IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 29

WCC No. 2000-0012

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

FRANK HELSTOWSKI

Claimant/Respondent

AUTO FINANCING USA

Employer/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 52-year-old car salesman claimed injury while lifting computer at workplace. Employer, who was sole proprietor, did not carry workers' compensation insurance and claimed the injury did not occur and was not reported to him in any event. Uninsured Employers' Fund (UEF) denied benefits based on employer's statement.

Held: WCC credited claimant's testimony that injury occurred, that employer was present when injury occurred, and that employer knew claimant claimed injury. UEF ordered to pay benefits. Employer ordered to reimburse UEF.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-603, MCA (1997). Uninsured employer had notice of accident under section 39-71-603, MCA (1997) where he was present when claimant hurt his back moving a computer and was later told by claimant that his back continued to hurt. Further, certified letter sent by claimant to employer, who refused to accept letter, would have been sufficient even if verbal notice not given. Employer cannot refuse to accept certified mail, then complain about a lack of the information contained in the letter.

Attorneys Fees: Unreasonable Denial or Delay. In absence of any statutory provision, WCC has no authority to order uninsured employer in WCC proceeding to pay attorneys fees of claimant.

Indemnification: Uninsured Employers Fund. Where court resolved credibility conflict to find injury did occur in uninsured employer's presence, UEF entitled to indemnification for compensation and medical benefits it paid to injured worker.

Limitations Periods: Notice to Employer. Uninsured employer had notice of accident under section 39-71-603, MCA (1997) where he was present when claimant hurt his back moving a computer and was later told by claimant that his back continued to hurt. Further, certified letter sent by claimant to employer, who refused to accept letter, would have been sufficient even if verbal notice not given. Employer cannot refuse to accept certified mail, then complain about a lack of the information contained in the letter.

Uninsured Employers' Fund: Indemnification. Where court resolved credibility conflict to find injury did occur in uninsured employer's presence, UEF entitled to indemnification for compensation and medical benefits it paid to injured worker.

¶1 The trial in this matter was held on May 11, 2000, in Butte, Montana. The Uninsured Employers' Fund (UEF), which is the petitioner in the case, was represented by Mr. Charles K. Hail. Claimant, Frank Helstowski (claimant), was present and represented by Mr. Mark L. Guenther. Pete Borup, the alleged uninsured employer and owner of Auto Financing USA, was present and represented by Mr. Karl Knuchel.

¶2 Although the UEF filed the petition in this matter, claimant's response included a cross-claim against Pete Borup, owner of Auto Financing USA. At trial, claimant's counsel confirmed that claimant presently wishes to pursue his claim in this Court.

¶3 Exhibits: Exhibits 1 through 12 were admitted without objection. No depositions were presented to the Court.

¶4 Witnesses: Claimant, Jennifer Helstowski, and Pete Borup testified at trial.

¶5 Issues: The issues stated in the Pretrial Order are as follows:

1. Whether Frank Helstowski suffered a compensable workers' compensation injury while employed by Auto Financing USA.

2. If Mr. Helstowski is successful in his claim, whether UEF is entitled to indemnification from the Employer for benefits that it may be ordered to pay.

3. If he is successful in his claim, whether Mr. Helstowski is entitled to an award of reasonable costs and attorneys' fees against the Employer?

¶6 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 Claimant is presently 52 years old. (Ex. 1 at 1.) His employment history includes military service, insurance sales, work as a disc jockey, and car sales.

¶8 During 1998, Pete Borup (Borup) started a business known as Auto Financing USA. He did not incorporate the business.

¶9 Borup bought cars at auction, then offered them for sale at a small lot (a former gas station) in Livingston, Montana. Borup testified he acted as a broker between lending institutions and people who needed credit for cars.

¶10 Borup was in business for only a short time. Auto Financing USA folded in December 1998.

