IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 29

WCC No. 2000-0197

RICHARD FLIEHLER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

GREG CASEY/THE RESTAURANT

INSTALLATION COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 06/11/02

Summary of Case: Claimant was hired in Montana to help install kitchens for restaurants located out of state. His employer resided in Montana, received plans for jobs while in Montana, kept his equipment and truck in Montana, hired his workers in Montana, designated all out-of-state jobs on which this claimant was employed from Montana, paid claimant in Montana on a Montana bank account, and transported his workers from Montana to jobs, then back to Montana after completing most jobs.

Held: (1) Claimant was an employee since he was not engaged in an independent business. (2) Although he was injured in Oklahoma on an Oklahoma job, he was a resident of Montana and his work was controlled from Montana, therefore his injury is subject to the Montana Workers' Compensation Act. (3) Since his employer was uninsured, the Montana Uninsured Employers' Fund is liable for benefits.

Topics:

> **Jurisdiction: Montana Employment.** Where the employer operates from Montana, employs Montana workers, directs his workers to out-of-state jobs from Montana, transports those workers from Montana to job sites in other states, transports the workers back to Montana after most jobs, pays the workers in Montana by checks

drawn on a Montana bank, the employer is a Montana employer and his employees are Montana employees subject to Montana jurisdiction and laws.

Statutes: 39-71-118. Where the employer operates from Montana, employs Montana workers, directs his workers to out-of-state jobs from Montana, transports those workers from Montana to job sites in other states, transports the workers back to Montana after most jobs, pays the workers in Montana by checks drawn on a Montana bank, the employer is a Montana employer and his employees are Montana employees subject to Montana jurisdiction and laws.

Employers: Where the employer operates from Montana, employs Montana workers, directs his workers to out-of-state jobs from Montana, transports those workers from Montana to job sites in other states, transports the workers back to Montana after most jobs, pays the workers in Montana by checks drawn on a Montana bank, the employer is a Montana employer and his employees are Montana employees subject to Montana jurisdiction and laws.

Independent Contractor: Element: Independently Established Business. Where worker was not engaged in independently established business and had not been engaged in the line of work for which he was hired by this employer, he was not an independent contractor.

Independent Contractor: Elements. One of the elements of independent contractor status is the existence of an independent business.

¶1 The trial in this matter was held on May 23, 2001, in Kalispell, Montana. Petitioner, Richard Fliehler (claimant), was present and represented by Mr. Garry D. Seaman. Respondent, Uninsured Employers' Fund (UEF), was represented by Mr. Daniel B. McGregor. The putative employer, Greg Casey (Casey), was represented by Mr. Mies Wm. Faerber. Mr. Casey was not present at trial.

¶2 Exhibits: Exhibits 1 through 13 and 15 and 16 were admitted without objection. Exhibit14, which is a written audit, was refused. There may be some confusion in the record as to Exhibit 14 - it may have been referred to as Exhibit 13. In any event, the exhibit which was refused was the July 6, 2000 UEF audit report.

¶3 Witnesses and Depositions: The deposition of Greg Casey was filed and is considered by the Court in reaching its decision. The claimant and Steven K. LaVoie were sworn and testified.

¶4 Issues Presented: The following issues are set forth in the Pretrial Order, however, at trial the parties agreed that issue 5, which concerns permanent partial disability benefits, is premature and should be withdrawn. Therefore issue 5 is not considered.

¶4A Whether Petitioner is an employee as defined in §39-71-118, M.C.A.

¶4B Whether Petitioner is a covered employee pursuant to §39-71-402, M.C.A.

¶4C Whether Petitioner is entitled to temporary total disability benefits pursuant to §39-71-701, M.C.A.

¶4D Whether Petitioner is entitled to payment of medical expenses pursuant to §39-71-704, M.C.A.

¶4E Whether Petitioner is entitled to permanent partial disability benefits pursuant to §39-71-703, M.C.A.

