IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 46

WCC No. 2000-0159

JOSEPH GEIGER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

DAVID DECKERT d/b/a/ DAVID DECKERT TRUCKING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 12/20/02

Summary: Claimant, a truck driver, seeks workers' compensation benefits from the Uninsured Employers' Fund (UEF), alleging he was employed by David Deckert (Deckert), who operates an interstate trucking business under authority from the Interstate Commerce Commission (ICC). Claimant initially was employed by Deckert but then entered into a purchase and lease agreement with Deckert for his own tractor and trailer and began driving on his own, securing his own loads. On occasion he secured loads through interstate brokers, using Deckert's ICC authority, which Deckert authorized him to do but at no profit to himself. While hauling one such load he was injured. Deckert was uninsured at the time.

Held: Claimant was not an employee of Deckert and was not "used" by Deckert in his business. Deckert exercised no control over claimant and did not profit from his operations other than to collect truck payments and expenses owed by claimant. At the time of his accident, claimant was operating a separate business.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-117(1), MCA (1997).** Where claimant was operating his own independent trucking business and claimant was purchasing/leasing equipment

from respondent, the claimant was not "in service under an appointment or contract of hire" even though parties previously had an employment relationship.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-117(4), MCA (1997). Sections 39-71-117 and -118, MCA (1997), which define "employee" and "employer," indirectly establish who must provide workers' compensation coverage and what workers are covered under the Montana Workers' Compensation Act. Section 39-71-117(4), MCA (1997), provides that an interstate motor carrier doing business in this state "who uses drivers in this state is considered the employer" and is liable for workers' compensation insurance unless the driver is certified as an independent contractor. Although claimant was not certified as an independent contractor, the statute applies only to a carrier "who uses drivers in this state." Where claimant was operating his own independent trucking business, respondent did not "use" claimant in *his* interstate business and was not required to insure claimant.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-118, MCA (1997). Where claimant was operating his own independent trucking business, he was not "in the service of an employer" within the meaning of section 39-71-118, MCA (1997). Thus, he was not entitled to benefits, and UEF correctly denied his claim.

Employers: Motor Carriers. Sections 39-71-117 and -118, MCA (1997), which define "employee" and "employer," indirectly establish who must provide workers' compensation coverage and what workers are covered under the Montana Workers' Compensation Act. Section 39-71-117(4), MCA (1997), provides that an interstate motor carrier doing business in this state "who uses drivers in this state is considered the employer" and is liable for workers' compensation insurance unless the driver is certified as an independent contractor. Although claimant was not certified as an independent contractor, the statute applies only to a carrier "who uses drivers in this state." Where claimant was operating his own independent trucking business, respondent did not "use" claimant in *his* interstate business and was not required to insure claimant.

Employment: Employee. Sections 39-71-117 and -118, MCA (1997), which define "employee" and "employer," indirectly establish who must provide workers' compensation coverage and what workers are covered under the Montana Workers' Compensation Act. Where claimant was operating his own independent trucking business, he was not "in the service of an employer" within the meaning of section 39-71-118, MCA (1997). Thus, he was not entitled to benefits, and UEF correctly denied his claim.

Estoppel and Waiver: Equitable Estoppel. Equitable estoppel applies when an employer has taken some positive action which either prevents a claimant from a timely claim or leads the claimant to reasonably believe he or she need not file such a claim. One of the six requirements is conduct amounting to a representation or a concealment of material facts. Where trial court was convinced claimant understood pre-injury that any workers' compensation insurance was his responsibility, putative employer and UEF were not equitably estopped from denying claim.

¶1 The trial in this matter was held on April 24, 2001, in Billings, Montana. Petitioner, Joseph Geiger, was present and represented by Mr. Marvin L. Howe. Respondent Uninsured Employers' Fund (UEF) was represented by Mr. Daniel B. McGregor. Respondent David Deckert was represented by Mr. Richard L. Burns.

¶2 Exhibits: Exhibits 1 through 23 admitted without objection.

¶3 Witnesses and Depositions: No depositions were submitted. Joseph Geiger, Debra Smith and David Deckert were sworn and testified.

