

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 11

WCC No. 2002-0650

JAPETH EDMUNDS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE

Respondent.

DECISION AND JUDGMENT

SETTLED & DISMISSED 7/13/04

Summary: An employee (claimant herein) of a subcontractor was injured on the job. The subcontractor was uninsured and the claimant therefore invoked section 39-71-405, MCA (1995), and sought benefits from the insurer of the general contractor. The insurer denied liability based upon section 39-9-207, MCA (1997), which exempts persons employing registered contractors from workers' compensation liability. At the time of the claimant's injury, the subcontractor had a certificate as a registered contractor. The certificate, however, on its face stated that the contractor registration was invalid if the subcontractor employed non-exempt workers.

Held: Section 39-9-207, MCA, is inapplicable since there was no valid contractor registration covering the subcontractor in the event he hired non-exempt employees. Section 39-71-405, MCA, is therefore applicable. Under that section the general contractor's insurer is liable for the claimant's industrial injuries.

Topics:

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-405 (1997). Reconciliation of section 39-71-405, MCA (1997), which provides that the employer of an uninsured subcontractor is liable for the industrial injuries of the subcontractor's employees, with section 39-9-207, MCA (1997), which provides that a "person" employing registered contractors is exempt from workers' compensation liability, presents difficult questions of statutory interpretation. However, those questions need not be addressed where the contractor registration

at issue was on its face “invalid.” Section 39-9-207, MCA, therefore did not apply at all and did not shield the general contractor or its insurer from liability.

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Employers: Subcontractors. Reconciliation of section 39-71-405, MCA (1997), which provides that the employer of an uninsured subcontractor is liable for the industrial injuries of the subcontractor’s employees, with section 39-9-207, MCA (1997), which provides that a “person” employing registered contractors is exempt from workers’ compensation liability, presents difficult questions of statutory interpretation. However, those questions need not be addressed where the contractor registration at issue was on its face “invalid.” Section 39-9-207, MCA, therefore did apply at all and did not shield the general contractor or its insurer from liability.

Estoppel and Waiver: Judicial Estoppel. The doctrine of judicial estoppel applies only to representations and positions taken in judicial proceedings.

Estoppel and Waiver: Judicial Estoppel. The doctrine of judicial estoppel applies only to inconsistent representations and positions in judicial proceedings.

Defenses: Double Recovery. Where claimant has obtained benefits from the Uninsured Employers’ Fund (UEF) on account of his industrial accident, and concedes that the UEF is entitled to a “set-off” for any benefits due him from an insurer, his claim is not barred by the double recovery doctrine announced in *Olson v. Daughenbaugh*, 2001 MT 284, 307 Mont. 371, 38 P.2d 154.

Cases Discussed: *Olson v. Daughenbaugh*. Where claimant has obtained benefits from the UEF on account of his industrial accident, and concedes that the UEF is entitled to a “set-off” for any benefits due him from an insurer, his claim is not barred by the double recovery doctrine announced in *Olson v. Daughenbaugh*, 2001 MT 284, 307 Mont. 371, 38 P.2d 154.

¶1 This matter is submitted for decision upon affidavits and exhibits attached to the parties’ motions and briefs for summary judgment, as well as the testimony of Maggie

Connor taken on July 15, 2003 in Helena, Montana. Petitioner, Japeth Edmunds (claimant), was represented by Mr. R. Russell Plath. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones.

¶2 The sole issue in this case is whether the contractor registration certificate for the claimant's immediate employer, who was uninsured, exempts the general contractor and its insurer, Liberty, from liability. The issue involves interpretation and application of section 39-9-207, MCA.

¶3 The following narrative discussion will constitute the Court's combined findings of fact and conclusions of law.

Discussion

¶4 This case arises out of a work-related injury suffered by claimant on June 1, 1999, when he fell off a roof while roofing a residence. The 1997 version of the Workers' Compensation Act therefore applies to his claim. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶5 At the time of his injury, the claimant was working for Brandon Kueffler Roofing (Kueffler Roofing), which had subcontracted the roofing job from Jeff Junkert Construction, Incorporated (Junkert Construction), the general contractor working on the residence. Kueffler Roofing was a sole proprietorship of Brandon Kueffler. Brandon Kueffler and Kueffler Roofing were uninsured at the time of the claimant's industrial accident.