¶11 Claimant and Borup had known each other prior to 1998. Around May 1998, claimant talked to Borup and told him he was looking for work. Borup hired claimant to sell cars and help in the business. Claimant began work around the beginning of June 1998.

¶12 According to claimant, Borup agreed to pay him on a wage and commission basis. The claim for benefits (ex. 10) states a wage rate of $5.25 per hour. According to Borup, he originally agreed to pay claimant only commissions, but claimant thereafter sold only one vehicle, so he then put claimant on "like a minimum wage" because he (Borup) needed someone to answer the phones and deal with people who came into the lot when he was not present. Borup acknowledged paying claimant "close to $300" every two weeks. He also provided him with a car to use.

¶13 Borup did not withhold taxes from amounts he paid claimant. He testified that the reason he did not withhold taxes was because claimant refused to complete necessary forms. According to Borup, claimant was afraid his wages would be garnished for support.

¶14 Borup and claimant were the only persons working at Auto Financing USA.

¶15 Borup admitted not having workers' compensation insurance. He testified: "I didn't think I needed it."

¶16 Claimant alleges he suffered a herniated disk while working for Borup at Auto Financing USA on August 31, 1998, a Monday. Borup disputes the allegation. Resolution of the dispute involves the Court's assessment of each individual's credibility.

¶17 Claimant testified both he and Borup were working on August 31st when Borup decided to move the office computer. Claimant picked up the computer and monitor, then waited for instructions but Borup hesitated. According to claimant he then turned to put down the equipment and felt a "twinge" or pulling in his lower back, which took his breath away. He testified that he told Borup, "Hold on, I have to sit down." He then sat for approximately ten or fifteen minutes. According to claimant, Borup asked him how his back was feeling and

he replied, "Give it a few minutes." Claimant worked the rest of the shift but did not finish moving the equipment.

¶18 Claimant testified to the following subsequent history:

- On the night of August 31st, he felt some discomfort in his back. The next morning, he felt pain moving down into his left leg. He had a slight limp but went to work. Borup was at work but claimant did not recall discussing his back with Borup that day.
- On Thursday, September 3rd, claimant and Borup drove to Billings to attend a car auction. His back hurt during the drive to Billings, and he told Borup about his discomfort. In Billings, Borup bought a car, which claimant then drove back to Livingston. Claimant's back continued to hurt, but he brought the car to the lot and set it up for sale.
- On the morning of September 4th, claimant's back pain was extreme. He could hardly walk. He called Borup and told him he would not be at work. Claimant did not return to work.
- On September 4th, claimant sought medical care at the Park Clinic in Livingston. Further information regarding his visit to Park Clinic is set out below

•On September 14th, claimant called Borup to discuss his injury and ask that he be paid his wages for the last half of August. Borup responded he didn't owe claimant wages and said that he had replaced claimant with someone else.

¶19 Borup disputed claimant's testimony. The salient points of his testimony are as follows:

- Borup "doesn't believe" he was at the car lot on August 31, 1998. He stated that while the computer in the office was moved at some time, he, not claimant, moved it. He claims he knew nothing about the injury "when it was supposed to have happened" and did not witness any back pain behaviors on claimant's part at any time.

Claimant brought his six-month-old son to work with him and sometimes carried him around. Borup suggested that claimant's back condition may have been due to lifting and carrying the infant.

- Claimant went with him to an auction in Billings but did so earlier in the summer.
- Claimant called his residence at least twice, after not showing up for work, talking to Borup's girlfriend on one occasion and leaving a message on the answering machine another time. According to Borup, claimant said nothing about a back injury or wages due. Borup did not return the calls.

- On the other hand, Borup said that claimant's wife stopped by the car lot, said claimant wasn't feeling well, and asked for claimant's pay check. Borup said he told her that he would give claimant a pay check when claimant brought back the key to the business. He testified that he even wrote out a check and had it ready to give claimant.