¶4 Issues Presented: The following issues are set out in the Pre-Trial Order:

> 1) Whether the Petitioner Joseph Geiger was an Independent Contractor, sole proprietor or Employee at the time of his injury on June 25, 1999.
>
> 2) Whether there is sufficient evidence to establish that Petitioner Joseph Geiger suffered a compensable work-related injury.
>
> 3) Whether the Petitioner is entitled to Permanent Partial Disability Benefits pursuant to Section 39-71-703 M.C.A. and medical benefits pursuant to Section 39-71-704 M.C.A.
>
> 4) Whether either of the Respondents have wrongfully and unreasonably denied and refused to compensate Petitioner for Workers' Compensation Benefits that he is entitled to.

(Pre-Trial Order at 5.) At trial, Issue number 3 was bifurcated from the other issues and deferred to a later time. However, in view of the disposition of the other issues in this case, the issue is moot. The Pre-Trial Order was also deemed amended to encompass UEF's contention 5(b) as an issue in the case. That issue is as follows:

> 5) Whether claimant was working as an "employee," as defined by section 39-71-118(10)(a), MCA (1997), at the time of his injury.

¶5 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, and exhibits, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant, Joseph Geiger (Geiger), is 46 years old and makes his living as a truck driver. (Ex. 1; Ex. 22 at 11.) He has lived in Glendive, Montana, most of his life and was living there during the times referred to in these findings of fact. Most of his truck driving experience has been as an employee of trucking firms.

¶7 On March 12, 1997, Geiger began driving truck for David Deckert (Deckert). Deckert lives in and operates a trucking business from Glendive, Montana. Deckert owned one truck (trailer and tractor) at the time he hired claimant.

¶8 Operating under the name "David Deckert Trucking," Deckert had interstate operating authority from the Interstate Commerce Commission (ICC) and in fact transported goods interstate. He contracted most of his loads through brokerage firms such as ProAm or Quality. He was required to provide proof of his ICC authority for the brokerage loads. Payment for brokerage loads were remitted to David Deckert Trucking.

¶9 After going to work for Deckert, Geiger also obtained loads for the truck, mostly transporting honey bees. Bees are considered agricultural products and can be transported interstate without ICC authority. Some of the payments for bee hauls were made directly to Geiger at Geiger's request.

¶10 During the first few months, Geiger sometimes rode with Deckert, acting as a second driver. On other trips, Geiger drove the truck by himself, and on others Deckert drove alone. The majority of the miles that they drove were in states other than Montana.

¶11 As a result of an increase in business due to the additional loads obtained by claimant, in the latter part of 1997 Deckert decided to purchase a second truck. He located and bought a 1993 Kenworth tractor unit, financing much of the purchase price. He also leased a second trailer. Geiger thereafter began driving the second truck and using the second trailer. At first he was paid 25% of the value of his loads, with Deckert paying the expenses. This was later changed to 30% but Geiger had to pay his own expenses.

¶12 Sometime in 1998, Deckert had his attorney draft an independent contractor (IC) agreement (Ex. 6), which he repeatedly asked Geiger to sign. However, Geiger never signed the document. Deckert began withholding taxes and social security from Geiger's wages and providing workers' compensation coverage. Workers' compensation insurance coverage was provided from May 29, 1998 through March 11, 1999. (Ex. 15.)

¶13 In August or September of 1998, Geiger and Deckert discussed claimant buying the second truck from Deckert. However, Geiger was unable to pay off the balance owed by Deckert on the truck and was not sufficiently credit worthy to obtain the financing necessary to buy the truck. Therefore, they agreed to the sale of the tractor on an installment payment basis and to a lease of the trailer. Deckert had his attorney draft the

written agreements in September 1998, however, the contract for the tractor (Ex. 4) and lease for the trailer (Ex. 5) were not signed until April 1, 1999.

¶14 The tractor contract fixed the purchase price at $45,000.00 and called for monthly installment payments of $1,350.59, with ownership of the truck to remain with Deckert until the full amount of the contract was paid. (Ex. 4.) The agreement further provided that Geiger would pay insurance premiums, maintenance, license fees, and fuel costs. (*Id.*) The lease agreement for the trailer provided that Geiger would pay license fees and insurance, as well and maintenance costs, but did not specify the rental amount. (Ex. 5.) Deckert, who had the titles in his name, obtained the actual insurance on the truck.

