IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 87

WCC No. 9407-7094

JOLANDA "SUSIE" GLAUDE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER DISMISSING PETITION

The matter before the Court is respondent's Motion to Dismiss the petition for failure to state a claim upon which relief can be granted. The single issue presented by the petition and the motion is whether the statutory liability imposed upon the employer of an uninsured contractor, section 39-71-405(1), MCA, applies to the "employer of the employer" where the immediate employer is also uninsured.

Facts

The relevant facts alleged by the petitioner are as follows:

1. That on or about November 17, 1993, Petitioner suffered an industrial injury arising out of and in the course of employment as a Pilot Car Driver with Don Ellis. The injury occurred when a tractor-trailer pulled forward and crushed the Petitioner's right thigh and buttock. The Petitioner had been lying under the truck, near the tires while screwing a drain plug onto the mobile home. The accident occurred in Granite County, Montana.

2. Don Ellis was an uninsured independent sub-contractor hired by Transit Homes of America, Inc. Transit Homes of America, Inc. was an uninsured independent contractor hired by Rangitsch Brothers Mobile Homes. At the time of the injury, Rangitsch Brothers was enrolled under Compensation Plan III of the Workers' Compensation Act and its insurer is the State Compensation Insurance Fund.

3. A dispute exists between the parties. The Petitioner believes she is entitled to coverage under the policy owned by Rangitsch Brothers Mobile Homes pursuant to §39-71-405, MCA (1993). The State Fund claims that §39-71-405 does not extend coverage to the Petitioner

because she works for a sub-contractor rather than a contractor who contracted directly with Rangitsch Brothers.

Discussion

The rules of the Workers' Compensation Court expressly contemplate motions to dismiss. Rule 24.5.316(1) provides in relevant part: "(1) Unless a different time is specified in these rules, the time for filing any motion to amend a pleading, **to dismiss** . . . shall be fixed by the court in a scheduling or other order." The rule, however, does not provide any further guidance concerning motions to dismiss. Therefore, as it has done in other cases, this Court will look to the Montana Rules of Civil Procedure for guidance when considering such motions. ***See Murer v. State Fund,*** *257 Mont. 434, 436, 849 P.2d 1036 (1993).*

Rule 12(b)(6) Mont.R.Civ.P. provides that a defense based on the failure of a complaint "to state a claim upon which relief can be granted" may be raised by a motion to dismiss. For purposes of such a motion, all well pleaded facts are deemed admitted, and the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief." ***Farris v. Hutchinson,*** *254 Mont. 334, 336, 838 P.2d 374 (1992).*

In this case the factual predicate is straightforward. Ms. Glaude (claimant) was employed by Don Ellis (Ellis) and was injured in the course and scope of her employment. Ellis in turn had been hired by Transit Homes of America, (Transit) which in turn had been hired by Rangitsch Brothers Homes of America, Inc. (Rangitsch). Both Transit and Ellis were independent contractors. Ellis and Transit did not have workers' compensation coverage, Rangitsch did. Diagrammatically, the relationship was as follows:

Rangitsch Brothers

(insured)

|

Transit Homes

(uninsured)

|

Don Ellis

(uninsured)

|

Susie Glaude

(injured employee)

According to the complaint Transit and Ellis were both independent contractors.

The sole issue presented by the motion to dismiss is whether Rangitsch and its insurer, the State Fund, are liable for claimant's injuries. Resolution of the issue requires the Court to interpret section 39-71-405(1), MCA, which provides:

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.

Claimant interprets the section as imposing liability upon the first insured contractor in a linear hierarchy of multiple subcontractors. The State Fund counters that on-its-face the section limits liability to the entity or person which directly hired the contractor by whom the injured worker was employed.

Claimant cites ***State Compensation Ins. Fund v. Castle Mountain Corp****, 227 Mont. 236 , 739 P.2d 461 (1987)* and ***Webb v. Montana Masonry Construction Co.,*** *233 Mont. 198, 761 P.2d 343 (1988)* as supporting her position. Neither case is on point. ***Webb*** held that a contractor who is liable for worker's compensation benefits solely on account of a subcontractor's failure to carry workers' compensation insurance coverage is not immune from liability in negligence for injuries suffered by the subcontractor's employee. ***Castle Mountain*** held that a contractor is not liable for injuries suffered by an employee of an insured subcontractor whether or not the subcontractor is deemed an independent contractor or employee. The case involved the application of a different subsection, section 39-71-405(2), MCA, which provides that the employer of a contractor "other than an independent contractor" is liable for injuries suffered by the contractor's employees.