¶20 There is no dispute that claimant suffered a herniated disk around the time of the alleged industrial accident. Claimant reported lower left back pain radiating into his left leg to medical providers commencing on September 4, 1998 (ex. 1) and an MRI done September 11, 1998, disclosed a herniated lumbar disk "moderate sized, left lateral protrusion that was consistent with his symptoms." (Ex. 3.) Dr. Noteboom, who initially treated claimant, opined that claimant "had an acute injury with a herniated disk, but also suffered from some longer-standing spondylitic changes in his spine." (*Id*.) On December 21, 1998, claimant underwent a hemilaminectomy and foraminotomy at the L4-L5 level. (Ex. 6 at 7-8.) Post-operatively, claimant experienced a significant decrease in his back and leg pain and returned to work, initially as a clerk at a Town Pump gas station/ convenient mart.

¶21 With regard to credibility, I find that claimant was credible, Borup was not. In reaching my assessment, I relied largely upon my observation of them as witnesses but I also found verification for my assessment of these witnesses in the substance of their testimony and on other information in evidence. More specifically, I considered the following facts:

- No evidence was presented indicating that claimant had back problems prior to the end of August 1998. He and his wife testified, without contradiction, that he did not have a history of back problems.
- Dr. Noteboom's opinion that the disk herniation was the result of an acute injury was uncontradicted.
- No other incident which would constitute an acute injury has been identified.
- The time of onset of claimant's back condition at the very end of August was supported by claimant's wife's testimony and by the medical records. In claimant's initial, September 4th visit to the Park Clinic, he reported a recent onset of symptoms, albeit two weeks prior. His report of onset of pain two weeks prior is somewhat inconsistent with an accident only five days earlier but may be explained by claimant's pain, to his lack of attention to the exact period, or to an inaccurate recording or interpretation by the doctor.
- While the Park Clinic office records for visits on September 4th, 8th, and 9th do not note any work-related cause of claimant's back pain, claimant testified that he was not asked. The Court notes that there is no indication of any cause for the pain, which indicates that causation was not actively explored at the time. When claimant

was seen on September 16, 1998 (16 days after the alleged accident), at the Bozeman Veterans' Administration (VA) clinic, a nurse's note regarding causation was made.

- States [he] has been diagnosed with herniated disc - had MRI locally last week (report in chart). Has had problem for 3 weeks, not sure of how occurred ? at work while moving equipment in office and felt twinge in back, later that week drove a vehicle some distance and this aggrivated [sic] condition.

(Ex. 4 at 1.) The nurse later amended her note, as follows:

In office tody [sic] to review the above note. At the time the note was written the veteran was unable to recall any other incident that could have happened, other than the work related incident, causing back problem leading to appointment that day.

(*Id.*)

- On September 16, 1998, claimant wrote Borup a certified letter demanding his back pay and informing Borup of his intent to seek workers' compensation on account of his August 31, 1998 injury. The letter is consistent with his claim and his testimony, saying:

> Pete, 9/16/98
>
> Because of our recent phone conversation, I am going to address two issues in this letter.
>
> First, I do not have the luxury of time available to me. The money you owe me for August wages is long overdue. You are aware of your own agreement made on Aug. 17th. I am incensed by your refusal to "honor" your part of our agreement for pay.
>
> I believe you will find it financially beneficial to pay the $240.00 (two hundred and forty dollars) rather than have this issue mediated in court. I know you are familiar with this procedure, since I was the one who explained it to you.
>
> Secondly, I am informing you at this time of my intention to pursue a workmans [sic] compensation claim. This claim is for the injury to my lower back, which occurred on August 31, 1998. As you are aware I was holding the C.P.U. and Monitor of the Packard Bell computer waiting for you to decide where to place it. This was aggravated to the point of Dr.'s attention by driving the vehicle back from Billings on Sept. 3rd.
>
> If you do not address these issues with dispatch, I will pursue them in accordance with state and federal regulations.

> Pete, this is hardly the way a "friend" treats a friend. Do the right thing and be honest.