¶15 Both the contract and the lease agreement specifically provided that during the terms of the agreements Geiger was required to operate the tractor and trailer under the trucking "authority of Deckert Trucking." (Exs. 4 and 5.) Deckert testified that he "recognized that until Geiger could get the truck in his own name, there was no way he could get it licensed and insured and get his own authority."

¶16 Up until the time Geiger actually signed the contract, Deckert allowed him to use his credit card for fuel purchases. As of April 1, 1999, Geiger was responsible for his own fuel expenses and other travel expenses.

¶17 When the contract was signed on April 1, 1999, Deckert told Geiger that the payroll withholdings had stopped and he had quit paying workers' compensation for him. I am persuaded that at that time Geiger understood that any workers' compensation insurance was his responsibility.

¶18 Deckert continued to report all truck mileage for tax purposes, including Geiger's mileage.

¶19 Even prior to April 1, 1999, and at least as early as October 1998, Geiger arranged his own loads. Transporting bees constituted a substantial part of Geiger's hauls and he arranged these directly without the aid of Deckert, and in many cases was paid directly by the bee shippers. He also arranged brokerage loads, contacting the brokerage firms directly. Deckert's involvement was limited to notifying the brokers that Geiger was operating under his ICC authority. Payments for loads arranged through brokerage firms were typically remitted to Deckert. After April 1, 1999, from the amounts received for loads driven by Geiger, Deckert deducted amounts due to himself under the truck contract and lease. He did not take a percentage or fee for loads and made no profit with respect to Geiger's trucking operations.

¶20 The amounts received by Deckert were insufficient to cover Geiger's payments under the contract and lease. As the result of Geiger's lateness in payment, Deckert fell behind in his payments to the original lender. On June 23, 1999, Deckert confronted Geiger and told him that the monies he had been receiving were insufficient to cover Geiger's expenses.

¶21 On June 25, 1999, Geiger was injured in an accident in Illinois while driving his truck. He sustained a closed head injury when he fell ten feet from the top of his tractor trailer to the concrete. (Ex. 22 at 11.) The fact of the accident is not disputed.

¶22 At the time he was injured, Geiger was hauling a load for ProAm, a brokerage company, and doing so pursuant to Deckert's ICC authority.

¶23 At the time of Geiger's injury, Deckert did not have workers' compensation insurance coverage.

¶24 Geiger was unable to bring his truck payments to Deckert current and on July 13, 1999, he signed a relinquishment of ownership on the tractor so that Deckert could surrender the truck to the loan company. (Ex. 14.) Deckert thereafter turned in the truck to the loan company.

¶25 On October 21, 1999, Geiger filed a First Report of Injury with the Montana Department of Labor and Industry. (Ex. 1.) Since Deckert was uninsured, Geiger's claim was routed to the UEF. On April 10, 2000, the UEF informed claimant that it was denying his claim since he was not an employee and he was either an independent contractor or a sole proprietor on the date of his injury. (Ex. 16.)

¶26 The only evidence offered regarding the miles driven by Geiger in various states was through the testimony of UEF's field auditor, Debra Smith. She analyzed trip envelopes for two periods of time. The first time period was one month from April 6 to May 6, 1998, which was prior to the truck purchase agreement. During that time, the trip envelopes showed that 30% of the miles driven by Geiger were in California and only 19% in Montana. However, for the period beginning April 1, 1999, which is the date the truck purchase and lease agreements were signed, until the end of June 1999, when Geiger was no longer able to drive, the miles driven in Montana (21%) were greater than the miles driven in any other single state.

¶27 In making the foregoing findings, I found Deckert the more credible of the two. In any event, where there was conflicting testimony, conflicts were resolved in accordance with the foregoing findings of fact.

¶28 Finally, irrespective of the final result in this case, the UEF's denial of liability was not unreasonable. As of October 1998, and certainly by April 1999, Geiger was operating his own trucking operation. It was reasonable to argue he was not an employee on the date

CONCLUSIONS OF LAW

¶29 The 1997 version of the Workers' Compensation Act applies since that was the law in effect on the date of claimant's injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶30 Resolution of the dispute in this case involves interpretation and application of sections 39-71-117 and 39-71-118, MCA (1997), which define "employee" and "employer." These provisions indirectly establish who must provide workers' compensation coverage and what workers are covered under the Montana Workers' Compensation Act since "[e]xcept as provided in subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118." § 39-71-401(1), MCA (1997).[(1)]

¶31 Section 39-71-117(4), MCA (1997), provides:

> (4) An interstate or intrastate common or contract motor carrier doing business in this state who uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:
>
> (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3) . . . .