¶4F Whether, in accordance with §39-71-611, M.C.A., and/or §39-71-612, M.C.A., the Respondent/Insurer shall pay reasonable costs and attorney fees established by the Court.

¶5 Following trial, and having considered all of the trial testimony, the exhibits, the deposition of Greg Casey, the credibility of Mr. Fliehler, the applicable statutes, and the parties' arguments, I ruled from the bench, finding that claimant was an employee of Casey and that Montana workers' compensation laws apply to his employment. Accordingly, I found that the UEF is liable for temporary total disability and medical benefits. The present decision confirms those rulings and sets out in greater detail the factual basis for them.

FINDINGS OF FACT

¶6 The claimant testified in this case and I find him to be a credible witness. Where there is a conflict between his testimony and the deposition testimony of Greg Casey, I have adopted claimant's testimony as the more persuasive.

¶7 The claimant in this case has worked in construction for a number of years.

¶8 Claimant's putative employer is Greg Casey. For a number of years Casey has contracted to install kitchens in restaurants in the western and mid-western United States. He does not provide the materials for his work, only the labor.

¶9 Casey does business under the business name of "The Restaurant Installation Company." He is not incorporated and operates his business as a sole proprietor.

¶10 Casey's primary source of work is through G. S. Beckman (Beckman), who designs restaurants. Beckman's design work includes restaurants for *Marie Callender's*, a restaurant chain which operates restaurants in the western and mid-western United States. Beckman recommends that his clients hire Casey for their kitchen installations.

¶11 Over the past several years, Casey has installed kitchens primarily for three restaurant chains -- *Marie Callender's, East Side Mario's,* and *McGrath's Fish House.* Casey's work for these restaurants included jobs in California, Texas, Idaho, Oregon, Washington, Colorado, and Oklahoma.

¶12 In 1997 Casey was in the process of divorcing his wife. While he owned a home with his wife in Washington State, where his wife lived, he also had a home in Big Fork, Montana, and that is where he resided when not working. I find that from 1997 through the date of the claimant's injury, Casey's residence was Big Fork, Montana.

¶13 Since 1997, Casey has filed Montana income taxes.

¶14 Since 1997, plans for Casey's next job have often been sent to him at his residence in Big Fork via Federal Express.

¶15 In 1997, claimant met Casey through a friend, John Pettigrew (Pettigrew). Pettigrew was working for Casey at the time.

¶16 Claimant and Casey met at the Garden Bar in Big Fork, Montana. Casey asked claimant if he would be willing to "go on the road" to help install kitchens for which Casey had contracts. Claimant agreed to go to work for Casey.

¶17 Casey initially paid claimant $15 an hour but told him that if his work was satisfactory he would put him on salary.

¶18 At the time Casey hired claimant, the claimant was working in construction but his work did not involve installation of kitchens. Claimant did not have an independent contractor exemption from the Montana Department of Labor and Industry. He did not advertise his services with respect to kitchens or any other matter. There is no evidence whatsoever that at the time of his hire that he was operating an independent business.

¶19 Claimant's first job for Casey was in Salinas, California in September 1997. Claimant was paid by the hour. Casey was satisfied with claimant's work and thereafter paid claimant by the job, initially $2,000 per job and ultimately $3,000 per job.

¶20 From 1997 until his injury, claimant was one of four workers installing kitchens for Casey. The other workers were Casey himself, John Pettigrew, and Dave Barton (Barton). All four lived in the Big Fork-Kalispell area of Montana.

¶21 The kitchen installation jobs typically lasted two weeks.

¶22 When not working on a restaurant job, Pettigrew, Barton, and claimant returned to Montana and awaited Casey's instructions concerning the next job. Sometimes Casey had another job lined up which began immediately upon finishing his current job. In those cases, Casey, Pettigrew, Barton, and claimant went directly to the next job and did not return to Montana. However, after most jobs they returned to Montana.