(Ex. 7 at 1-2). The letter came back to claimant undelivered. Claimant retained the letter unopened, eventually providing it to Mr. Guenther. The unopened letter was lodged with the Court prior to the filing of the petition. At the request of Mr. Guenther, the letter was opened by the Clerk and copies were mailed to all counsel. The authenticity of the letter is not questioned in this proceeding.

- Borup's conduct towards claimant was evasive. He admitted he did not return claimant's phone calls after claimant ceased working. He did not pick up a certified letter from claimant sent September 16, 1998, despite repeated post office notices left in his post office box over a two-month period.
- Claimant testified, without contradiction by Borup or otherwise, that he did return the key to the auto lot, giving it to a Mr. St. Peter, who had replaced him, yet Borup has never sent claimant his last pay check. Borup's testimony that he wrote out a check after claimant's wife stopped by so it would be ready if claimant returned the key was unbelievable.
- Borup's testimony was at times evasive or incomprehensible. For example, when asked about his failure to pick up the certified letter from claimant, he testified that he checked his mail box weekly. Only after being pressed on cross-examination did he disclose that he never picks up or accepts certified mail and ignores notices regarding certified mail.

¶22 I find that claimant injured his back while lifting a computer at work on August 31, 1998. I further find that Borup was present and witnessed the injury, thus he had immediate notice of it. Moreover, claimant thereafter told Borup that his back was hurting and on September 16, 1998, sent a certified letter containing a demand for his back wages and advising Borup of his intention to pursue a workers' compensation claim.

¶23 I further find that the UEF's denial of the claim in conjunction with its petition with this Court was reasonable. As noted earlier, the claim pits claimant's credibility against that of Borup. While the Court has found in favor of claimant, there is nothing in the evidence which makes the credibility determination overwhelming or obvious.

CONCLUSIONS OF LAW

¶24 Claimant's entitlement to benefits is governed by the 1997 version of the Workers' Compensation Act since that version was in effect at the time of his injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶25 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *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).

Industrial Accident

¶26 Section 39-71-119, MCA (1997), provides in relevant part:

> **Injury and accident defined.** (1) "Injury" or "injured" means:
>
> (a) internal or external physical harm to the body that is established by objective medical findings;
>
> . . . .
>
> (2) An injury is caused by an accident. An accident is:
>
> (a) an unexpected traumatic incident or unusual strain;
>
> (b) identifiable by time and place of occurrence;
>
> (c) identifiable by member or part of the body affected; and
>
> (d) caused by a specific event on a single day or during a single work shift.

Under Montana law, "unusual strain" encompasses not only unexpected *causes* of injury, but also unexpected *injuries* resulting from ordinary workplace activities. *Jones v. Bair's Café*, 152 Mont. 13, 445 P.2d 923 (1968). Claimant has carried his burden of proving an injury to his back, caused by an unusual strain occurring when he lifted the computer equipment. All four elements of the accident definition are satisfied and the MRI evidence constitutes objective findings establishing physical harm.

¶27 With regard to required notice to the employer, section 39-71-603, MCA (1997), provides:

> **Notice of injuries other than death to be submitted within thirty days.** (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

As I have found, Borup was present while claimant moved the computer, felt a twinge in his back, and sat down. In addition, claimant subsequently spoke with Borup about his hurting back. Even if verbal notice had not been provided, the certified letter satisfied claimant's obligation to provide notice. Borup cannot refuse to retrieve certified mail then complain about a lack of information contained within the mailing. Both the verbal notice and the availability of the certified letter occurred within 30 days of August 31, 1998, making the notice timely under section 39-71-603, MCA (1997).

Employee or Independent Contractor

¶28 Counsel for Borup argued at hearing that claimant was an independent contractor not entitled to workers' compensation coverage. This issue was not stated in the Pretrial Order and is not properly before the Court. Even if properly raised, the evidence clearly shows that claimant was an employee, not an independent contractor.