This Court has not found any other Montana Supreme Court decision which concerns the precise issue raised in this case. In ***Castle Mountain*** the Supreme Court did identify the general purpose of section 39-71-405, MCA, as the protection of employees of irresponsible and uninsured subcontractors. The Court quoted with approval the following statement taken from *1C Larson,* Workmen's Compensation Law, § 49.11:

"The purpose of this ['contractor-under' statutes like Section 39-71-405, MCA] legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. This being the rationale of the

rule, **in the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon sub-subcontractors, if an employee of the lowest subcontractor on the totem pole is injured, there is no practical reason for reaching up the hierarchy any further than the first insured contractor**." [Emphasis added.]

277 Mont. at 240. The quoted purpose suggests that an injured employee should be permitted to climb the "totem pole" of subcontractors and contractors until he or she reaches the first insured entity. However, neither ***Castle Mountain*** nor Larson specifically discuss the matter, and the Larson section is cited only as supporting "the general purpose of Montana's workers' compensation laws." ***Id.***

Lacking specific precedent, the section must be interpreted utilizing general principles of statutory interpretation. The beacon for all statutory interpretation is legislative intent. "Our function is to effectuate the intent of the legislature." ***Minervino v. University of Montana,*** *258 Mont. 493, 496, 853 P.2d 1242 (1993).* That function, however, is qualified by the rule that legislative intent is ordinarily gleaned from the plain meaning of the statute. ***Holly Sugar v. Department of Revenue,*** *252 Mont. 407, 412, 830 P.2d 76 (1992).* Thus, the Court must first look to the face of the statute, and if the words are plain, the Court can go no further. ***State ex rel. Neuhausen v. Nachtsheim,*** *253 Mont. 296, 299, 833 P.2d 201 (1991).* "Where the language of a statute is plain, unambiguous, direct, and certain, the statute speaks for itself." ***Blake v. State,*** *226 Mont. 193, 198, 735 P.2d 262 (1987)*

Heeding the foregoing rules, I read section 39-71-405(1), MCA, as imposing statutory liability upon the entity which hired the uninsured contractor, and not upon any entity which is higher up in a linear chain of multiple contractors and subcontractors. Taking out the language that is unrelated to the present controversy, section 39-71-405(1), states: "An employer who contracts with an independent contractor . . . 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." (Emphasis added.) As written, this language plainly refers to **the** independent contractor with whom the employer contracts, and to **the** employees of that independent contractor.[(1)] Moreover, the imposition of liability on the employer is not conditioned upon the employer having workers' compensation insurance. Thus, the section is fully implemented by imposing liability on the direct employer whether or not the employer is uninsured.

I recognize that the general purpose of section 39-71-405(1) would be better served by interpreting the section in a manner which would impose liability on the first insured contractor and which would thereby assure that a solvent insurer is liable for benefits. Courts, however, are specifically precluded from inserting terms or conditions which the

legislature has omitted. "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,*** *51 St.Rptr. 414, 415 (Mont. 1994);* ***State v. Crane,*** *240 Mont. 235, 238, 784 P.2d 901 (1989).*

Rangitsch Brothers and its insurer are not liable for claimant's claim. The motion to dismiss is well taken and the petition is **dismissed.**

DATED in Helena, Montana, this 20th day of September, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Steve M. Fletcher
Mr. Charles G. Adams

1. In ***Reeverts v. Sears, Roebuck and Co.,*** *Slip Opinion at 12 (September 16, 1994),* the Supreme Court similarly relied on the use of the word "the" in determining that a statutory reference to the injury is to a "single injury."

It [sic] its original form, this statute laid out a progression for payment of benefits which could only refer to different types of benefits from the same injury. The statute refers to "the accident" and "the injury" and sets forth a sequence which can only logically apply to a single injury, rather than separate and distinct injuries.