¶23 Claimant, Pettigrew, and Barton traveled to job sites in Casey's pickup truck. While the truck may have been registered by Casey in Washington at the time of claimant's hire, it was registered in Montana at the time of claimant's injury.

¶24 At the time most of the jobs began, Pettigrew, Barton, and claimant were in Montana. Casey had a girlfriend in California. After completion of some of the jobs he flew to California to visit her while Pettigrew, Barton and claimant returned to Montana in his truck. But Casey was most often in Montana. When Casey was in Montana, all four drove to the next job site in Casey's truck. When Casey was in California, the other three drove the truck and met Casey at the job site. Whether or not Casey was along, he paid for gas for the truck.

¶25 Casey paid for the motel bills and meals for his crew. He also determined the times his crew started work, their lunch hours, and the time they knocked off for the day.

¶26 While claimant furnished a cordless drill and a few other hand tools for his work, Casey furnished all other tools. Casey kept his tools in the pickup truck.

¶27 The work claimant did was routine and repetitive. After showing claimant what to do, claimant was able to perform his work without further supervision.

¶28 Casey paid claimant upon returning to Montana. He paid him with checks written on his personal account at a Big Fork bank.

¶29 On April 23, 1999, while working on a *Marie Callender* restaurant in Oklahoma, claimant fell and injured his elbow and arm. The fact of the accident and his injury is not disputed, and therefore warrants no further discussion.

¶30 At the time of claimant's April 23, 1999 accident, Casey did not have workers' compensation insurance.

¶31 Claimant's workers' compensation claim was submitted to the UEF, which initially denied coverage for the claim based upon a lack of medical information. (Ex. 11 at 6.) Medical information demonstrating an injury has been provided since the denial, however, the UEF adheres to its denial based on its determination that the employment in this matter is not governed by Montana law.

¶32 Casey joins in the UEF's position, also urging that Montana workers' compensation statutes are inapplicable. He alleges that claimant was an independent contractor and therefore ineligible for benefits.

CONCLUSIONS OF LAW

¶33 The claimant's accident occurred April 23, 1999. It is governed by the 1997 version of the Workers' Compensation Act, which was in effect at that time. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶34 The fact of the accident and claimant's injury is not questioned. The amounts which may be due claimant are also not presently at issue. The only issue is whether the UEF and, derivatively, Casey are liable for claimant's industrial injury.

¶35 There are two questions which must be addressed. The first is whether Montana law applies and, therefore, whether this Court has jurisdiction over the controversy. Assuming Montana has jurisdiction over the claim, the second question is whether the claimant was an employee of Casey.

¶36 At trial, I addressed these questions in reverse order, noting that the issue of employment is related to the jurisdictional issue. If claimant was an employee, he was hired in Montana, and the case for applying Montana law is stronger.

¶37 Under Montana law, claimant was clearly an employee, not an independent contractor. He did not have an independent contractor exemption. *See* § 39-71-401, -415, MCA (1997). To be an independent contractor, he had to have been engaged "in an independently established trade, occupation, profession, or business." § 39-71-120(b), MCA (1997). There is not a scintilla of evidence that claimant was engaged in any business, much less a kitchen installation business, prior to Casey hiring him. The lack of evidence that claimant was engaged in an independent business prior to his hiring by Casey is fatal to Casey's claim that claimant was an independent contractor. *Lundberg v. Liberty Northwest Ins. Co., Inc.,* 268 Mont. 499, 503-504, 159 (1994).

¶38 At the time claimant was employed by Casey, both Casey and claimant were Montana residents. Nonetheless, the Court must still determine whether Montana law applies to the claimant's industrial injury.

¶39 The Montana Workers' Compensation Act applies to "employee[s] . . . in this state." Section 39-71-118(1), MCA (1997), provides in relevant part:

> **39-71-118. Employee, worker, volunteer, and volunteer firefighter defined**. (1) The term "employee" or "worker" means:
>
> (a) each person **in this state**, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. [Emphasis added.]