¶6 At the time of the claimant's accident, Junkert Construction was insured by Liberty. The claim was submitted to Liberty under section 39-71-405, MCA (1997).

¶7 Claims were submitted to both the UEF, which accepted liability and paid benefits, and Liberty which denied liability.

¶8 Section 39-71-405, MCA (1997), imposes liability for a subcontractor's employees upon the general contractor and its insurer where the subcontractor is uninsured. It provides in relevant part.

39-71-405. Liability of employer who contracts work out. (1) An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Worker's Compensation Act. Any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses from the contractor primarily liable therein. (2) Where an employer contracts to have any work to be done by a contractor other than an independent contractor, and the work so contracted to be done is a part or

process in the trade or business of the employer, then the employer is liable to pay all benefits under this chapter to the same extent as if the work were done without the intervention of the contractor, and the work so contracted to be done shall not be construed to be casual employment. Where an employer contracts work to be done as specified in this subsection, the contractor and the contractor's employees shall come under that plan of compensation adopted by the employer.

¶9 However, Liberty denies liability based on section 39-9-207, MCA (1997), which provides:

39-9-207. Contractor registration -- limiting liability. A person who, pursuant to an oral or written contract, engages a construction contractor who is registered under this chapter on the date of the contract is not liable as an employer for workers' compensation coverage under 39-71-405, for unemployment insurance coverage, or for wages and fringe benefits for:

- (1) the registered construction contractor;
- (2) the employees of the registered construction contractor; or
- (3) any subsequent subcontractor or the employees of any subsequent subcontractor engaged to fulfill a part of or all of the obligations of the oral or written contract of the registered construction contractor listed in subsection (1).

At the time of the claimant's accident, Kueffler Roofing was a registered contractor. Liberty asserts that section 39-9-207, MCA (1997), therefore exempts it from section 39-71-405, MCA (1997).

¶10 As interpreted by Liberty, section 39-9-207, MCA (1997), conflicts with section 39-71-405, MCA (1997), which is absolute on its face and has no exceptions in it. Therefore, section 39-9-207, MCA (1997) must repeal implicitly either section 39-71-405, MCA (1997) as to registered contractors or be reconciled with it in some fashion.

¶11 Section 39-9-207, MCA (1997) exempts "persons" employing registered contractors from workers' compensation liability, whereas section 39-71-405 MCA, (1997) refers to "employer." Person is undefined in chapter 9 of Title 39, but "construction contractor" is defined as "a person, firm, or corporation." Similarly, an employer is defined in chapter 71 of Title 39 as encompassing

the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire

§ 39-71-117 (1)(a), MCA. Given the broader definitions of employer and construction contractor, albeit ones that include “persons,” it may be argued that the “persons” exempted from workers’ compensation liability under section 39-9-207, MCA (1997) are only natural persons, or even just natural persons who do not otherwise meet the definition of an employer. However, in light of my determination below concerning the scope of the contractor registration in this case, I need not go further in my analysis or construe the meaning of “person” in section 39-9-207, MCA (1997). I assume for purposes of this decision that “person” encompasses Junkert Construction.

¶12 A copy of the Contractor Registration Certificate at issue in this case is attached to this decision. On its face it states that it is “Invalid if Employing Non-Exempt Workers.” (Emphasis added.) The reference to “employing non-exempt workers” is to Kueffler Roofing employing non-exempt workers. The limitation was the result of Brandon Kueffler representing he had no employees when he applied for the contractor registration. (See exhibits attached to briefs.) In light of his representation, he was not required to prove he had an effective workers’ compensation policy to register. See § 39-71-201, MCA (1995).⁽¹⁾ The registration was therefore limited to his work as an individual.

