Some of those employees are then able to work for Mor-Berg during the off-season. (Morgenstern Dep. at 21.)

¶18 Mor-Berg and Century maintained separate accounts, and paid their employees out of the separate accounts. Each carried separate workers' compensation insurance coverage.

II. Claimant's Work For Century

¶19 Claimant was hired on April 10, 1994, to work for Century. (Morgenstern Dep. at 22.) Prior to April of 1994, claimant had not been employed by either Century or Mor-Berg. (*Id.*)

¶20 Claimant worked for Century as a traffic controller. His job responsibilities normally began sometime in April and ended sometime in December. (Trial Test.) His supervisor was Tom Evans.

¶21 Claimant's hourly wage for Century was \$9 an hour unless the construction project he was working on mandated Davis Bacon wages which were higher.

¶22 Claimant's work for Century involved extensive travel throughout Montana. He went wherever Century was working on road construction.

¶23 When working for Century, claimant's work week typically exceeded 40 hours.

¶24 While working for Century, claimant recorded his hours on Century timecards and was paid by Century.

¶25 Claimant's job with Century was not guaranteed. It depended on Century obtaining contracts for road construction.

III. Claimant's Work For Mor-Berg

¶26 Following the 1994 construction season, and around January 1, 1995, claimant was hired to work for Mor-Berg. He worked for Mor-Berg until Century's construction season began the next spring.

¶27 Claimant's duties at Mor-Berg included steam cleaning equipment, janitorial work, and occasionally running parts. His position was part-time and he reported to work on an as-needed basis. His supervisor was J.R. Killham.

¶28 Mor-Berg paid claimant an hourly wage of \$6.50. He reported his time to Mor-Berg on Mor-Berg time cards and Mor-Berg paid his wages.

¶29 Claimant's work for Mor-Berg amounted to 20 hours per week or less. During his Mor-Berg employment, and based on the fact that his work for Mor-Berg was part time, claimant also drew unemployment benefits. He was receiving unemployment benefits at the time he was injured.

IV. Single Entity Evidence

¶30 Claimant testified that he believed that if he did not work for Mor-Berg in the off season Century might not employ him during the construction season. Despite his belief, there is not a shred of evidence that he was ever told that the employments were connected or that in fact they were.

¶31 Claimant acknowledged that the type of work he performed for Mor-Berg was substantially different from the work he performed for Century.

¶32 Between December 15, 1995, and February 8, 1996, the only work claimant performed was for Mor-Berg. He performed no work for Century. (Trial Test.)

¶33 In the summer of 1996, claimant received a partial release to return to work and thereafter returned to work with Mor-Berg. When he returned to work he had not reached MMI and his return was to a modified light-duty job on a temporary, part-time basis. (Ex. 7 at 1.) Mor-Berg created a position to accommodate claimant's partial release and his work restrictions. (Trial Test.)

¶34 After returning to work for Mor-Berg, claimant occasionally delivered bids for Century although he was paid by Mor-Berg. (*Id.*)

CONCLUSIONS OF LAW

I.

¶35 Claimant's industrial injury occurred on February 8, 1996. His claim is governed by the 1995 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶36 Claimant must prove by a preponderance of the evidence that he suffered an industrial accident and injury in the course and scope of his employment. *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).

III.

¶37 The State Fund calculated claimant's disability benefits pursuant to section 39-71-123(3)(a), MCA (1995), which states:

Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

¶138 Claimant contends that his employment meets the exception articulated in subsection (3)(b) of section 39-71-123, MCA (1995). Subsection (3)(b) provides:

For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

He argues that since Morgenstern owned both Mor-Berg and Century, and because Mor-Berg provided services to Century, the companies should be considered to be the same employer. He contends that his Century wages should be included in calculating his wages and that the use of his last four pay periods therefore did not accurately reflect his wage history.

¶139 The claimant's argument is unpersuasive. Mor-Berg and Century are separate corporations and separate legal entities. They kept separate accounts, paid their employees out of the separate accounts, had their own employees - most of whom were not shared - and provided different services.

¶140 The fact that they may have common ownership is insufficient to disregard the corporate veil. If it were sufficient, then incorporation would be meaningless, at least in workers' compensation cases. As a Florida court noted in a workers' compensation case where companies are separate legal entities, they must be treated as separate employers. The court said, "[W]e do not think the fact that the corporations were closely related is of itself sufficient to support that on the night in question claimant was doing the work of both employers." *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (1954).

¶141 Claimant's evidence does not warrant a disregard of Century's corporate veil. Montana has adopted a two part test for determining when it is appropriate to pierce the corporate veil. First, the Court must find that the defendant was either the "alter ego, instrumentality, or agent of the corporation." *Berlin v. Boedecker*, 268 Mont. 444, 458, 887 P.2d 1180, 1188 (1994) (citing *Drilcon, Inc. v. Roil Energy Corp., Inc.*, 230 Mont. 166, 176, 749 P.2d 1058, 1065 (1988)). Second, the Court must find evidence that the corporate entity was used as a "subterfuge to defeat public convenience, justify wrong, or perpetrate fraud." *Berlin*, 268 Mont. at 458, 887 P.2d at 1188 (citing *Drilcon* 230 Mont. at 176, 749 P.2d at 1065.)