As set forth above, the Montana Workers' Compensation Act applies to workers "**in this state."** Subsection (10) of section 39-71-118, MCA (1997), defines who those workers are, as follows:

> (10) For purposes of this section, an "employee or worker in this state" means:
>
> (a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;
>
> (b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or

(d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:

. . .

Claimant in this case is a "resident" of Montana, therefore, subsection (a) applies. Under that subsection, his duties must be either "primarily carried out or controlled" in Montana. Claimant never worked in Montana, since all of his jobs were in other states. He must therefore prove that his duties were "controlled within" Montana.[(1)] The control of claimant's duties did not emanate from a single state. However, Casey's job assignments of claimant and his coworkers occurred primarily in Montana. But actual on-the-job direction took place in the states where they were working. Thus, there was no singular point of control in the sense that **all** of claimant's duties were controlled from Montana, or that **all** of his duties were controlled at non-Montana job sites.

¶40 Neither subsection (10) of section 39-71-118, MCA, nor any other section of the Montana Workers' Compensation Act, address what is required to show that an employee's duties are "controlled within" Montana. Since, as apparent from the facts of this case, "control" over a particular employee can be exercised from many states, the only reasonable interpretation of subsection (10) is one which construes "control" as referring to "primary" or "principal" control.

¶41 In this case, "primary, principal and ultimate" control over claimant's employment took place in Montana. Casey's principal place of business was in Big Fork, Montana. Big Fork was not only where Casey resided, but where he hired his workers, where he received the plans for his jobs, where he assigned jobs to his workers, where he kept his equipment (truck and tools), where his workers traveled from and returned to, and where he paid his workers.

¶42 I therefore conclude that the claimant's industrial accident was governed by the Montana Workers' Compensation Act, and that Casey was required to provide workers'' compensation coverage.

¶43 Since Casey did not have workers' compensation insurance covering the claimant, the UEF is liable for his injury. Section 39-71-503, MCA (1997), provides in relevant part:

> **39-71-503. Administration of fund -- appropriation.** (1) The department shall administer the fund and shall pay from it all expenses of administering the fund, all loss adjustment expenses for claims of injured employees of uninsured employers,

> and all proper benefits to injured employees of underinsured and uninsured employers.
>
> . . .

¶44 The final issue which the Court must address is claimant's request for attorney fees under either section 39-71-611 or 39-71-612, MCA (1997). Both sections limit awards of attorney fees to cases in which the Court finds that the insurer unreasonably denied or terminated benefits. Assuming the statutes apply, the UEF's denial of this claim was not unreasonable. Claimant presented no evidence to rebut the UEF's initial rejection of his claim based upon his failure to submit medical information. As to the merits of the claim, there are significant questions of fact and law which preclude any finding of unreasonableness. Initially, there are factual issues concerning the place of Casey's business. More significantly, the issue of the place of control is a legal one which is reasonably debatable. While I have found in favor of the claimant, there are arguments for the UEF's and Casey's position that Casey's control of claimant's employment was in the states where claimant worked, not in Montana.

JUDGMENT

¶45 Montana and the Montana Workers' Compensation Court has jurisdiction over the claimant's industrial injury since, at the time of the injury, claimant was a Montana employee and Casey was a Montana employer.

¶46 Since Casey was uninsured at the time of the claimant's industrial accident, the Montana Uninsured Employers' Fund is liable for his claim.

¶47 Claimant is entitled to his costs but not to attorney fees.

¶48 This decision is otherwise certified as final for purposes of appeal. ARM 24.5.348.

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

DATED in Helena, Montana, this 1st day of June, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Garry D. Seaman
Mr. Daniel B. McGregor
Mr. Mies Wm. Faerber
Submitted: May 23, 2001

1. Claimant bears the burden of proof. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1204 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).