¶13 Since the Certificate of Contractor’s Registration was on its face invalid if Kueffler Roofing used non-exempt employees on its work, and since it did so on the Junkert Construction job, section 39-71-207, MCA, does not apply and does not provide either Junkert Construction or Liberty a safe harbor with respect to section 39-71-405, MCA. Liberty and its insured could have readily ascertained the limitations of Kueffler Roofing’s contractor registration by simply examining the certificate. The fact that it did not afford any protection to them under section 39-9-207, MCA, should therefore come as no surprise to them.

¶14 Liberty also asserts that the claimant is judicially estopped from seeking benefits from Liberty because he sought and obtained benefits from the UEF. The defense is utterly without merit. Judicial estoppel applies to representations made in judicial proceedings. *Brown v. Small*, 251 Mont. 414, 418, 825 P.2d 1209, 1212 (1992). The representations upon which Liberty relies were to the UEF and were not in connection with a judicial proceeding. Moreover, the doctrine applies only to inconsistent representations and positions. *Id.* The claimant’s immediate employer was in fact uninsured; there is no inconsistency.

¶15 Citing *Olson v. Daughenbaugh*, 2001 MT 284, 307 Mont. 371, 38 P.2d 154, Liberty also asserts that the present claim is barred by the election of remedies doctrine. In *Olson* the Supreme Court held that the claimant was barred from pursuing a claim for benefits against an uninsured employer when he had previously entered into a settlement agreement with the employer providing for the employer’s payment of salary, medical benefits, and other in-kind compensation and had executed a general release and

indemnification agreement. Thereafter, the claimant filed a claim for compensation with the UEF and ultimately entered into a compromise settlement agreement under which he accepted \$5,000.00 from the employer for attorney fees and \$38,820.88 from the UEF in return for releasing the UEF and the employer from all liability for workers' compensation benefits. Despite his settlements and releases, the claimant then pursued a direct action for benefits against the employer under section 39-71-515, MCA, which allows a claimant to recover workers' compensation benefits from the employer.

¶16 *Olson* was a double recovery case and the Supreme Court, not surprisingly, held that the claimant was not entitled to double recovery. The Supreme Court held:

Daughenbaugh seeks full compensation for his work-related injury twice-once from the UEF and again from the Olsons. We hold that § 39-71-515, MCA, does not allow for a double recovery of workers' compensation benefits.

Id. at ¶ 15.

¶17 The claimant in this case represents, and Liberty does not dispute, that his UEF claim has not been finally settled or closed. The claimant states he is not seeking double recovery and acknowledges that with respect to any amounts due him from Liberty the UEF is entitled to a "set-off" for the benefits it has paid to him. In light of his representation, it is clear the he agrees that the UEF is subrogated with respect to benefits it has paid him and that he is personally seeking only unpaid benefits from Liberty. Under these circumstances, I find that *Daughenbaugh* is inapposite and inapplicable.

¶18 Since section 39-71-405, MCA (1997), applies, Liberty is liable for the claimant's June 1, 1999 industrial injury.

JUDGMENT

¶19 Pursuant to section 39-71-405, MCA (1997), Liberty is liable for the June 1, 1999 industrial injury the claimant suffered while working for Brandon Kueffler Roofing. However, the UEF is subrogated to the benefits owed by Liberty to the extent it has paid him benefits. Thus, the UEF is entitled to reimbursement for amounts it has paid claimant and the claimant is entitled to any additional benefits due him on account of his industrial accident.

¶20 The Court has not been asked to determine the amount of benefits due. In the event the parties are unable to agree, the claimant may bring a new petition asking the Court to determine benefits.

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

¶22 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 19th day of February, 2004.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. R. Russell Plath

Mr. Larry W. Jones

Submitted: July 25, 2003

Attachment: [Contractor Registration Certificate](#)

1. Section 39-9-201(2), MCA, provides in relevant part:

(2) An applicant for registration as a construction contractor shall submit an application under oath on a form to be provided by the department that must include the following information:

. . . .

(b) proof of compliance with workers' compensation laws;