¶142 Black's Law Dictionary defines the "instrumentality" or "alter ego" test as follows:

The so-called "instrumentality" or "alter ego" rule states that when a corporation is so dominated by another corporation that the subservient corporation becomes a mere instrument and is really indistinct from controlling corporation, then the corporate veil of dominated corporation will be disregarded, if to retain it results in injustice.

Blacks Law Dictionary 550 (6th ed. 1991); see also Blacks Law Dictionary 720 (6th ed. 1979) (citing *National Bond Fin. Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (1964)).

¶43 Claimant failed to present credible, substantial evidence that Century dominated or controlled Mor-Berg. The evidence indicates that the two corporations were managed separately and that their affairs were separate and distinct. The only evidence of any intermingling of the affairs of the two corporations was with respect to claimant's work for Mor-Berg **after** he was injured. After returning to work for Mor-Berg, claimant occasionally delivered bids for Century. A singular instance is not sufficient to disregard the legal, corporate entities.

¶44 Moreover, the instance was triggered by an attempt to accommodate claimant and the insurer by returning claimant to work. It does not indicate a pattern and practice by Mor-Berg. The evidence therefore fails to satisfy the second prong, which requires that use of the corporation is a "subterfuge to defeat public convenience, justify wrong, or perpetrate fraud." There is not a scintilla of evidence that Mor-Berg was created to perpetrate a fraud or to justify a wrong. On the contrary, claimant acknowledged that Mor-Berg carried its own workers' compensation insurance and that claimant received benefits from Mor-Berg on account of his injury.

¶45 The Court finds that Mor-Berg and Century were separate employers and that claimant was employed by Mor-Berg at the time of his injury.

IV.

¶46 Claimant's second argument is based on the concurrent employment provision found in section 39-71-123, MCA (1995). Subsection (4)(a) reads:

(4) (a) For the purpose of calculating compensation benefits for an employee working concurrent employments, the average actual wages must be calculated as provided in subsection (3). As used in this subsection, **"concurrent employment" means employment in which the employee was actually employed at the time of the injury** and would have continued to be employed without a break in the term of employment if not for the injury.

(b) The compensation benefits for a covered volunteer must be based on the average actual wages in the volunteer's regular employment, except self-

employment as a sole proprietor or partner who elected not to be covered, from which the volunteer is disabled by the injury incurred.

(c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, except self-employment as a sole proprietor or partner who elected not to be covered, from which the employee is disabled by the injury incurred. [Emphasis added.]

Under the subsection, a second employment is "concurrent" only if the claimant was "actually employed [in the second employment] at the time of the injury." The language is clear and unambiguous on its face, thus it must be applied as written; no further interpretation is necessary. *GBN, Inc. v. Montana Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991).

¶47 Claimant was not "actually employed" by Century at the time of his injury. He had been laid off by Century since the construction season had ended.

¶48 Section 39-71-123(4), MCA (1995), was added by the 1989 Legislature. Although this Court's prior decisions in *Wood* and *Lamping* are, to a certain extent, factually similar to the case at hand, they were decided prior to the 1989 amendment of section 39-71-123(4)(a), MCA, defining concurrent employment. See *Wood v. Montana School Groups Ins. Auth.*, WCC No. 9401-6986, Findings of Fact, Conclusions of Law and Judgment (August 12, 1994); *Lamping v. State Compensation Insurance Fund*, WCC No. 9303-6738, Findings of Fact, Conclusions of Law and Judgment (August 25, 1993). Similarly, Montana Supreme Court precedents discussing concurrent employment involved pre-1989 law. See *Lovell v. State Compensation Mut. Ins. Fund*, 260 Mont. 279, 860 P.2d 95 (1993) (the date of Lovell's injury was August 9, 1988); *Milender v. Carpenter*, 230 Mont. 1, 748 P.2d 932 (1987); *Harmon v. Harmon*, 220 Mont. 445, 716 P.2d 605 (1986); and *Gee v. Cartwheel Restaurant*, 197 Mont. 335, 642 P.2d 1070 (1982).

¶49 Under the law in effect at the time of his injury, claimant's employment with Century was not "concurrent employment" and may not be aggregated with his time-of-injury employment. The State Fund correctly calculated claimant's disability benefits utilizing the wage he earned at Mor-Berg.

V.

¶50 Claimant has not prevailed in this action and is not entitled to either attorney fees or costs. § 39-71-611, MCA (1995).

JUDGMENT

¶51 1. The State Fund correctly calculated claimant's disability benefits. His petition is **dismissed with prejudice.**

¶52 2, Petitioner is not entitled to attorney fees or costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.

¶53 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶54 4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 5th day of November, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Torger S. Oaas

Mr. Thomas E. Martello

Date Submitted: September 16, 1998