¶29 Section 39-71-120, MCA (1997), defines an independent contractor as follows:

> **Independent contractor defined.** (1) An "independent contractor" is one who renders services in the course of an occupation and:
>
> (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact: and
>
> (b) is engaged in an independently established trade, occupation, profession or business.
>
> (2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.

"[I]ndependent contractor status requires a 'convincing accumulation' of evidence from the statutory test, whereas employee status may be found based on one part of the statutory test." *Lundberg v. Liberty Northwest Ins. Co. Inc.,* 268 Mont. 499, 503, 887 P.2d 156, 159 (1994). Designation of a worker as an independent contractor is not dispositive: a party must have been an independent contractor in fact. *Id*.

¶30 In this case, the only evidence before the Court demonstrates that claimant was an employee. He was not engaged in an "independent established trade, occupation, profession or business." Moreover, as evidenced by Borup's unilateral decision (according to Borup) to put claimant on a biweekly wage because he wasn't earning enough selling cars, claimant was not free from Borup's control. There is no evidence claimant worked for anyone other than Borup. Thus, I find that claimant **was** an employee of Borup, and that Borup was required to provide workers' compensation coverage, § 39-71-401, MCA (1997).

Indemnification

¶31 Since Borup was an uninsured employer, the UEF is liable to claimant for compensation and medical benefits. § 39-71-502, MCA. Section 39-71-504, MCA, provides that the UEF "shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer." Thus, the UEF is entitled to indemnification from Borup for compensation and medical benefits due, and which in the future shall become due to claimant.

Attorney's Fees

¶32 Claimant's Response of Claimant Frank Helstowski and Cross-claim Against Pete Borup DBA Auto Financing Usa includes a prayer for "an award of reasonable attorney's fees and costs against the Employer." The request is set out in the Pretrial Order as one of the issues.

¶33 The remedies this Court can order are limited to those provided by statute. While there is statutory provision for an award of attorney fees against an insurer which has unreasonably withheld benefits, §§ 39-71-611, -612, MCA (1997), there is no corresponding statute for an award of attorney fees against an employer, at least in a proceeding in the Workers' Compensation Court. Section 39-71-515 (5), MCA (1997), does make provision for an award of costs and attorney's fees against an uninsured employee but that section is limited to an independent cause of action brought by the employee in district court. Such actions are within the exclusive jurisdiction of the district court. Thus, this Court lacks jurisdiction to order Borup to pay claimant's attorney's fees in this case. Claimant will have to seek his fees in district court.

Costs

¶34 Claimant is entitled to costs from the UEF pursuant to section 39-71-611, MCA (1997), and section 39-71-505, MCA (1997), (providing that all appropriate provisions in the Workers' Compensation Act apply to the UEF in the same manner as they apply to compensation plans No. 1, 2, and 3). UEF is entitled to indemnification from Borup for those costs.

JUDGMENT

¶35 1. On August 31, 1998, claimant was an employee of Pete Borup, who was doing business as Auto Financing USA.

¶36 2. On August 31, 1998, claimant suffered an industrial injury while working for Pete Borup, doing business as Auto Financing USA, and is entitled to the compensation and medical benefits provided in the Workers' Compensation Act. Since his employer was uninsured, claimant is entitled to receive benefits from the Uninsured Employer's Fund pursuant to section 39-71-502, MCA, and the Uninsured Employer's Fund shall pay those benefits as provided by the Workers' Compensation Act.

¶37 3. Pete Borup shall indemnify, reimburse, and pay the Uninsured Employers' Fund all reasonable amounts it pays in compensation and medical benefits to or for claimant. The Court retains continuing jurisdiction to determine the amounts owed by Borup and to enforce its judgment.

¶38 4. Claimant is entitled to costs from the UEF in an amount to be determined by the Court in accordance with its rules.

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

¶40 6. 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 23rd day of May, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Charles K. Hail
Mr. Mark L. Guenther
Mr. Karl Knuchel
Date Submitted: May 11, 2000