This subsection is specific to cases, such as this one, involving interstate motor carriers. As applied to this case, Deckert was doing business in the State and was an interstate contract motor carrier. Geiger also drove within Montana. The only question raised in applying the section to the facts of this case is whether Deckert "used" Geiger in his interstate trucking business.

¶32 The word "use" must be interpreted in the context of the statutory provision in which it is used and according to approved usage of the language. *Steinbrenner v. Love,* 113 Mont. 466, 468-69, 29 P.2d 101, 102 (1942). The "use" (no pun intended) of the word indicates that the legislature intended it to encompass non-employee drivers, in other words to encompass independent contractors who drive for those carriers. The legislature could have used the word "employ" if it had intended to limit the application to employees. Moreover, subparagraph (4)(a), expressly exempts drivers who are certified under section 39-71-401(3), MCA, as independent contractors, thus demonstrating that the word "use" encompasses" independent contractors who lack the exemption.

¶33 However, the fact that the word "uses" may apply to independent contractors does not end the inquiry. "Use" is defined by the Random House Unabridged Electronic Dictionary, Ver. 1.7 (1994), as "to employ for some purpose; put into service; make use of: to use a knife." In the context of the statute, it implies that the driver must be used to benefit the trucking firm. In this case I am unable to discern any "use" to which Deckert put Geiger after they entered into the truck and trailer contract and lease. The facts provided to the Court do not indicate that Deckert received any financial benefit from Geiger's trucking operations apart from payments made to amortize the cost of the truck and pay Geiger's actual expenses of operating the truck. Deckert did not receive any percentage or other fee

for the loads carried by Geiger. While Deckert lent Geiger his interstate operating authority on occasion, his doing so did not contribute to or benefit Deckert's interstate trucking business, it merely enabled him to recover payments due under the sale and lease agreements and recover costs he advanced to Geiger. I conclude that at least after April 1, 1999, Geiger was operating his own, independent trucking business, and that Deckert did not "use" Geiger in his own interstate trucking operation.

¶34 Since subsection (4) of 39-71-117, MCA, is inapplicable to the facts of the present case, Deckert was required to provide workers' compensation coverage only if he was an employer and claimant an employee under other, more general provisions governing employment and coverage. Under the general definition of employer, section 39-71-117(1)(a), MCA (1997), an employer is defined as a person or entity which "has a person **in service** under an appointment or contract of hire." Thus, the person hired must be providing a service to the hiring party. As discussed in the previous paragraph, Geiger was not providing a service to Deckert's trucking operation. I conclude that Deckert was not an employer.

¶35 I reach the same conclusion in determining whether Geiger was an "employee" withing the meaning of the Workers' Compensation Act. Employee is defined in section 39-71-118, MCA (1997), which provides in relevant part:

> (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.]

Since Geiger was not in the service of Deckert, he was not an employee.

¶36 Since Deckert was not Geiger's employer he was not required to furnish workers' compensation coverage for the accident and Geiger is not entitled to benefits.

¶37 Geiger has also requested an award of attorney fees and a penalty. Those awards are available only against insurers and only if the claimant is entitled to benefits. §§ 39-71-611 and 2907, MCA (1997). Moreover, they are only available if the insurer has acted unreasonably. I have found as a matter of fact that the UEF did not unreasonably deny benefits. Accordingly, Geiger is not entitled to attorney fees or a penalty.

¶38 Since Geiger did not prevail, he is also not entitled to his costs.

JUDGMENT

¶39 Claimant was not an employee at the time of his June 25, 1999 accident and is not entitled to workers' compensation benefits. He is also not entitled to attorney fees, costs, or a penalty. His petition is **dismissed**.

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

¶41 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 22nd day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Daniel B. McGregor
Mr. Richard L. Burns
Submitted: May 22, 2001

1. None of the exceptions enumerated section 39-71-401 are at issue in the present case.